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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

DECEMBER, 1886-APRIL, 1887.

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RETIREMENT

OF THE

Honorable Samuel Treat,

JUDGE U. S. DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI, FROM THE BENCH, AND THE INAUGURATION OF HIS SUCCESSOR, THE HON. AMOS M. THAYER.

MARCH 5, 1887.

ADDRESSES BY JUDGES TREAT, THAYER, AND BREWER.

Judge Treat's address was as follows:

All persons present are aware that this is the last hour of my long official life. In disappearing from the bench, I wish to express my profound gratitude to the living and the dead of bench and bar, state and federal, through whose generous aid I have gone forward in my judicial work for now nearly 38 years. Without such aid my life might have been a failure. I have had to lead the way in many untried paths of jurisprudence, the record of which, for good or ill, is now closed. Never through fear or favor have I suffered justice to be perverted. Errors have been committed, but not through pas-

sion, partiality, or cowardice.

The contest for public and private rights are not determined amid the carnage of battle-fields alone, but more frequently in legislative halls and in the judicial forum. A wise statute or far-reaching judgment often shapes the destinies of a nation; though silently, yet potentially. Coke, at the cost of his judicial life, refused to surrender, under royal behests, his independent judgment. That sturdy independence culminated in the petition of right, the overthrow of royal usurpation, and the incoming of the commonwealth. So, at a later day, the trial of the seven bishops caused the expulsion of the Stuarts, and, through the bill of rights consequent thereon, permanent safeguards of civil and religious liberty. When popular rage sought to overbear the deliberations of the court, Mansfield, defiant of such clamor, calmly and courageously pronounced the judgment which law and justice demanded. Are not such scenes, and the leaders in such conflicts, as worthy of commemoration as if they had fought with Cromwell at Naseby, or Wellington at Waterloo?

This is not the hour to trace the growth of the law, and its many changes

through legislation or otherwise. Though often impeded by obstructive and unwise legislation, the judicial mind has ultimately to control. Every judge of the supreme court of this state and of the local bench who were in office when I commenced my first judicial labors; every justice of the United States supreme court, and of the district courts, save three, when I passed to the United States bench; all of my contemporaries at the bar, except a favored few, --have gone to that "bourne whence no traveler returns." Those who survive patiently await the inevitable. One after another has fallen, and others must fall by the way, as the "innumerable caravan" moves forward. It has been my painful yet grateful duty to pronounce from the bench just tributes to the memory of those who, from year to year, have been numbered To-day, officially, I join the departed, and invoke the among the departed. charity implied in the well-cherished maxim, "De mortuis," etc., which, liberally interpreted, reads, "Speak no ill of those who are gone." The elder members of the bar will call to mind from the portraits in yonder court-room those who have been with me in my arduous labors. First was Justice Catron of the United States supreme court, "clarum et venerabile nomen." Next, the still living justice allotted to this circuit, whose judgments have been treasures of wisdom, and whose opinions on the supreme bench have shown a strength of learning and forecast which, as I well know, have commanded the admiration, not of this country alone, but also of all cognate judicial tribunals abroad where free government obtains. As associates, on the district bench, I had at first the learned, wise, and experienced judge, ROBERT W. WELLS, who was followed in office by one whom you all honor, and who still is with us, Arnold Krekel. Under the changed conditions of judicial organization, came United States circuit judges: First, that wise, learned, and honored judge, John F. Dillon, followed by George W. McCrary, equal to all the high demands of his great office; then our present circuit judge, "non longo intervallo," who favors us with his presence at this hour, and whom you all know and honor. His predecessors have been forced from their high position through inadequate compensation, as others have been. Now may it so be that those who remain or succeed are not to be starved into retirement when the needs of public and private justice demand such able and wise judges for the conservation of whatever is dearest and best to each and all in every department of life. He will administer the oath of office to my successor, which terminates my official career, and I congratulate my successor that so able and worthy coadjutors will be with him in the consideration of the many important questions to be presented for their determination.

With gratitude and thanks to each and all who have aided in my important labors, I request the same measure of kindness and fidelity for my successor, who you know is eminently worthy in all respects of the high trust com-

mitted to him.

May I cause to be read for my last official words the following communication, which has touched me profoundly:

"DEPARTMENT OF JUSTICE, WASHINGTON, February 26, 1887.

"SIR: I am directed by the president to acknowledge the receipt of your letter of the seventeenth inst., tendering your resignation of the office of United States district judge for the Eastern district of Missouri, to take effect on the fifth day of March proximo, and, at the same time, to express his regret that the public are now to lose your valuable services, and his earnest hope that the retirement upon which you are about to enter may be marked by the tranquillity and happiness which all who love justice and good government wish may attend the able and upright judge when he lays down his office. I am, with great respect, your obedient servant,

"A. H. GARLAND, Attorney General.

[&]quot;To Hon. Samuel Treat, United States District Judge, St. Louis, Mo."

I remain here, at this last moment, only to witness the introduction into office of my honored successor, and, on surrendering my high trust into such faithful hands, to express the devout wish that he and his colleagues may, with continuing strength and ability, and also with increasing happiness, not pass away until at least 30 years to come measure their official life.

At the conclusion of Judge Treat's address, Judge Thayer arose, and the oath of office was administered to him by Judge Brewer. After administering the oath, Judge Brewer said:

AMOS M. THAYER, I salute you as judge of the United States district court for the Eastern district of Missouri. In so doing I can express no higher wish than that, in the discharge of your duties as such judge, you manifest the same loyalty to your convictions, the same purity of judicial life, the same fidelity, unswerved by popular clamor, whether of demand or threat, the same wise knowledge of the broad, enduring principles of law and justice, and the same diligence and devotion to the duties of your office, that have so eminently characterized your predecessor.

Col. James O. Broadhead then presented to the court, on behalf of the bar of St. Louis, a portrait of Judge Treat and delivered an eulogistic address.

Judge THAYER accepted the gift on behalf of the court in the following words:

Gentlemen of the Bar: It is with great pleasure that I accept, on behalf of this court, the admirable portrait of the distinguished judge who has just left his seat on this bench, having committed to younger but less experienced hands the trust which he has so long and faithfully discharged. Without this portrait to adorn its walls, Judge Treat's influence would long be felt in this court-room, where so much will always remain to perpetuate his memory; nevertheless the feeling on the part of the bar which has prompted your action must commend itself, not to the legal profession alone, but to every citizen who feels an interest in the honest and fearless administration of justice. Your gift is expressive of reverence for the law, and of gratitude to one who has courageously, impartially, and wisely administered it. I need not say, gentlemen, how heartily I sympathize with the feeling which has inspired your action, and how cordially I approve your desire that one who has so long presided in this court may, through portraiture, be ever present as an encouragement and example to his successors.

Judge TREAT's term of judicial service covers a period so memorable in the history of the country, and in the growth of law, that it is impossible, in a few words, to speak fittingly of his most notable official acts; nevertheless I deem it proper on this occasion to supplement what has already been said by a brief reference of my own to some of his important services to the profession and to the community. As a nisi prius judge on the state bench, it was his duty, under adverse influences, to make almost the first practical trial of the new Code of Procedure in this state, without the aid of text-books or previous adjudications. During his period of service on that bench, rights of property involving many titles to realty in this city and the adjoining county were also in litigation. It became his duty to explore French and Spanish law, and to determine how, under changes of government, treaties, and acts of congress, individual right was to be ascertained and established. How well the task was performed other persons have borne witness; but the many anxious hours spent in laborious examination of the complicated questions involved are known only to the judge himself, and to those members of the profession who are familiar with such labors Fortunately for those who succeed him, the beneficent growth of law, and the shifting conditions of judicial service are such, that the questions of real-estate law, which then taxed bench and bar to the utmost, have in great part been solved, and have almost dis-

appeared from the court as matters for serious debate.

When the supreme court of the United States, after years of contention, decided that admiralty and maritime jurisdiction under the constitution was not limited to tide-waters, but extended "wherever navigation successfully aided commerce," and hence covered our great inland lakes and rivers, this court was created, and Judge TREAT, as its first judge, was called to a new field of judicial duty. It so happened, from the geographical location of the court, that in most every instance a new pathway had to be explored and marked out to successfully apply the principles of maritime law as enforced on the high seas to inland navigation and commerce. No man was better fitted for that difficult task than Judge TREAT. He understood perfectly how to mould principles to meet the necessities of the place and the occasion, and thus give effect to the reason and spirit of the law rather than to its letter.

Following closely upon his accession to the district bench came the many grave responsibilities and bitter questions occasioned by civil strife. In this jurisdiction an unknown and difficult course had to be pursued by the judiciary. The passions of the hour, bearing first in one direction and then in the other, tended mainly to the overthrow of civil law, with all which that implies. The judge of this court had daily to pass upon complicated questions, new in all their aspects, growing out of non-intercourse and confiscation acts, and oftentimes to interpose the strong authority of the bench against influences which tended to the disregard of some of the most cherished constitutional safeguards. Of Judge Treat's record during that eventful period it is all sufficient to say that he never swerved from the straight line of duty as a judge, through the pressure of circumstances, or through cowardice or favor.

The establishment, as an incident of that war, of a system of internal revenue bearing directly on all of the leading industries and business interests of the country, led to the enactment of an elaborate code of laws, and to the invention of machinery for their enforcement with which the public, and even the legal profession, were very generally unfamiliar. Into this new field of litigation it was Judge TREAT'S fortune to lead the way. Very few persons, I apprehend, who have not made a study of that branch of the law, can form an adequate conception of the labor devolved on the judge of this court in familiarizing himself with the many provisions of those statutes, and in mastering the details of minute and complex treasury regulations. It is a matter of public history that those statutes imposed greater burdens of litigation on the federal court of this district than on any other tribunal throughout the country, and that prosecutions here were more numerous, and excited, both here and elsewhere, a most absorbing public interest. In the presence of so many lawyers who were daily witnesses of the proceedings to which I allude, it is unnecessary for me to pass any comments upon the masterful manner in which Judge TREAT discharged the labors and responsibilities incident to that legislation.

Next, in order of time, came the bankruptcy system, with all of its cumbersome and ill-digested provisions, which daily taxed the powers of the court to make out of chaos some well-defined rules for the determination of the respective rights of debtor and creditor. With great credit to himself, and with vast benefit to the public, Judge TREAT supervised the proceedings under that law from its adoption to its repeal, and the fruit of his labor has been preserved for the advantage of those who will succeed him, if like legislation shall be hereafter repeated.

This brief sketch of some of Judge TREAT's important labors on the bench of this court would be incomplete if I failed in conclusion to mention his serv-

ices to the public and to the profession in the domain of patent and commercial law. In patent cases his decisions for years have commanded as great, if not greater, consideration at the hands of the profession as those of any other *nisi* prius judge on the federal bench; while in the department of commercial law he has been conspicuous in moulding its principles and enlarging its scope to meet the necessities of trade and the conditions of the time.

And now, after nearly 38 years spent in the continuous discharge of laborious duties such as have been this morning only partially described, he retires from the bench to engage in less arduous, and, it is to be hoped, in more congenial, labors. His professional brethren in commemoration of the event, and in recognition of his great services and the healthful influence he has had on the jurisprudence of the country, tender this portrait as an ornament to the courtroom wherein he has so long presided. The gift, gentlemen, is gratefully accepted. I know that I but echo the thought of my predecessor on this bench, and of yourselves and of all good citizens, when I express the wish that his portrait may here long remain; that these walls may stand through years to come; and that a long succession of lawyers and judges may here be heard in vindication of right and justice.

Judge Thayer's speech of acceptance was followed by an address by Judge Brewer, who spoke as follows:

GENTLEMEN OF THE BAR: This is an hour of death and birth. We bury the dead, and we baptize the new born. The Persians have a pleasant way, on the birth of a babe, of saying: "Oh, little one, you come into life with a cry, while those around you are smiling. So live that when you go out you may go out with a smile, while those around you cry." We say good night to Judge TREAT with tears. We say good morning to Judge THAYER with While we say good-night to Judge TREAT, and know that his official life is dead, yet the highest form of Christian faith affirms that when we lay down these bodies of ours, these garments of flesh, the real and the true life still goes on, and goes on forever. And so, while the official body of Judge TREAT is dead to-day, the life that he has lived in this city and in this court When I think of him coming to this city in early years; when will never die. I think of all that he has done to affect the legislation of this city and this growing commonwealth; of all that he has done to give tone and character to the judicial and political life of this city and state; when I think of the influence which he has exerted, which has been so well referred to by the gentlemen who have preceded me, in the various departments of law, in building up that magnificent structure of federal jurisprudence, which obtains throughout the length and breadth of this land to-day, (and in respect to whose growth and perfection he may well say, with the Roman of old, "Omnia vidi et quorum magna pars fui,")—when I bring all these to mind, I feel that he may well say with Tennyson:

> "Men may come, and men may go But I go on forever."

We rejoice to see this painted representation of Judge TREAT adorn these walls; we rejoice to meet in this magnificent building, erected as a temple of justice; but, gentlemen of the bar, long after that picture will have grown dim and faded, and these walls have fallen to the ground, the name and the influence of Judge TREAT will go on through the jurisprudence of this land, and will go on till time shall be no more.

Three times ten years have passed since he was sworn into office, as my Brother Thayer has this day been sworn in. If I might trespass upon your time, and if there were not others far more competent to speak, I could picture the changes that have come during all those years. But I leave that to other tongues. Nor will I, among the many virtues which have been referred to, and others which might be mentioned which have characterized Judge TREAT

during his long judicial career, single out one to commend. And yet, gentlemen, you will pardon me, I trust, if in this day and hour I refer to that which to my mind is in the present exigency the most essential qualification of a judge, and which my Brother TREAT, during his 30 years of service, has manifested in the fullest degree. It is that of glorious loyalty to his convictions; it is that of uplifting his judicial life above every voice of popular clamor, indifferent whether it says yea or nay, but looking only to the single question of, "What is my judicial duty?" And in this day when popular clamor is sweeping over the land, and burying many a weaker man, it is an exceeding comfort to look upon one who, at the close of 30 years of judicial life, can truly affirm, "There never has been a question which I have faced or decided with reference to the applause or the condemnation of any man, or set of men." [Applause.] But, gentlemen, I will not trespass upon your time. While Judge TREAT's official life is ended, and while, ere the silver cord has begun to loosen, or the golden bowl to shatter, he has returned to the people of these United States the sacred trust committed to his care, and which for 30 years he has held with pure and unstained hand, we all hope that he will remain in this city and state which he has honored during these many years, and that he will give to us all the benefit of his advice and of his example, and I know I shall but voice the sentiment of every true man in this city, and of every true man in the state, when I say to him, in the words of Horace to Cæsar Augustus:

> "Serus in cœlum redeas, diuque L'etus intersis populo Quirini."

The following letter, from Judge Krekel, was then read:

KANSAS CITY, March 3d.

John W. Noble and David P. Dyer, Committee—Gentlemen: Your kind invitation to be present on the occasion of the Hon. SAMUEL TREAT retiring and the Hon. Amos M. THAYER assuming the duties of judge of the United States court at St. Louis has been received. Unavoidably detained, I will not forego the pleasure of speaking a kind word to and of my friend. It was my good fortune on assuming the duties of my office to be introduced to them by my friend Judge TREAT. Our intercourse has uniformly been pleasant, and I profited largely from his experience. I have freely consulted him on all occasions, and have implicit confidence in his knowledge of the law, and, what is more, expounding it in the interest of justice. The people of the United States are largely indebted to Judge TREAT for aiding in the settlement of questions in admiralty and commercial law. Coming from the past to the future, I congratulate our friend, Judge THAYER, as a co-laborer. It is a consolation that in the loss of an old, we gain in Judge THAYER a new, friend, who, no doubt, will in every way show himself worthy of the high trust reposed in him. May the occasion of the meeting of the judge and the members of the bar be a pleasant one is the sincere wish of your friend.

KREKEL.

Addresses then followed by Hon. Gov. T. C. REYNOLDS, Gen. JOHN W. NOBLE, CHESTER H. KRUM, Col. D. P. DYER, Mr. HENRY HITCHCOCK, and Mr. D. P. BASHAW, District Attorney.

JUDGES

OF THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

FIRST CIRCUIT.

HON. HORACE GRAY, CIRCUIT JUSTICE.

HON. LE BARON B. COLT, CIRCUIT JUDGE.

HON. NATHAN WEBB, DISTRICT JUDGE, MAINE.

HON. DANIEL CLARK, DISTRICT JUDGE, NEW HAMPSHIRE.

HON. THOMAS L. NELSON, DISTRICT JUDGE, MASSACHUSETTS.

HON. GEORGE M. CARPENTER, DISTRICT JUDGE, RHODE ISLAND.

SECOND CIRCUIT.

HON. SAMUEL BLATCHFORD, CIRCUIT JUSTICE.

HON. WILLIAM J. WALLACE, CIRCUIT JUDGE.

HON. NATHANIEL SHIPMAN. DISTRICT JUDGE. CONNECTICUT.

HON. A. C. COXE, DISTRICT JUDGE, N. D. NEW YORK.

HON. ADDISON BROWN, DISTRICT JUDGE, S. D. NEW YORK.

HON. CHARLES L. BENEDICT, DISTRICT JUDGE, E. D. NEW YORK.

HON. HOYT H. WHEELER, DISTRICT JUDGE, VERMONT.

THIRD CIRCUIT.

HON. JOSEPH P. BRADLEY, CIRCUIT JUSTICE.

HON. WILLIAM MCKENNAN, CIRCUIT JUDGE.

HON. LEONARD E. WALES, DISTRICT JUDGE, DELAWARE.

HON. JOHN T. NIXON, DISTRICT JUDGE, NEW JERSEY.

HON, WILLIAM BUTLER, DISTRICT JUDGE, E. D. PENNSYLVANIA.

HON. MARCUS W. ACHESON, DISTRICT JUDGE, W. D. PENNSYLVANIA.

FOURTH CIRCUIT.

Hon. MORRISON R. WAITE, CIRCUIT JUSTICE.

HON. HUGH L. BOND, CIRCUIT JUDGE.

HON. THOMAS J. MORRIS. DISTRICT JUDGE, MARYLAND

Hon. AUGUSTUS S. SEYMOUR, DISTRICT JUDGE, E. D. NORTH CAROLINA

HON. ROBERT P. DICK, DISTRICT JUDGE, W. D. NORTH CAROLINA.

HON. CHARLES H. SIMONTON, DISTRICT JUDGE, SOUTH CAROLINA.

Hon. R. W. HUGHES, DISTRICT JUDGE, E. D. VIRGINIA.

Hon. JOHN PAUL, DISTRICT JUDGE, W. D. VIRGINIA.

Hon. JOHN J. JACKSON, DISTRICT JUDGE, WEST VIRGINIA.

FIFTH CIRCUIT.

HON. WILLIAM B. WOODS, CIRCUIT JUSTICE.

HON. DON A. PARDEE, CIRCUIT JUDGE.

HON. JOHN BRUCE, DISTRICT JUDGE, M. AND N. D. ALABAMA.

HON. HARRY T. TOULMIN, DISTRICT JUDGE, S. D. ALABAMA.1

HON. THOMAS SETTLE, DISTRICT JUDGE, N. D. FLORIDA.

HON. JAMES W. LOCKE, DISTRICT JUDGE, S. D. FLORIDA.

HON. HENRY K. McCAY, DISTRICT JUDGE, N. D. GEORGIA.²

HON. WILLIAM T. NEUMAN, DISTRICT JUDGE, N. D. GEORGIA.

HON. EMORY SPEER, DISTRICT JUDGE, S. D. GEORGIA.

HON. EDWARD C. BILLINGS, DISTRICT JUDGE, E. D. LOUISIANA.

HON. ALECK BOARMAN, DISTRICT JUDGE, W. D. LOUISIANA.

HON. ROBERT A. HILL, DISTRICT JUDGE, N. AND S. D. MISSISSIPPI.

HON, CHAUNCEY B. SABIN, DISTRICT JUDGE, E. D. TEXAS.

HON. A. P. MCCORMICK, DISTRICT JUDGE, N. D. TEXAS.

HON. E. B. TURNER, DISTRICT JUDGE, W. D. TEXAS.

SIXTH CIRCUIT.

HON. STANLEY MATTHEWS, CIRCUIT JUSTICE.

HON. HOWELL E. JACKSON, CIRCUIT JUDGE.

HON. JOHN WATSON BARR, DISTRICT JUDGE, KENTUCKY.

HON, HENRY B. BROWN, DISTRICT JUDGE, E. D. MICHIGAN.

HON. HENRY F. SEVERENS, DISTRICT JUDGE, W. D. MICHIGAN.

HON. MARTIN WELKER, DISTRICT JUDGE, N. D. OHIO.

HON. GEORGE R. SAGE, DISTRICT JUDGE, S. D. OHIO.

¹Qualified January 29, 1887.

² Deceased.

⁸ Qualified August 13, 1886. Appointed to fill vacancy occasioned by death of Hon. HENRY K. McCay.

Hon. D. M. KEY, DISTRICT JUDGE, E. AND M. D. TENNESSEE. Hon. E. S. HAMMOND, DISTRICT JUDGE, W. D. TENNESSEE.

SEVENTH CIRCUIT.

HON. JOHN M. HARLAN, CIRCUIT JUSTICE.

HON. WALTER Q. GRESHAM, CIRCUIT JUDGE.

HON. HENRY W. BLODGETT, DISTRICT JUDGE, N. D. ILLINOIS.

HON. SAMUEL H. TREAT, DISTRICT JUDGE, S. D. ILLINOIS.¹

Hon. WILLIAM J. ALLEN, DISTRICT JUDGE, S. D. OHIO.3

HON. WILLIAM A. WOODS, DISTRICT JUDGE, INDIANA.

HON. CHARLES E. DYER, DISTRICT JUDGE, E. D. WISCONSIN.

HON. ROMANZO BUNN, DISTRICT JUDGE, W. D. WISCONSIN.

EIGHTH CIRCUIT.

HON. SAMUEL F. MILLER, CIRCUIT JUSTICE.

HON. DAVID J. BREWER, CIRCUIT JUDGE.

HON. HENRY C. CALDWELL, DISTRICT JUDGE, E. D. ARKANSAS.

HON. ISAAC C. PARKER, DISTRICT JUDGE, W. D. ARKANSAS.

HON. MOSES HALLETT, DISTRICT JUDGE, COLORADO.

HON. OLIVER P. SHIRAS, DISTRICT JUDGE, N. D. IOWA.

HON. JAMES M. LOVE, DISTRICT JUDGE, S. D. IOWA.

HON. C. G. FOSTER, DISTRICT JUDGE, KANSAS.

HON. RENSSELAER R. NELSON, DISTRICT JUDGE, MINNESOTA.

Hon. SAMUEL TREAT, DISTRICT JUDGE, E. D. MISSOURI.

HON, AMOS M. THAYER, DISTRICT JUDGE, E. D. MISSOURL.

HON. ARNOLD KREKEL, DISTRICT JUDGE, W. D. MISSOURL

HON. ELMER S. DUNDY, DISTRICT JUDGE, NEBRASKA.

NINTH CIRCUIT.

HON. STEPHEN J. FIELD, CIRCUIT JUSTICE.

HON. LORENZO SAWYER, CIRCUIT JUDGE.

HON, OGDEN HOFFMAN, DISTRICT JUDGE, N. D. CALIFORNIA.

Hon. E. M. ROSS, DISTRICT JUDGE, S. D. CALIFORNIA.

HON. GEORGE M. SABIN, DISTRICT JUDGE, NEVADA.

HON. MATTHEW P. DEADY, DISTRICT JUDGE, OREGON.

1 Deceased.

²Qualified April 18, 1887. Appointed to fill vacancy occasioned by death of Hon. Samuel H. Terat.

^{*} Retired.

⁴Qualified March 5, 1887. Appointed to fill vacancy occasioned by retirement of Hon. Samuel Treat.

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CASES

ARGUED AND DETERMINED

IN THE

Anited States Circuit and Pistrict Courts.

FERGUSON and others v. DENT and others.

(Oircuit Court, W. D. Tennessee. September 30, 1886.)

 RECEIVER—EQUITY—APPEAL — SUPERSEDEAS BOND — CUSTODY OF RECEIVER PENDING THE APPEAL.

The omission from an appeal-bond of the statutory stipulation as to damages required to effect a supersedeas does not necessarily entitle the party to whom the property is adjudged to a discharge of the receiver, and possession of the property, pending the appeal. The subsequent custody is a matter which the court will regulate, upon the equitable circumstances of each case, independently of the fact whether there has been a statutory supersedeas of the final decree or not.

2. Same—Mistake—Correction of Defective Bond.

Whether the circuit court has authority, after appeal, to allow an amendment to a supersedeas bond, quære. But, in the exercise of its jurisdiction to determine whether it will grant an application to execute the decree because of a defective bond which cannot operate as a supersedeas, it may withhold execution until the supreme court can act in the matter; and should do so, if there be equitable considerations of mistake which would induce a court of equity to reform the bond on a bill for that purpose. On such an application the court is not compelled to act solely upon the one fact of a defective bond. It will inquire at large, and exercise its equitable powers of relief, as in other cases, upon all the facts.

8. SAME—DISCHARGE OF RECEIVER.

The court will not sanction the dispossession of its receiver by a writ issued by the clerk upon the discovery of a defect in the *supersedeas* bond, although the final decree, if not *supersedead*, might authorize it. The proper practice is to apply to the court to execute the decree.

(Syllabus by the Court.)

In Equity. Application to discharge receiver.

The opinion of the court, and the decree entered upon this application, which is appended as useful to show what was actually done in pursuance of the opinion, sufficiently state the facts. At the last term of the supreme court the plaintiffs applied for a mandamus to compel the circuit court to vacate the order recalling the writ issued by the clerk, or to otherwise execute the decree by discharging the re-

¹See note at end of case.

v.29f.no.1-1

ceiver and surrendering the possession to them. The mandamus was refused, but without any opinion or other information as to the grounds of the refusal. The penalty of the bond as actually executed was as follows:

"Whereas, the above-named George G. Dent and others have prosecuted a writ of appeal to the supreme court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the Western district of Tennessee, now, therefore, the consideration of this obligation is such that if the above-named George G. Dent and others shall prosecute said writ of appeal to effect, and answer all costs; or if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue."

This bond, as executed, was copied by the deputy-clerk from a form filled up by one of the lawyers in the case, and it does not distinctly appear whether the deputy-clerk or the lawyer left out the words "and damages," for which a blank was left in the printed form in use in the clerk's office, to be inserted when desired by parties to make a supersedeas bond. On discovery of the omission, and on application to him, the clerk issued the writ of possession ordered by the final decree, and the marshal put the plaintiffs in possession. This action was revoked by the district judge, and the receiver reinstated. The plaintiffs, having been refused a mandamus by the supreme court, moved in the circuit court (1) to now discharge the receiver, and surrender possession to them in accordance with the final decree: and (2) to vacate the order of revocation. The defendants moved to be allowed to amend the bond or to file a new one.

T. B. Edgington, for plaintiffs.

Poston & Poston and L. W. Finlay, for defendants.

HAMMOND, J. The affidavits here show, what is well known to the court, that it was intended by the defendants and the court that this bond should be a supersedeas bond. The penalty was sufficiently large to cover any damages likely to come within the liability pending the appeal. Kountze v. Omaha Hotel Co., 107 U. S. 378; S. C. 2 Sup. Ct. Rep. 911; Roberts v. Cooper, 19 How. 373.

I cannot think, as suggested by the plaintiffs' counsel, that the words necessary to make it in form a supersedeas bond were designedly omitted in order to evade that responsibility. The surety understood the full extent of it, as well as the defendants; for when he came to sign the bond he inquired of me, and it was fully explained to him, as it had been to Mr. Frazer when he drew the bond. I must protest, good-naturedly of course, against the inaccuracies of Mr. Frazer's affidavit. He is mistaken when he states that I undertook to see that "the appeal was perfected as affiant desired." I read to him the statute, the twenty-ninth rule of the supreme court, and certain passages in Phillips' Practice, and warned him of the strictness of the practice. I subsequently saw in the clerk's office the soiled form of bond mentioned in the affidavits as in his hand-writing, but did not inspect it, and do not know whether it contained the words "and damages" or not; but he left my chambers to write a bond which would be sure to have those words in it. He is altogether mistaken when he says in his affidavit that, "under the direction of the court, the clerk made out the bond as filed." I gave no directions about it, and had nothing to do with it, except to justify the surety and approve it, which I did, as I always do, without the least scrutiny of the bond; for it is the business of counsel to see that it is in the form they wish it, and it is a matter about which I should not and do not meddle at all.

But, in my own view, it is wholly immaterial how this mistake in the bond occurred. It is not in form a supersedeas bond. Yet it operated de facto as a supersedeas bond for seven months from September 29, 1885, the date it was filed, until April 23, 1886, when counsel for the plaintiffs first discovered the omission, and applied to the clerk for a writ of possession to oust the receiver. I was then absent at Cleveland, Ohio, holding court, and, upon my return, sua sponte revoked the action of the clerk, and restored the possession to the receiver, because it was not, in my judgment, a case for action by the clerk, and the receiver could not or properly should not be dispossessed except upon the order of the court, and possibly not without an application to the supreme court itself.

It is true that the opinion in the case, and the decree following it, directs that "the receiver deliver possession to the plaintiffs, for which purpose a writ of possession should issue to place them in the quiet possession of the property, freed from all tenants of the receiver and their effects," (Ferguson v. Dent, 24 Fed. Rep. 426;) but this was merely a mode of declaring the right of the plaintiff to the property. and was not intended, at least, to direct that the receiver be dispossessed without a further order of the court to that end. Strictly speaking, there is no such thing in our equity practice as a writ of possession, and certainly none is ever needed to dispossess a receiver of the court. If a receiver should refuse to obey an order of the court, possibly a writ of assistance might be issued by the clerk, under equity rule 9; but even that is doubtful, for it seems to provide rather for that writ as against the parties to the suit without an application to the court which otherwise would have to be made. 2 Daniell, Ch. Pr. (1st Ed.) 724; 1 Daniell, Ch. Pr. 643. We have, in Tennessee chancery practice, a writ of possession in analogy to that writ in ejectment at law; but that, of course, has no application here, though it was used in Wallen v. Williams, 7 Cranch, 278. At all events, this decree meant no more than would have been implied if it had not contained the directions as to a writ of possession against the receiver. Mr. Daniell says:

"The appointment of a receiver, made previous to a decree, will be superseded by it, unless the receiver is expressly continued. A receiver, however, is never discharged by decree, but the application for his discharge must be made by petition," etc. 3 Daniell, Ch. Pr. (1st. Ed.) 408; 2 Daniell, Ch. Pr. (5th Ed.) 1765.

Naturally enough this final decree was treated as a direct order of the court to dispossess the receiver; and, strictly, there should have been an order continuing his possession after the decree, and pending the appeal; so while, under the circumstances, neither the plaintiffs nor the clerk would be guilty of willful contempt in dispossessing him, yet, since he had been, without any special order, continuously in possession since the appeal, and repeated orders had been given for his direction in the management of the property, it seemed to me that, whether the bond justified that continued possession or not, the application to the court, which is now made, should have been then made, before turning him out, notwithstanding the command of the final decree. Just as if the final decree, or one subsequently made. had contained specific directions for continuing the receiver pending the appeal, the clerk would not have issued the writ; so that, possession having been continued, in fact, he should not have issued it without a further order to that effect. For these reasons the motion to vacate the order of revocation is denied. I cannot sanction any interference with the receiver's possession without the special order of the court whose receiver he is; and, under the circumstances stated, the final decree cannot be treated as such sanction, whether the bond be a supersedeas bond or not.

It does not follow, even at law, that the court will either issue an execution, or refuse to quash one issued by the clerk, simply because the bail in error is fatally defective. The text writers, abridgments, and cases show that it is very much a matter of sound discretion in the court; and one of the chief influences in controlling that discretion is the desirability of preserving the existing status until the appellate court can exercise its undoubted power of determining whether there be in fact a fatal defect or not. Undoubtedly, the plaintiff, the clerk, and the sheriff-indeed, all the officials concerned-may be called on to determine, each for himself, just as the clerk did here, whether the judgment or decree has been superseded or not by the writ of error or appeal; and each for himself must act at his peril, for there is no tangible writ of supersedeas to guide them. by implication of law from the existing facts, and the matter to be determined is whether there can be any action towards executing the judgment or decree,—whether there be any supersedeas. the court can always revise that action of the officials, and the fallacy is in supposing that the matter is to be always determined by either the officials or the court solely and exactly upon the face of the bailpiece, be it recognizance or bond. Often the court below will not proceed, notwithstanding the defects; and just as often it will refuse to interfere where execution has in fact issued under equivocal circumstances, although there may be in fact no defect, and in a law a supersedeas,—leaving the party to some other remedy, such as an in-

dependent action at law for the trespass or injury done. I need not say that the ultimate purpose of all concerned is to give the plaintiffs the benefit of their recovery, pending the appeal, if they be entitled to it, or the defendants the privilege of their supersedeas, if there be one; but it is a mistake to suppose that whether we shall, or how we shall, execute the final decree in this case, for example, depends altogether upon the fact of the omission discovered in this bond. this property was taken from the defendants pending the controversy over its ownership, and, without any bond at all from plaintiffs, except for costs, put into the hands of a receiver, so that the defendants could not waste it, or destroy it, or sell it and embarrass its recovery by plaintiffs. Now, pending the appeal, it would seem that justice requires that it should equally remain protected if there be necessity for it, from the waste or destruction of plaintiffs, or its embarrassment by their sale, until the plaintiff's right to it has been confirmed. It was not thought safe to plaintiffs to leave it with defendants pending litigation in this court, because they were insolvent, etc.; and, without going into details, if these non-resident plaintiffs be not also insolvent, as to which there is no proof, they are not shown to be solvent, and it may be doubtful, at the least, whether they could respond to any claim of defendants arising out of their possession during the continuance of the litigation pending the appeal if our decree be reversed; and, if they could do that, defendants would have to go to a distant state to seek a recovery. Again, they might sell the property to strangers, and embarrass its recovery by the defendants, The purchasers would take pendente lite, no doubt, if it be theirs. but the embarrassment would still exist. So we might have prevented that by a special injunction at the hearing, but it is too late now, and a receiver would be better for all concerned, any way, as well after as before appeal.

When we took it from the defendants, in contemplation of law their right of possession remained, although the property was in the hands of a receiver: for which additional reason this court should, if it has the power, be careful to protect defendant's possession which is in its keeping. If there were no statute, and the court as free to act as it always was in England, it would, under the circumstances of this case, stay proceedings pending the appeal; and I doubt if a case can be found surrendering a possession, so taken, to the triamphant plaintiff, if the defendant appeals, and the court be unrestricted by some limitation on its powers in that regard. statute abrogated all such equitable considerations, and required us here, without inquiry into other facts, to surrender possession because of this omission in the bond? I think not. Not even the precise language of the statute requires such a ruling. Rev. St. 1000, 1007. The appellants cannot have the statutory supersedeas without doing certain things, among which is an undertaking by surety to pay damages, as well as costs: but, as Mr. Justice Story says in

Martin v. Hunter's Lessee, 1 Wheat. 374, we must not resort to "hypercritical severity in examining the distinct force of words," etc. Therefore, when we construe this language by the light of the law of supersedeas, as it applies to courts of chancery especially, we are forced to acknowledge that those courts have not been shorn of their ordinary power to stay proceedings pending an appeal, outside of and beyond this statute. I do not break down the act of congress, nor claim a power unrestricted by it, nor forget the abundant rulings on it, from a critical examination of which I have just emerged. But, not to be misunderstood, and confining the rulings to the facts before us here, I affirm that when a court of equity appoints a receiver, and by the final decree adjudges the property to belong to one of the parties, it may, pending the appeal, continue the receiver or not, according to circumstances; and this statute does not affect that power except so far as it furnishes an analogy as to the terms it may impose upon The appellate court may, beyond question, control the the parties. exercise of the power, but still it exists, and, in my judgment, the most important consideration to govern the discretion is that which demands that we save that control of the appellate court which it should always have over the res to make its jurisdiction effectual. Just as before the appeal it was within the power of this court, why should not we do all we ought, to transfer the control to the appellate court? If it be equitable to commence the judicial custody, generally it would be equitable to continue it.

If we had not appointed a receiver, this property would have been in the hands of defendants at the final decree. Possession would have been decreed to plaintiffs, and could have been enforced under equity rule 9, unless they had perfected the statutory supersedeas. But the plaintiffs were not content with this, but invoked the extraordinary power of this court to appoint a receiver,—extraordinary in its commencement and in its continuance before and since the appeal; and, being extraordinary, it is governed by its own rules as well in relation to a stay of proceedings pending an appeal as everything We suspend the ordinary laws of procedure, and oust tenants without ejectment. We allow no man to eject the receiver, or to sue him, or to tear down the buildings, (which power has been invoked in this case as against the city police,) without our consent. Why, then, does not this extraordinary procedure of appointing a receiver likewise stretch itself beyond the ordinary law of statutory supersedeas, and present some element of its own in that regard? does. I think.

The result of it is that the most that can be technically claimed by the plaintiffs because of this omission in the bond is that the decree declaring them entitled to the right of property in this real estate has not been suspended, as it was intended to be, per force of the statute and the bond; and, as against the defendants, they would be entitled to a writ of assistance to acquire that possession which ordinarily belongs to the right of property; but they have themselves defeated that effect by taking the possession of the property from defendants, and placing it with this court. On applying here for possession other procedure comes into play, and the fact appears that there has been an appeal, and the question is, shall the court surrender its possession because there has been no bond under the statute? Generally, it ought to do so; because, but for any statutory command to stay its further action on the giving of a proper bond, generally it would do so. 3 Daniell, Ch. Pr. (1st Ed.) 105-110. I mean that whatever restrictions there may be in this statute, if it were out of the way, the court would, notwithstanding an appeal, pass the possession along with the right of property, unless some equitable consideration supervened to prevent it. I have already suggested those that should influence this court to withhold that possession in this case, at least temporarily, until the appellate court can be heard from;

and, I think, until the appeal is finally heard.

Moreover, if the defendants had given a bond which would have suspended the force of the decree declaring the right of property to be with the plaintiffs, the latter could not have expected the court, in the exercise of its power over receivers pending an appeal, to surrender possession to them, not because the supersedeas deprived the court of its power over the receiver in that behalf, but because, not having the established right of property, they would not be entitled to possession,—not any more than they would have been if the final decree had declared the right of property to be with defendants; and, certainly, if that had been done, the plaintiffs would not have wished the court, pending appeal, to let the defendants into possession, though the power to do so would have been unquestioned. But the defendants have been deprived of that statutory supersedeas which would have suspended the plaintiff's right of property as declared by the final decree, by a mistake of some one, against which they may equitably ask this court to relieve them by continuing the receiver pending the appeal otherwise than through a supersedeas, if it has the power to do so. That it has that power by a direct stay of proceedings for the discharge of the receiver, pending the appeal, I do not doubt. The plaintiffs, if occasion required, could be relieved against the mistake by a reformation of the contract upon a bill for the purpose. 3 Pom. Eq. 1367; 2 Pom. Eq. 843, 845, 846, 852, et seq.; Bisp. Eq. 469, 871; Ivinson v. Hutton, 98 U. S. 79; Snell v. Insurance Co., Id. 85; Elliott v. Sackett, 108 U. S. 132; S. C. 2 Sup. Ct. Rep. 375; Pickersgill v. Lahens, 15 Wall. 140; State v. Frank, 51 Mo. 98; Craft v. Dickens, 78 Ill. 131.

Let us suppose, for instance, that plaintiffs had not discovered this mistake until after an affirmance of our decree, and a suit by them upon the bond, does any one suppose they could not, on a bill, reform it according to the facts stated here, and would not defendants and their surety be liable for "damages" according to their real intention? Then, why is the bond, within the purview of a court of equity, looking at the real facts, any less a supersedeas bond, here and now, upon the principle of treating that as done which ought to "It is a peculiar excellence in chancery, on many occasions, that it goes behind writings, and even sealed instruments and judgments, to ascertain how the original transaction stood, and what were its true obligations, in order to enforce them." U.S. v. Price, 9 How. 83, 102. If, therefore, the defendants have been defeated of their intention—and they had the right of absolute choice upon executing the statutory bond, so that it need not be a mutual mistake, since the plaintiffs had no choice as to the terms of the contract—to give a supersedeas bond, which would have suspended the plaintiff's right of property, and, as a consequence of that suspension, any right of possession pending the appeal, by a mistake relievable in equity in favor of the plaintiffs, if they desired it, I do not see any reason why the plaintiffs should not be, in a court of equity, called on to act in the premises wherever the matter is involved, left to resort to that remedy, or else compelled to accept the defendants' offer to make the bond complete. Of course, only upon any just terms as to security or indemnity, and that containing the same condition as the statutory bond would be just; or an amendment of the defective bond to conform to the statute, by the consent of the surety, would be just, and precisely what a court of equity on a bill to reform the contract would grant.

On this reasoning, if it be correct, the right of this court to direct the amendment or a new bond does not depend on any jurisdiction it may have over the instrument qua a supersedeas bond, or any authority over the appellate proceedings which might be deemed a usurpation, but only on the fact that, having lawful custody of the res, and a plenary discretion to allow or refuse a surrender of it to the plaintiffs on their application to enforce the decree, (so far as the decree relates alone to that custody, and no further,) it may exercise that authority according to the demands of the equitable considerations here suggested, and refuse to deliver possession to the plaintiffs in spite of their unsuperseded decree, if the defendants shall voluntarily And it should be remembered here that, by incorrect the mistake. voking this extraordinary authority of the court over its receivers to continue them or not upon these equitable considerations, we neither create nor restore the statutory supersedeas, do not substitute another, nor affect the rights of the plaintiffs growing out of any want of one. We simply and independently, upon our own terms, withhold possession from them until the supreme court can act. To show this distinction, let us imagine that no supersedeas bond had been given at all, or attempted or intended to be given, but, before the receiver was discharged, the defendants, by motion or petition, should apply to this court to continue the receiver, or to appoint one originally, pending the appeal, and we should rightfully or wrongfully do that, is it not plain that the plaintiffs' rights of property under the final decree would not be affected by the action of the court? No more are they affected by the action we now take in continuing this receiver.

The only possible fault with this reasoning that occurs to me is, that by the final decree we adjudged, not only the right of property, but also the right of possession.—construing the decree as plaintiffs construe it.—to them: thereby technically bringing the possession of the receiver within the influence of the supersedeas law, so that the right to that possession, so decreed, could only be suspended by command of the statute, and not otherwise. The court and parties certainly intended to surrender the possession along with the right of property decreed. unless defendants complied with the statute; but the court did not intend to do so by that decree, and supposed that, if the defendants did not give the bond, the receiver would first pass his accounts, and then surrender the property by some subsequent order to that effect. But this is beside the question, and of no importance now, I think; for, being better informed, the court finds it has larger power than it was aware of, and that its continued control does not depend at all upon whether a bond was given or not. I think it is not precluded by the final decree from exercising that larger power.

In other words, it is proposed now to exercise only that power which Mr. Justice Bradley confirms in Hovey v. McDonald, 109 U. 2. 150. S. C. 3 Sup. Ct. Rep. 136. and Mr. Chief Justice Waite in Leonard v. Ozark Land Co., 115 U. S. 465, S. C. 6 Sup. Ct. Rep. 127, and for the exercise of which, so far as it relates to injunctions, the ninety-third equity rule was established. That rule does not extend to the regulation of the practice in the matter of continuing receivers pending an appeal, but the power is not created by or derived from the rule at all, and exists without it. The court not vet having prescribed any precise regulations in relation to receivers, we are directed by equity rule 90 to the general practice as it existed in 1842, just as the supreme court itself is directed by its rule 3 to the practice prior This practice, in its relation to receivers, Mr. Daniell briefly summarizes at the last citation above made from that author. and Mr. Justice Bradley in Hovey v. McDonald, supra, is somewhat complicated by a reference to the local practice on appeals from special to general term in the District of Columbia, which misled counsel in Leonard v. Ozark Land Co., supra; but a careful reading makes it very plain in its application here. I had intended to quote largely from it, but forbear, as nothing less than a careful reading of the whole case will suffice. It was the case of a receiver. and I regard it as directly in point as to the doctrine to control us here. It shows that the supersedeas of the statute does not suspend the power of the court below as to the receiver, pending the appeal. any more in a case coming from the circuit court than the one from which that appeal then under discussion came. It is a general principle of our appellate law, established, as to the effect of an appeal upon an injunction, in the Slaughter-house Cases, 10 Wall. 273. The only reasonable doubt in its application here, as before suggested, is as to the power of this court after the final decree and the term at which it was rendered; but the ninety-third equity rule itself recognizes that it then exists, as well as before, as it did in England, and does yet; for it directs the judge to exercise it when he "allows" the appeal, which may be after the term at which the final decree was rendered, and at any time within the statute of limitations. There is no reason why the court may not exercise it at any time, particularly since Goddard v. Ordway, 94 U. S. 672, decides that it is the duty of the court below, notwithstanding an appeal, to give the necessary orders to preserve the property in the hands of the receiver pending the appeal whenever it remains in its possession.

pending the appeal whenever it remains in its possession.

Now, applying the doctrine here, and it appears that the final decree directed the possession of the receiver to be delivered to the As already explained, it was not thereby intended to determine that pending the appeal they should have possession. As to that no special directions were given, as ought to have been done; but, as a fact, it was supposed that a supersedeas bond would be necessary to continue the receiver pending the appeal. It was further supposed that a supersedeas bond had been given, and in fact the receiver has been continued without any special instructions to that A bond intended to be a supersedeas, but omitting the operative words, was filed, and the proof shows that the omission was by But this mistake, under the doctrine we are considering, is beside the question, because, if there had been a good bond, it would not have superseded the directions of the final decree concerning the receiver, be they what they may; and, of course, a defective bond could have no effect in that direction. In Hovey v. McDonald, supra, the directions to the receiver were to deliver the fund, and they were not in the decree at first, but the supreme court sanctioned the insertion of them by amendment; saying, however, that "it was merely expressing the legal effect and consequence of the decree;" so here the directions given merely expressed the legal effect of the decree without them.

The plaintiffs were as much entitled to the possession then as now, and no more now by reason of the mistake than they would be now without it. Wherefore, when they ask us to discharge the receiver, we consider the application independently of the mistake; and, I think, for reasons stated, the court should retain its control pending the appeal, at least until the supreme court directs otherwise, and I should, as I understand the law, make the same ruling precisely if the defendants had appealed intentionally without a supersedeas, though at the time the appeal was granted I thought, as we all did, that a supersedeas was absolutely necessary to effectuate that result. Draw a broad line between the right of property of the plaintiffs, whether they claim under the original title or the final decree, and the right

of possession, which has been in fact but not in law severed from it by the appointment of a receiver, and we have two entirely distinct things, as to one of which the defective bond may be important, but as to the other it seems not to be; and if we keep these two things apart, and do not confuse them, the case becomes clearer as to existing rights of the parties in this application. And in this connection it is useful to distinguish between that continuance of the receiver which would have necessarily resulted from a suspension of plaintiffs' right of property by a supersedeas of the final decree in their favor, and that continuance of the receiver which comes of the present action of the court. In the one, the plaintiffs' possession would have been arrested by the suspension of their right of property; in the other, it is arrested regardless of such suspension, and rightly on the facts of this case.

I do not know why, in this case, any terms should be imposed. We imposed none on the plaintiffs as a condition for appointing a receiver in the first instance; and, considering that the supreme court may disagree with us as to the right of property, there is no apparent reason for imposing any on defendants for continuing a custody that protects all alike till the end of the appeal. events, the same bond that the statute requires would, by analogy, be sufficient here. There would often be circumstances when the court should not continue the receiver at all, or only on terms indicated by the peculiarities of the case; but I recognize no such circumstances here, and think, on the whole, no terms ought to be imposed, except that the defendants have leave and be required to carry out the original design by inserting the omitted words, with the consent of the surety, if he will consent, or, if not, to file a new bond with the omitted condition supplied, and a superadded stipulation that it shall operate retrospectively to cover all "damages" from the date of the appeal. Perhaps, as these conditions are somewhat logically inapplicable to the views above expressed, and if any terms are to be imposed they should be such as the court would require independently of the mistake that has been made and of the statutory requirements for a supersedeas, they should not be demanded. defendants move to amend the bond or to file another, and are willing to do so; and, as I see no occasion on the facts of this case to impose any independent conditions for the continuance of the receiver, I see no harm in permitting them to complete the bond according to the original design, so that, if plaintiffs are entitled to any benefit of it, they can have it in such form of bond as it ought originally to have been. They cannot object to this, and it does not. if we have no power to do that here, injure them in the least, nor impose a supersedeas if none already exists. This disposes of the motions quite satisfactorily to my own judgment.

But, while I am not now required to go further, I should be prepared to rule, if necessary, but with great diffidence as to the correctness of the conclusion in view of the sinuosities of our American law in relation to the implied appellate supersedeas, that this court has the power, under the authority of Revised Statutes, § 954, to direct the amendment of a writ of error or appeal-bond, and to permit the amendment asked for here, as a part of the proceedings of this court. I have not the least doubt it could be done in England, particularly in chancery; but, through the influence of statutes and the distorted growth of an American notion that an appeal transfers a case bodily into the appellate court, and strips the court below of all power over the record and the case, I am not certain that the power could be sustained here, though there is no adjudication of the supreme court of the United States against it, whatever may be said of expressions to be found in the opinions. Experimentally, I will permit the amendment pro forma, and not undertake to justify it now, since I find it unnecessary, but will cite in a note to this opinion some authorities which seem to sustain it. It is not a practical question of much value in a situation precisely like this, because the case of Seward v. Corneau, 102 U.S. 161, and other cases like it, furnish a complete remedy in the supreme court itself for the correction of the mistake made; and, if the position first assumed in this opinion be correct, the receiver would be continued independently of the statutory supersedeas, and that would give the defendants relief until the supreme court could act to correct the bond.

Motions of plaintiffs denied. Motion of defendants granted.

DECREE.

Because it appears to the court that the appeal-bond filed herein on the twenty-eighth day of September A. D. 1885, was intended, by the obligors, the court, and the judge approving the bond, to operate as a supersedeas, but by some mistake the words "and damages" were unintentionally omitted from the condition thereof, and for other satisfactory reasons to the court appearing, the motion of the plaintiffs to vacate the order of April 26, 1886, recalling the writ of possession issued by the clerk, and to now proceed with the execution of the final decree of August 1, 1885, by such orders as may be necessary to discharge the receiver, and deliver possession of the property in dispute to the plaintiffs pending the appeal of the defendants herein, is denied. And for the same reasons, on motion of defendants, they are permitted to amend the said bond, by interlining the words so unintentionally omitted in the place left for them in the printed blank upon which the said bond was executed, if the surety in the bond shall in writing indorse thereon his consent thereto; and it is ordered that the bond shall then operate as if said words had originally been inserted therein. thereupon the said M. L. Bacon, surety as aforesaid in the said bond, appeared in open court, and declined to consent to the change in the bond as above allowed; and thereupon defendants moved the court to be allowed to file another bond, conditioned as required by law to operate as a supersedeas, whereupon they tendered a bond with J. H. Malone and W. H. Robinson as sureties, conditioned as therein expressed, which said bond is hereby accepted and approved; and it is ordered that, according to the tenor and effect thereof as established by law and by the consent of said sureties and the defendants herein, it shall be taken, and in all respects operate, to supersede the said final decree pending the appeal heretofore granted in this case, and that, in pursuance thereof, and in obedience to the statutes in that behalf regulating the supersedeas of proceedings pending an appeal, the execution of said decree be, and it is hereby, stayed, as it has been heretofore stayed since the said appeal was taken, the property remaining in the hands of the receiver, as heretofore; the original bond not to be affected in any way by the allowance of the new bond, but to stand as if this order had never been made.

To all of which the plaintiffs except, and ask that their exception be entered of record, and that the affidavits used upon both sides upon the hearing of these motions be filed as a part of the record, and taken as such to all intents and purposes as if they were incorporated in a bill of exceptions, which, in that respect, this order shall be taken to be, which is granted, and it is done accordingly. And thereupon the plaintiffs pray an appeal from this order, and from that of April 26, A. D. 1886, which is allowed; and their bond for \$250, conditioned as appeal-bonds are required by law to be, with T. B. Edgington as surety therein, executed and filed this day, is accepted and approved by the court,—the defendants in open court waiving all other citation and notice; the affidavits so used upon the hearing of these motions, and so as above made a part of the record, and as though embraced in a bill of exceptions for the purposes of this appeal, being those of C. W. Frazer and D. H. Poston, dated June 22, A. D. 1886, and of T. B. Edgington, dated June 28, A. D. 1886, and of W. B. Weisiger, dated June 29, A. D. 1886; the same being properly filed, and entitled in this cause.

NOTE BY JUDGE HAMMOND.

AMENDMENT OF THE BOND. Rafael v. Verelst, 2 W. Bl. 1067; S. C. Cowp. 425. There were two defendants, with verdict against one and in favor of the other. Writ of error joined both, as did the bail in error, which was by recognizance. Motion, in the appellate court, to amend the writ, granted. Same day f. fa. issued and levied, although plaintiff in error offered to alter the recognizance; motion in court below to quash f. fa., and to amend the recognizance, granted; and bail in error entered into a new recognizance. In Justice v. Mersey Steel Co., 1 C. P. Div. 575, the old practice of giving held in error on appeal to have self-load being still in force the definition of the self-load being still in force the definition of the self-load being still in force the definition of the self-load being still in force the definition of the self-load being still in force the definition of the self-load being still in force the definition of the self-load being still in force the self-load being self-load being still in force the self-load being self-l giving bail in error on appeal to house of lords being still in force, the defendants in error, not knowing that, put in no bail; f. f. issued; application to appellate court to extend time and stay execution pending appeal. Held, application should be made to the court below.

Attorney General v. Swansea, etc., Co., 9 Ch. Div. 46. Practice now in England that in equity cases application to stay proceedings for any cause pending appeal should be made by to the court below in the first instance, and, if refused, then to appellate court by "motion by way of the appeal." But see Wilson v. Church, 11 Ch. Div. 576; S. C. 12 Ch. Div. 454.

That a bail-bond could always have been amended, see 1 Bac. Abr. 567, tit. "Bail in Civil Cases," D 4; Hampton v. Courtney, Cro. Jac. 272; Anderson v. Noah, 1 Bos. & P. 31, and numerous other common-law authorities.

In the chancery practice of England there was no difficulty; for, if the stay of proceedings should be granted below, of course the terms as to security bonds, etc., were all in the control of that court, but if by the house of lords, then, of course, in the control of that court; and, in both, the proceedings were subject to amendment as liberally as proceedings in chancery always were but the application had to be made to the court proceedings in chancery always were, but the application had to be made to the court in which the stay had been obtained. The only difficulty in our practice is in determining to which court the bond belongs, or in which the proceedings for stay may be said to be taken; for, unlike a writ of error at law, the appeal is granted below, while the bond is taken below in both; and in neither is the supersedeas directly and expressly ordered, as it always is in chancery in England, but comes by an implication from the statute, addressed alike to both the appellate court and the court below. 2 Daniell, Ch. Pr. (1st Ed.) 675; 3 Daniell, Ch. Pr. 105, 109, 134, 136, 140, and 97-150 gen-

erally; 2 Daniell, Ch. Pr. (3d Ed.) 1467.

In Arnold v. Frost, 9 Ben. 267, Blatchford, J., held that an appeal-bond was so much a part of the suit in which it is given that an action on it might be maintained in the same court where given, as ancillary to the original suit, on a question of juris-

In Tipton v. Cordova, 1 N. M. 383, an appeal-bond was held to be "process" under the internal revenue act, and as such required a stamp.
In Bentley v. Jones, 8 Or. 47, it was held that the appeal-bond was not properly a

part of the transcript in the appellate court on an appeal from the judgment made

upon a motion to quash a fi. fa., but belonged to the files in the court below, etc.

In Martin v. Hunter's Lessee, I Wheat. 304, 361, it was said: "But there is nothing in the record by which we can judicially know whether a bond has been taken or not; for the statute does not require the bond to be returned to this court, and it might, with equal propriety, be lodged in the court below," etc.

In Iring Polity, and the propriety of the court below, "etc.

In Irwin v. Bellefontaine Bank, 6 Ohio St. 81, it was held, under a statute almost identical with our Rev. St. U. S. § 954, that an appeal-bond is a "proceeding," and as such amendable. Therefore the appellate court allowed the defective bond to be

amended, with consent of the surety, or a new one to be filed.

In Williams v. McConico, 25 Ala. 538, the bond appeared to have been approved after the appeal, but on affidavit the court sent a certiorari to the judge below to certify when it was in fact approved, and would not dismiss the appeal until the truth was made

In Dobbins v. Dollarhide, 15 Cal. 374, Field, C. J., held that, if the appeal-bond do not operate as a stay, the remedy is by motion, in the court below, for leave to proceed

notwithstanding the appeal, and not to dismiss the appeal.

In Schenck v. Conover, 13 N. J. Eq. 31, it it distinctly stated that, outside of a rule of court regulating the supersedeas very much as our Revised Statutes do, a court of equity may interpose to protect the parties pending an appeal, and stay or allow the decree to be executed, according to circumstances. And so in Granger v. Craig, 85 N. Y. 619, that the statutory supersedeas was not the entire reliance of the appellant, but the court

below might stay proceedings when equitable to do so.

Abundant authority could be cited to this point, but care should be taken not to abrogate the statutory requirement of a supersedeas bond, though this power has always existed since 13 Jac. I. c. 8, qualified the absolutely suspensive effect of a writ of error; and the danger of trenching on the statute is not great. Our act as to this statutory supersedeas assimilates appeals to write of error at law, and, certainly, a court of equity can exercise the same discretion as did a court of law under the statute of James; and the books are full of cases where the court has refused to issue execution pending error, upon considerations extraneous to the four corners of the bond. But a court of equity essentially has a larger power, growing out of its control over appeals in this matter of staying further proceedings; and when our original act, requiring a decree in equity to be reviewed only by writ of error, was repealed, and the appeal substituted therefor, presumably congress intended to remove the restrictions imposed, by the anomaly of a writ of error in equity, upon that larger power, both as to the authority of the appellate court and the court of original cognizance.

When, therefore, the statute invests the court of original cognizance with the power to grant an appeal, and leaves it to exercise the usual powers in that behalf, among them was that to stay proceedings pending the appeal in all those circumstances where before it could have been done if not forbidden by the statute, or fairly not forbidden by implication from it; and, necessarily, when it is called upon to take a bond, that "proceeding," like the rest, must be liable to amendment, under Rev. St. § 954, if the jurisdiction of the court be subsequently invoked to rule upon that bond, and the circumstances surrounding its existence, as it must if the court be applied to for the execution of the decree notwithstanding the appeal. Our equity rule 85 recognizes this power of amendment even of decrees, and I see no reason why, under the general power existing outside that rule, it may not amend an appeal-bond, at least for its own purposes of procedure in delaying execution of the decree until the appellate court issues its mandate in the premises, whether the supreme court recognizes that amendment as sufficient for its purposes of procedure on the appeal or not.

And, finally, I think section 954 of the Revised Statutes gives the party a right to

such an amendment before the court can take advantage of the mistake, and execute the decree, to the defeat, perhaps, of the appellate control of the litigation. Authorities are in almost every volume of reports and text writers prescribing the reasonable and intelligent conditions under which such amendments should be allowed or re-

fused, whether in the one court or the other.

JACKSON v. WALKIE.

(Circuit Court, N. D. Illinois. November 8, 1886.)

COPYRIGHT-NOTICE PRINTED IN BOOK-MUST STRICTLY COMPLY WITH STATUTE

-Act of Congress, June 18, 1874, § 1.

The only notice of copyright given in a printed book was the following, printed upon the page immediately following the title-page: "Entered according to act of congress, in the year 1878, by H. A. Jackson." Held, on demurrer, that the notice was not such a notice as is required by United States statute, (18 U. S. St. at Large, 78,) and did not entitle the proprietor to maintain the states of the states o tain an action for infringement of copyright.

In Equity. Bill alleging infringement of copyright, and praying for injunction and accounting.

H. Harrison, for complainant.

Dyaenforth & Dyaenforth, for defendant.

BLODGETT, J. The bill in this case alleges that complainant is the author and proprietor of a certain book, entitled "Franco-Prussian Mode," and that the same has been duly copyrighted in this country by compliance with the acts of congress, and charges that the defendant, in violation of his rights as such author and proprietor, has infringed said copyright by the publication of the same matter contained in complainant's work, for which infringement complainant seeks an injunction and accounting. Defendant demurs to the bill upon the ground that it fails to show that complainant has obtained a valid copyright upon said work.

The book in question is referred to in the bill, and made a part thereof, from which it appears that the only notice of the copyright given in the book itself is by printing, upon the page immediately following the title-page, the following words: "Entered according to act of congress, in the year 1878, by H. A. Jackson;" and the only question made by the demurrer is whether this shows a sufficient notice to entitle the complainant to maintain an action for the infringe-

ment of his alleged copyright.

Section 1 of the act of June 18, 1874, (18 U. S. St. at Large, 78.) is as follows:

"No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof, by inserting in the several copies of every edition published, on the title-page, or the page immediately following, if it * * * the following words, viz.: 'Entered according to act of congress, in the year —, by A. B., in the office of the librarian of congress, at Washington,' or, at his option, the word.' Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: 'Copyright, 18-, by A. B.'"

It will be seen that the complainant has not adopted either of the formulæ for his notice prescribed by the act of congress. He has used a portion of the first formula, but has omitted the words, "in the

office of the librarian of congress, at Washington," which are certainly a part of the notice. Without discussing the question as to the natural rights of authors in their literary productions, and whether they have any such rights in this country aside from our copyright laws, it is enough to say that the bill in this case shows that complainants' work has been published and put in circulation; that be has taken no means to protect the same except by the steps shown in his bill to obtain and secure a copyright, and, since the decision of the supreme court of the United States in Wheaton v. Peters, 8 Pet. 591, it has been the recognized rule in this class of cases that a party must bring himself strictly within the terms of the statute in regard to copyright in order to protect his property in case of publication. Argument seems hardly necessary to show that the defendant in this case has not complied with the statute in this regard. has not given either of the forms of notice which the statute specifically requires him to give in order to be entitled to bring a suit for the protection of his alleged copyright. If an author or proprietor of a book or literary work can change the formula prescribed by the statute for his notice of copyright to the public, by omitting the words left out of this notice, he may omit other words, or adopt an entirely different form, or may change the location of the notice. He may think that the title-page, or the page immediately following, is not as good a place to print the notice as some other place in the book, and may therefore insist that he has a right to exercise his own judgment as to where he will print his notice, as well as the form in which it shall be printed. An author or proprietor of a work has no right to say, in effect, that any part of the prescribed notice is immaterial, and may be omitted. He takes his copyright under the law, only by giving the notice, and the entire notice, which the statute provides; and the statute expressly declares that he shall not maintain an action unless he has complied with this condition. Hence I think the bill fails to show a valid copyright in complainant, and the demurrer must be sustained, and the bill dismissed.

The only case cited by the complainant in support of his bill is Myers v. Callaghan, 10 Biss. 139; S. C. 5 Fed. Rep. 726. In that case the late learned circuit judge of this circuit held that where the notice of copyright stated the copyright to have been entered in 1866. when in fact it was not entered until 1867, did not defeat the copyright, because the only effect of the mistake as to date was to abridge the life of the copyright one year, and no possible damage could accrue to the public, or to any other person, by reason of such mistake. That case is clearly distinguishable from this, and does not in any

way, as it seems to me, control the questions here made.

United States v. American Bell Telephone Co. and others.¹

(Circuit Court, S. D. Ohio, E. D. November, 1886.)

1. WRIT AND PROCESS-MOTION TO QUASH SERVICE.

Where the invalidity, irregularity, or defect in the service of the writ appears upon the face of the return, a motion to quash the service, or abate the writ, is the proper mode of bringing the matter to the attention of the court; but, where the objection does not appear upon the face of the papers, the better rule of practice, where it is sought to question or dispute the facts stated therein, is to do so by plea in abatement, on which an issue may be regularly taken and tried.

2. Partnership—Service upon Non-Resident Partner.

While the interest of a non-resident partner in a partnership doing business in Ohio, in respect to such business, may be subject to the local jurisdiction, if the partnership is properly served in conformity with the statutes of the state, it is, however, well settled that the non-resident partner cannot be brought personally before even the local courts, or be subjected to judgment in personam, by service upon the resident partners.

WRIT AND PROCESS-EQUITY PRACTICE-SERVICE OF SUBPŒNA.

In suits in equity, the federal courts are regulated, not by state statutes, but by the judiciary acts, and the rules of equity practice.

4. SAME—AMERICAN BELL TELEPHONE COMPANY.

The return of a subpœna which recited that the marshal had served the same upon the "American Bell Telephone Company (which is a corporation found and doing business in the Southern district of Ohio) by reading the same to A. D. Bullock, the president of the City and Suburban Telegraph Company, (the said City and Suburban Telegraph Company being an agent and partner of the said the American Bell Telephone Company, within said district,)" fails to show affirmatively the facts required to constitute a valid service, either under the judiciary acts, the rules of practice governing the court, or the statute of Ohio providing for service upon a foreign corporation having a "managing agent" in the state. No presumptions are to be indulged in favor of such a return, so as to give the court jurisdiction over a non-resident corporation. The return is also irregular, and open to the objection that the marshal did not confine himself to a statement of what he did in executing the subpænas, but states conclusions of law and fact, apart from what was done.

5. SAME—SERVICE UPON FOREIGN CORPORATIONS.

In the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the federal courts jurisdiction in personam over a corporation created without the territorial limits of the state in which the court is held, viz.: (1) It must appear, as a matter of fact, that the corporation is carrying on its business in such foreign state or district; (2) that such business in such foreign state or district. ness is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition express or implied of doing business in the state.

6. Same—Section 789, Rev. St. U. S.—Act of Congress, March 3, 1875.
The judiciary acts (Rev. St. § 789) and act of March 3, 1875, providing that no civil suit or action shall be brought against any person outside of the district in which he resides or may be found at the time of the service of process, do not affect the general jurisdiction of this court, but merely confer a personal privilege or exemption upon the defendant, which can be waived, and is waived, by a foreign corporation, not only by a voluntary appearance to the suit, but by doing business in a state imposing the condition of liability to suit there by service of process on its agent.

7. SAME—SERVICE UPON FOREIGN CORPORATION.

It is not sufficient to give this court jurisdiction in personam over a foreign corporation that it has property rights, however extensive, within the district, or that it has pecuniary interests, however valuable, in business managed and conducted by others.

¹Reported by J. C. Harper, Esq., of the Cincinnati bar. v.29f.no.1—2

8. Telephone Companies -- Licensor and Licensee -- Bell Telephone Com PANIES.

The contracts between the American Bell Telephone Company and the local telephone corporations create the relation of licensor and lessor on the one side, and licensee and lessee on the other, and not a relation of agency.

9. Corporations—Foreign Corporations—Doing Business in a State. Whether a foreign corporation is carrying on business in a state must be determined by what it has done, or is doing, rather than by what it may hereafter do, under powers reserved to it in existing contracts, but not yet exercised. For one person to supply the means to another to do business with or on is not the doing of that business by the former.

10. Same—Managing Agents—Bell Telephone Companies.

Transactions such as the American Bell Telephone Company has had with the licensee corporations of Ohio, at its place of business in Boston, and not elsewhere, is not the carrying on of business by it in Ohio; nor are such licensee corporations its "managing agents."

11. Same—Service on Agent.

An agent of a foreign corporation upon whom service can be made, must be one actually appointed by or representing the corporation as a matter of fact, not one created by implication or construction, contrary to the intention of the parties.

12. Same—Managing Agents.

The term "managing agent" implies the carrying on of the corporate business, or some substantial part thereof, by means of an agent who manages and conducts the same within the limits of the state, for and on account of the foreign corporation.

18. PATENTS FOR INVENTIONS—LICENSE—PATENT-HOLDING CORPORATION—NA-

The right of the patent owner to permit or license the use of the invention is not the creature of the federal franchise or statute, but of the common law; and in exercising this common-law right of licensing others to use its patent, the corporation owner is no more nationalized than a private owner would be under the same circumstances; nor does the fact that a patent-holding corporation licenses others to use its patent in a particular state have any more effect and operation in *domesticating* it within such state than the same act on the part of a private owner would have in rendering him a citizen and resident of every test in which him tests with the rendering him a citizen and resident of every tests in which him tests with the rendering him a citizen and resident of every tests in which him tests with the rendering him a citizen and resident of every tests in which him tests with the rendering him a citizen and resident of every tests in the same act of the rendering him a citizen and resident of every tests in the same act on the part of the rendering him a citizen and resident of every tests in the same act on the part of a private owner would have in rendering him a citizen and resident of every tests of the same act on the part of a private owner would have in rendering him a citizen and resident of every tests of the same act on the part of a private owner would have in rendering him a citizen and resident of every tests of the same act on the part of a private owner would have in rendering him a citizen and resident of every tests of the same act on the part of the same act on the part of the same act on the part of the same act on the same act on the same act on the same act on the same act of the same act of the same act of the same act on the same act of the same a dent of every state in which his patent might be used.

14. SAME—JURISDICTION—PRACTICE.

Neither the patent law, nor the privileges secured to patentees thereunder, in any way enlarge, modify, or change the judiciary acts in respect to either the territorial jurisdiction of the federal courts, or the proper service of process upon defendants.

15. ACTION—ENTRY OF APPEARANCE.

Allegations in a plea in abatement showing that the cause of action, and the subject-matter of the suit, did not have its origin in Ohio, such plea being presented solely to object to the jurisdiction of the court, and to quash the return of service, do not amount to an appearance of the defendant.

Hearing on motion of the American Bell Telephone In Equity. Company to set aside the marshal's return, and on plea in abatement to the jurisdiction of the court over said company.

A. G. Thurman, Grosvenor Lowry, Jeff. Chandler, and P. H. Kum-

ler, Dist. Atty., for the United States.

Joseph E. McDonald, Richard A. Harrison, and J. J. Storrow, for American Bell Telephone Co.

Perry & Jenney, for local telephone companies.

JACKSON, J. Proceeding upon the general theory that a patent is a contract between the inventor on the one side, and the government on the other, founded on conditions or considerations prescribed by law, those moving from the former being the production of some new invention or discovery beneficial to the public, in consideration of

which the government grants to the patentee the exclusive privilege, for a limited period, to make, vend, and use the invention throughout the United States, with the right to invoke the aid of its courts for the protection and enforcement of these rights or franchises, the complainants seek, by their bill in this case, to have certain letters patent, numbered 174,465 and 186,787, embodying the electric speaking telephone, issued to Alexander Graham Bell, March 7, 1876, and January 30, 1877, respectively, declared void, set aside, and annulled, on the ground that they were fraudulently, surreptitiously, and improperly obtained on the part of said Bell, by means of alleged false statements, on which the government relied, and on the faith of which it was induced to issue said patents. In the event said letters patent should not be declared wholly invalid and void, because of the alleged fraud of said Bell in procuring their issuance, the bill further seeks to have said letters patent treated as contracts, "reformed, and modified, as in law and equity and good conscience they ought to be," for the reason that, by inadvertence, accident, and mistake, they embrace more than said Bell was entitled to claim, etc. Alexander Graham Bell, who is averred to be a resident of the District of Columbia. is made a party defendant; but having neither appeared, nor been served with process, he is not before the court.

It is alleged in the bill that prior to the institution of this suit said Alexander Graham Bell had divested himself of all right, title, and interest in the said letters patent, which, together with the grants therein contained, he had transferred to the American Bell Telephone Company, a corporation chartered and duly organized by and under the laws of the state of Massachusetts. The American Bell Telephone Company, as the owner of said letters patent, together with several corporations chartered by the laws of Illinois, Pennsylvania, and Ohio, designated in the pleadings as the "local or licensee" companies, "associates," "copartners," "representatives," and "agents" of the American Bell Telephone Company, are made defendants. There has been no service upon or appearance by the Illinois or Pennsylvania companies. The "local or licensee" corporations of Ohio are before the court by regular service of process and appear-The averments of the bill touching the jurisdiction of the court over the several defendants are as follows:

"Your orator further shows that the said defendants, the American Bell Telephone Company, duly incorporated under the laws of Massachusetts; and the Central Union Telephone & Telegraph Company, a corporation duly chartered under the laws of Illinois; and the Erie Telephone & Telegraph Company, incorporated under the laws of the state of Massachusetts; and the Central District & Printing Telegraph Company, incorporated under the laws of the state of Pennsylvania; and the Cleveland Telephone Company, the City & Suburban Telegraph Company, the Miami Telephone Company, and the Buckeye Telephone Company, the latter four incorporated under the laws of Ohio; and the defendant, Alexander Graham Bell,—all of whom are made defendants to this bill,—are present, and are found and have property within the jurisdiction of this court, and are now engaged in carrying on the business of telephony, and maintaining a close monopoly thereof, in the

said district,—that is to say, in said Eastern and Western division of said Southern district, and in said Northern district of Ohio,—under and by virtue of said patents to said Bell, and by the means and in the manner hereinafter set forth. Your orator further shows that the defendant the American Bell Telephone Company owns all the telephone instruments used in the business of telephony in the United States conducted under the authority of its patents, and especially all those used by said defendants, or any or either of them, in the state of Ohio; the said instruments that are used by them in said state being in number over 20,000. Its local associates and copartners, the said companies, respectively, own their wires and poles, and contribute the same as their shares, respectively, of the capital of the business, while the American Bell Telephone Company furnishes the franchise and exclusive right of said patents, and the telephone instruments, together with a contract stipulation with each of said local companies that the American Bell Telephone Company will also supply counsel, and maintain all such suits, and do all things, to make the business an exclusive and close monopoly, without charge or burden to the local company or corporation; that the local association, copartnership, or joint stock company thus formed, divides the profits of the business between the American Bell Telephone Company and the said local association, on terms agreed upon between the parties, and the share of the American Bell Telephone Company, as your orator is informed and believes, is set apart weekly, and accounted for by said local company, and is collected by agents of the American Bell Telephone Company, who visit said local company for that purpose, or otherwise paid to said American Bell Telephone Company; that the telephone being a necessary agent in conducting commercial business affairs, the said business is carried on in the manner hereinbefore stated in every city and town of importance in the United States, and between cities, towns, and places in different states, and is so carried on by said defendants in the Eastern division of the Southern district aforesaid, and in the Western division thereof, and the Northern district of said state; and that the said other defendants or sub-companies are part owners and copartners, agents, and representatives of the said American Bell Telephone Company within each of the divisions and districts aforesaid of the state of Ohio, and that the said American Bell Telephone Company is entitled to, and has an interest in, all and singular the property, rights, and business of the other said defendants; that the said American Bell Telephone Company does business in each of said divisions and districts by the sale and grant of licenses to use said patents, by the renting or lease of said telephone instruments, by sharing in the earnings and profits of each of said local companies, by holding stock in the same, by having an interest in the rights, property, and business thereof, by supporting and maintaining each of said companies in litigation, by the employment of officers, agents, and servants in each of said divisions and districts, and by divers other means and devices."

Subpænas were issued to the marshals of the Southern and Northern districts of Ohio for the American Bell Telephone Company, and the local companies resident therein, reciting that the American Bell Telephone Company (impleaded with others) was "a corporation doing business and found in the state of Ohio."

The returns of the marshals thereon were as follows:

"Received this writ at Columbus, Ohio, on the twenty-third day of March, 1886, and on the twenty-fourth day of March, 1886, I served this writ on the defendant the American Bell Telephone Company (which is a corporation doing business and found within the Eastern and Western divisions of the Southern district of the state of Ohio) by reading the same to A. D. Bullock, the president of the City & Suburban Telegraph Company, and delivering him a duly-attested copy thereof, (the said City & Suburban Telegraph Company

being an agent and partner of the said the American Bell Telephone Company, within said Southern district of the state of Ohio,) on March 24, 1886; also served this writ on said defendant the City & Suburban Telegraph Company by reading the same to A. D. Bullock, its president, and delivering to him a duly-attested copy thereof, on March 24, 1886.

"H. C. URNER, U. S. Marshal.
"By RICHARD C. ROHNER, Deputy."

On the writ sent to the Northern district this return was made, viz.:

"Northern District of Ohio—ss.: Served this writ on the defendant the American Bell Telephone Company (which is a corporation doing business within said district) by delivering a true and certified copy thereof to James P. McKinstry, vice-president of the Cleveland Telephone Company, the said Cleveland Telephone Company being an agent and partner of the said the American Bell Telephone Company, within said Northern district of Ohio, on March 31, 1886; also served this writ on said defendant the Eric Telephone & Telegraph Company by delivering a true and duly-certified copy thereof to James M. McKinstry, its general superintendent, on March 31, 1886.

"W. F. GOODSPEED, U. S. Marshal.
"By Geo. Wyman, Deputy."

These returns, while varying slightly in form, recite that the American Bell Telephone Company is doing business and found within each of said districts, and that the writ was served upon it by reading the same, or delivering a certified copy thereof, to the president or vice-president of the local corporation, with the statement, parenthetically made, that such local company was "the partner and agent" of said American Bell Telephone Company.

On May 3, 1886, the day said defendants were required to enter their appearance in the suit, the American Bell Telephone Company, by its solicitors, entered a special appearance, as follows:

"(No. 229.) In Equity. The United States of America v. The American Bell Telephone Company and others.

"To the Clerk of said Court: Please enter our appearance for the American Bell Telephone Company specially for the purpose of objecting to the jurisdiction and power in said court to compel said corporation, the American Bell Telephone Company, named as defendant herein, to appear or answer in the above cause, and of objecting to the returns of the marshal upon the subpœnas issued in the cause, so far as the same relate to said corporation, and for no other purpose. At the same time we file this paper we file a motion to set aside said returns, and we shall also file a plea to the jurisdiction of the court when the same reaches Columbus, to-morrow.

"HARRISON, OLDS & MARSH, Solicitors."

Thereupon the said defendants filed the following motion, viz.:

"The American Bell Telephone Company, named defendant herein, appearing specially for the purposes only herein set forth, hereby moves the honorable court to set aside so much of the return of the marshal on the several subpenas issued herein as relates to the American Bell Telephone Company, for the reason that said return is untrue in fact, and to disregard it for the reason that it is insufficient in law; and hereby prays the judgment of this court whether it shall be compelled to appear herein or answer thereto, for the reason that it has not been served with process herein, and is not compellable to appear in response thereto, and has not accepted and does not accept service

thereto, and has not accepted and does not accept service, nor waive due service of process upon it."

The motion then proceeds to set forth the same statement of facts as is contained in the plea in abatement to the jurisdiction of the court over said defendants, filed at the same time. Affidavits were filed in support of said motion, which, together with all the allegations of fact contained therein, are sworn to by the president and general manager of the American Bell Telephone Company.

The plea in abatement to the jurisdiction of the court, containing the same recital of facts as the motion to set aside the marshal's return, is as follows:

"In Equity. The United States of America v. The American Bell Telephons Company et al. Plea to the Jurisdiction.

"The American Bell Telephone Company, named as defendant herein, appearing specially and solely to object to the jurisdiction and power of this court to compel it to appear and answer in the aforesaid action, by protestation, not confessing or admitting all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, pleads to the jurisdiction of this court over it, and for plea says that this court ought not to compel it to appear or to answer in the aforesaid action, because at the time of the commencement of the said suit, and at the times when service of the several writs of subpœna issued therein was attempted or pretended to be made upon it, this defendant was not an inhabitant nor found in the state of Ohio, nor in either of the judicial districts thereof established by the United States, and has not been served with process herein, (although service has been attempted to be made, and a pretended return made upon said subpoena;) and this defendant is not compellable to appear in response to said writs, and does not accept or waive service thereof."

And this defendant further says:

"The American Bell Telephone Company is a corporation established under the general laws of the commonwealth of Massachusetts, and particularly by virtue of chapter 117 of the Acts of 1880, and acts in amendment thereof, to which reference is hereby made. It has always had its place of business and maintained its office in Massachusetts. It was not, at the time of the filing of the bill in this case, nor of the attempted service of the subpœna herein, nor at any time since the filing of the bill, nor before, an inhabitant of, nor a resident of, nor present, nor found, in the state of Ohio, nor the Southern district of Ohio. It was not at either of said times doing business in the state of Ohio, nor engaged in carrying on the business of telephony in the state of Ohio. It had not, at either of said times, any place of business, office, officer, or managing agent, nor any partner, in the state of Ohio. It has not been served with process in the state of Ohio, nor has service been accepted or waived by it, or by any one thereto authorized.

"Neither of the other corporations defendant was, at any of said times, a partner, nor a managing agent, of the American Bell Telephone Company, in

the state of Ohio, nor elsewhere.

"The bill seeks to annul, cancel, tear the seal from, and destroy the two patents—No. 174,465 and No. 186,787—referred to in the bill, and to destroy the property therein of the owner thereof. The American Bell Telephone Company now is, and at all times since the year 1881 has been, the sole owner and possessor of said patents. Said other corporations defendant have never been owners or co-owners or part owners thereof, in law or in equity,

nor partners with the American Bell Telephone Company in respect of the same, nor agents for the management thereof, nor in possession thereof,

"The bill seeks to cancel, tear the seal from, and destroy said patents upon the alleged ground of alleged fraud in the proceedings of the patentee, Alexander Graham Bell, in procuring the same, and of errors, mistakes, and inadvertences in the officers of the United States in granting the same, and before the respective grants and dates thereof. Such alleged cause of action arose, if at all, in and out of transactions had in Massachusetts and the District of Columbia, and by and between parties then and there resident. Said alleged cause of action arises, if at all, out of the constitution and laws of the United States, and said bill has for its sole object to destroy a grant made by the United States, the patent-office, and the secretary of the interior, to hold the same null and void, and to mutilate and destroy the records of the patentoffice. As ancillary thereto, this bill also seeks to prevent the American Bell Telephone Company from bringing suits for the infringement of said patents in the courts of the United States, where alone such suits can be brought. Said alleged cause of action, if it exists, is exclusively of federal origin, cognizance, and jurisdiction.

"The two patents referred to in the bill are No. 174,465, applied for by Alexander Graham Bell, February 14, 1876, and dated March 7, 1876, and No. 186,787, applied for by Alexander Graham Bell, January 15, 1877, and dated January 30, 1877. They were both issued to said Bell as inventor, owner, and patentee. At the time when each of said patents was applied for, and at the time when each was granted and issued, and during all the intervening time, the patent-office of the United States, and the legal official residence of all the officers thereof, and of the secretary of the interior, was at Washington, in the District of Columbia. At all said times, and during the whole of the pendency of said two applications, said Bell was an inhabitant of and resident in the state of Massachusetts, and not of or in the state of Ohio. The whole business of filing said two applications, prosecuting them, obtaining and receiving said patents, and all communications with the patent-office and with the officers thereof, relating to that business, were done, transacted, and had in Massachusetts, or in Washington, and not in any particular in the state Thereafter, by purchase for valuable consideration, and by divers mesne assignments, the entire, sole, and absolute title in and to said patents became vested in the American Bell Telephone Company, in the years 1880 and 1881, and has ever since continued vested in said corporation. All said assignments have been executed and delivered in Massachusetts or Washington, and not in the state of Ohio.

"At the time this bill was filed, and ever since, and long before, the business of the American Bell Telephone Company and the telephone business in Ohio has been conducted and transacted as follows:

"The American Bell Telephone Company, ever since it purchased said patents, and took said assignments thereof, in 1880 and 1881, has always been the sole and exclusive owner of said two Bell patents,—No. 174,465 and No. 186,787; and has never granted or conveyed to any person whatever, and especially has never granted or conveyed to any of the other corporations defendant, any such assignable right or interest in the said patents, or either of them, as is described, referred to, or contemplated by section 4898 of the Revised Statutes of the United States. It has not given or granted to either of the other defendant corporations any right or license whatever to make or sell telephones employing or embodying or embracing any of the inventions patented in and by the said two patents, nor any telephones whatever.

"It and its predecessors, owners of said patents, each for itself determined that it would not itself carry on the telephone business (or any business) in the state of Ohio, (or elsewhere outside of the state of Massachusetts,) but, in lieu thereof, that it would grant licenses under its patents to persons or corporations who might apply therefor to use its patented telephones, and

furnish them to others, for use in the state of Ohio, (and in other states.) and, generally, to carry on all the telephone business therein. Whereupon divers corporations, including the Central Union Telephone Company, the Central District & Printing Telegraph Company, the Cleveland Telephone Company, the City & Suburban Telegraph Company, and the Miami Telephone Company, named as defendants herein, or certain other corporations under whom they, or some of them, claim as successors, (called hereinafter, for convenience, the 'licensee corporations,') desired and sought and obtained licenses to carry on the telephone business in the state of Ohio, at and for the risk and as the business of said licensee corporations. To that end, and long before this suit was brought, the American Bell Telephone Company so arranged with such licensee corporations that, at the commencement of this suit, and ever since, and long before, the latter should carry on and have carried on all such business in the state of Ohio, and the American Bell Telephone Company has not carried on the telephone business in the state of Ohio. Said licensee corporations have carried on that business in their own right, and entirely for their own profit and loss, and not as agents or for account of the American Bell Telephone Company.

"The American Bell Telephone Company has no license contract with the Erie Telephone & Telegraph Company, another corporation named as defendant herein; but it is believed that the latter corporation owns the whole or a major part of the stock of the Cleveland Telephone Company, with whom the American Bell Telephone Company has, and for several years past has had, a

license contract and dealings as herein stated.

"The American Bell Telephone Company furnishes to each of said licensee corporations, at its general office or factory in Boston, Massachusetts, and not elsewhere, and as often as requested, telephones embodying said patented inventions, and manufactured by the American Bell Telephone Company. actual and the legal place of delivery thereof is agreed to be, and in fact is, such general office or factory. The licensee corporation transports them, at its own risk and expense to wherever it wishes to, and lawfully may use them or furnish them to others for use. The licensee corporation, when it sees fit, returns them into the possession of the American Bell Telephone Company, in Massachusetts, and it pays to the American Bell-Telephone Company a certain stipulated sum per month in respect of each telephone, reckoned from the time when it receives the same from the American Bell Telephone Company, in Massachusetts, as aforesaid, until it returns the same into the actual possession of the American Bell Telephone Company, as aforesaid, and in some few cases pays certain other sums, but in no case a share or portion of profits. These payments are made, and the accounts respecting the same are settled, at the American Bell Telephone Company's office, in Boston, Massachusetts.

"All the telephones used in the state of Ohio are so furnished, and all the money the American Bell Telephone Company actually receives in respect of, or growing out of, any use of telephones in the state of Ohio, it receives at its general office, in Boston, Massachusetts, from the licensee corporations, and all its accounts therefor are there settled. Each licensee corporation uses said telephones, and furnishes them to others, under and by virtue of, and in the exercise of, its license right so to do, and makes such payments as payments due from it for such license right; and no payments beyond what the licensee corporation has so agreed to make, and in the invariable course of dealing does itself make, are due to or demanded by or received by the American Bell Telephone Company in respect of the use of telephones in the state of Ohio.

"Subject to certain general limitations and regulations restricting the use of telephones so furnished, the right of the licensee corporation is, and its invariable course of business is, to use those telephones itself, or to furnish them to others to be used, within certain counties and portions of the state of Ohio. The licensee corporation constructs, or procures to be constructed, at its own

expense, or at the expense of users to whom it furnishes telephones, all needed lines of wires, and furnishes all batteries and other appliances; the telephones as they have been in fact furnished not being intended to be used, or adapted to be used, without such wires, batteries, and appliances. The licensee corporation selects the customer who is to use such telephones, and fixes the price charged to him; but no matter what price it charges, nor whether it puts the telephones to use, or lets them lie unused in its store-house, it agrees to pay, and does pay, to the American Bell Telephone Company the said stipulated price per month for each instrument.

"The whole of the business connected with the telephones, from the time the licensee corporation received them from the American Bell Telephone Company at its general office or factory, in Boston, Massachusetts, until it returns them to said company, is done at the risk and expense of the licensee corporation, under its direction and control, and by officers and agents appointed and paid by it. The American Bell Telephone Company does not direct or control, and has not the right to direct or control, such business; does not participate in the profits thereof; and is not responsible for, and does not bear the burden of, the losses thereof. It does not select nor dismiss such officers and agents, nor pay them, nor bear any of the burden of payment to them for their salaries. It does not, in fact, by itself, or any officer or agent employed by it, use telephones in the state of Ohio. It has not in fact, and at no time since the filing of this bill nor long before, used, or had a right to use, any telephone existing, nor any telephone line existing, in the state of Ohio, and it has never itself built or operated a telephone line in the state of Ohio. It does not select what individual users shall be furnished with telephones and lines, nor control their selection. It does not solicit business, nor direct who shall be solicited, and has not the power or right to do either. It is not responsible to the individual user for bad service, and does not receive complaints therefor. It does not, and for many years last past it has not, (and it is believed that it never has,) demanded or received any money from any individual user of telephones in the state of Ohio.

"In originally arranging for such conduct of the telephone business in the state of Ohio, (and elsewhere in the United States,) the American Bell Telephone Company sometimes found a licensee corporation disposed to undertake one branch or subdivision of the several branches into which it has been found convenient to divide the telephone business; as, for example, one licensee corporation might undertake the construction and operation of a telephone exchange in one town, another licensee corporation in another town, and another licensee corporation the business of building lines to connect these two exchanges. In such cases, the American Bell Telephone Company stipulated for and reserved, for example, in each exchange license, the right to construct connecting lines, and connect them with the exchange, and other similar rights to make connections and through lines; but it contemplated that such other lines would be built and operated by other licensee corporations, and therefore made such stipulations and reservations in favor of its appointees or assigns as well as itself, and provided that, when its appointees or assigns undertook such work, they should become pro tanto the contracting parties, and the American Bell Telephone Company should not be responsible for their misfeasance or non-feasance. And further, for the same purpose, it established such regulations that different licensee corporations needing to interchange business or connect lines should do so in a convenient manner, without the power of either to obstruct the same by mere self-will; but it has not otherwise undertaken to regulate such business. In fact, it has not itself, in the state of Ohio, undertaken or carried on such business, but the same has been entirely undertaken and carried on and performed by its various licensee corporations. In many cases one licensee corporation has successively undertaken to extend its business as aforesaid into the other branches and connecting exchanges or lines.

"The more effectively to carry out said course of dealing, and to enable it to enforce its rights and protect its interests as licensor, not itself carrying on the telephone business in the state of Ohio, and to do this without destroying or dismembering the telephone system, we the serious inconvenience of the individual users, in case of default or failure on the part of the licensee corporation, the American Bell Telephone Company retains the technical legal title to said telephones; and has the right, in case of default, or if said course of dealing is not duly carried out, to take possession of lines and instruments temporarily or permanently, and thereafter to withdraw them from operation, or cause them to be operated by itself or through other licensees, or pursue various remedies at law and in equity to collect from each individual user what he would otherwise have paid to the licensee corporation, or otherwise to step into the shoes of the licensee corporation, and then, retaining its stipulated royalty or license fee, to account for the overplus to the licensee corporation, or otherwise, according to law; but no such steps have ever in fact been taken in the state of Ohio.

"The license contracts to and with the licensee corporations, in respect of instruments to be used on private lines, contemplated that the whole business of selecting and soliciting customers for private lines, of communicating with them, demanding and collecting all payments from them, and doing all business in connection with them, should be performed by the licensee corporation as its own business, at its own discretion, at its own expense, for its own profit or loss, and at its own risk, and in its own right; and that (except in case of a cancellation of said contract for default) the American Bell Telephone Company should neither demand nor receive, in respect of instruments used on private lines, any payment whatever, except the monthly royalties to be paid to it at its office, in Boston, Massachusetts, by the licensee corporation, as already stated, and whether the instruments furnished to the licensee corporation were by it furnished to an individual user or not; and the business, in fact, has been and is so conducted.

"The license contract also contemplated, but solely as a convenient means for enabling the parties to exercise the rights arising thereunder, that, in respect of each set of instruments for such private line, a special license should also be furnished by the American Bell Telephone Company to the licensee corporation, and by it countersigned and granted over to such individual users as it might so select. So far as such special licenses have been furnished, they have been furnished by the American Bell Telephone Company to its licensee corporation in bulk, with the blanks unfilled, and the particular telephones not designated therein, to be used by the licensee corporation as its property, and of right, and not as an agent, nor liable to be revoked at pleasure by the American Bell Telephone Company, even before they were furnished to individual users by the licensee corporation.

"As a matter of fact, the licensee corporations have not, with any considerable degree of accuracy, returned to the American Telephone Company duplicates of such special licenses when used, nor reported the names of the private-line users to whom such special licenses have been furnished; but the course of dealing at the present time is, and for a period long before the beginning of this suit has been, for the licensee corporation to receive all its telephones from the American Bill Telephone Company at Boston, Massachusetts, and to pay the stipulated royalties thereon under a general classification thereof, according to their intended uses; but without discrimination as to the particular customers to whom they might be furnished, and without being precluded from using, for private lines, telephones ordered for exchanges, or vice versa, when holding separate license contracts for both these purposes.

"These, and all other provisions of detail in the license contracts, and in the dealings between the American Bell Telephone Company and licensee corporations, are intended and used to provide for and secure the licensee corporations in carrying on its business, and enjoying its rights as licensee, and to enable the American Bell Telephone Company to enjoy, protect, and enforce its rights in case the licensee corporation fails to carry on its business,

and make its payments as contemplated.

"The American Bell Telephone Company owns stock in four of the licensee corporations named as defendants herein. In some of them it acquired some stock when the licenses were made. In others of them it has acquired it by subsequent purchase at the market price, as any other purchaser might do. It has not a majority of the stock in any of them, except two, and in those it holds a bare majority, and acquired enough to give it a majority by purchase at the market price.

"The American Bell Telephone Company has not agreed to supply all counsel, and maintain all suits, against or affecting the licensee corporations. It has in two cases, but not in others, agreed, as in good conscience a manufacturer and furnisher of patented machinery may well agree, that, in consideration of the license fees paid to it, it will defend all suits brought against its licensee corporations on the ground that the telephones furnished by it un-

lawfully infringe patents owned by others.

"Samples of the standard forms of contract which the American Bell Telephone Company has been accustomed to make with the licensee corporations aforesaid are hereunto annexed. They are designated 'Form 109 D,' 'Form

113 D, 'Form 116 C,' and Form 251 B.'

"The Central Union Telephone Company, the Erie Telephone & Telegraph Company, the Central District & Printing Telegraph Company, the Cleveland Telephone Company, the City & Suburban Telegraph Company, the Miami Telephone Company, and the Buckeye Telephone Company, named as defendants in this cause, were not at the date of filing the bill of complaint herein, nor at the several dates of alleged service of the writs of subpæna issued herein, nor theretofore, the associates or copartners, nor was either or any of them at those dates, nor has either or any of them ever, at any time, been an associate or copartner of the American Bell Telephone Company, in any manner or for any purpose; nor have they, nor has either or any of them, in the state of Ohio, or elsewhere, formed with the American Bell Telephone Company any association, copartnership, or joint-stock company which divides the profits of any business whatsoever between them, or either or any of them, and the American Bell Telephone Company; nor has any part of the profits of the telephone business carried on by any local association, copartnership, or joint-stock company, nor any part of the profits of the licensee corporations, been set apart weekly, (or at any other period,) and accounted for by such local company, nor collected by agents of the American Bell Telephone Company who visit any local company for that purpose, (and no such visits are made,) or otherwise paid to the American Bell Telephone Company; nor is it entitled to receive any such share or division.

"All of which matters and things this defendant avers to be true, and is ready to maintain and prove. Wherefore this defendant prays the judgment of this honorable court whether it ought to be required to appear in accord-

ance with any writ of subpæna issued in the said suit."

Along with its plea and motion the American Bell Telephone Company exhibits samples of the standard forms of the contracts "for exchanges," for "extraterritorial connecting lines," "branch lines," and for "private lines and other purposes," which it has usually made with the licensee or local corporation. These contracts are too lengthy to be here inserted, but will be referred to in considering and passing upon the questions raised by the plea in abatement, of which they form a part.

The complainants set down this plea in abatement for argument, and also moved to strike said defendant's motion from the files, because in controverting the truth of the returns it presents an issue of fact which cannot, in the regular and orderly mode of judicial proceedings, be raised and tried on motion and by ex parte affidavits; because the statement of facts accompanying and supporting its motion set up and rely upon matters dehors the return, which should properly be raised by plea in abatement; and because the plea in abatement, embodying precisely the same extrinsic facts relied on to sustain the motion, overrules the motion.

Two grounds of objection are taken to the marshal's return by the motion of the American Bell Telephone Company: The first that "said return is untrue in fact;" and, secondly, that "it is insufficient in law,"—one presenting an issue of fact, and the other raising a question of law upon the face of the return. The defendant's plea in abatement, and its motion to set aside the marshal's return or quash the service, because it "is untrue in fact," are identical, and present precisely the same issue, and on the same state of facts. Both the plea in abatement and the first ground of said motion seek to controvert the truth of the return, as to matters of fact stated therein, on grounds that do not appear upon the face of the return; both dispute the truth of the return on precisely the same extrinsic Where the invalidity, irregularity, or defect in the service of the writ appears upon the face of the return, a motion to quash the service or abate the writ is the proper mode of bringing the matter to the attention of the court; but where the objection does not appear upon the face of the papers, the better rule of practice, where it is sought to question or dispute the facts stated therein, is to do so by plea in abatement, on which an issue may be regularly taken and tried. Halsey v. Hurd, 6 McLean, 14: Rubel v. Beaver Falls Cutlery Co., 22 Fed. Rep. 282, 283.

It is not denied that objections to the regularity or validity of the service, not appearing on the face of the return, are sometimes taken by motion to dismiss or set aside the service. Thus, in Harkness v. Hyde, 98 U.S. 476, the illegality of the service, which did not appear upon the face of the return, was presented by motion to dismiss the suit, which was treated by the court as a motion to set aside the service, and was sustained. But the general rule of practice is to raise such issues of fact by plea in abatement; and in this case, as the defendant's motion and plea in abatement present identically the same issue, and on the same state of facts, so far as relates to the truth of the return, it would seem to be the better practice, and most correct course, to have that question considered and determined on the plea rather than the motion, which is an application for summary relief based upon ex parte affidavits. The court will accordingly overrule so much of defendant's motion as seeks to dispute or controvert the truth of the facts stated in the marshal's return, but will leave said motion to stand so far as it raises the question of the legal

sufficiency of the service on the face of the return, and to be considered with the plea in abatement.

The questions, then, presented for the consideration and decision of the court are whether the returns on their face show a good and legal service upon the defendant the American Bell Telephone Company; and, if so, whether, under the facts set up by the plea in abatement, it can be held that said defendant is carrying on its business in Ohio, and that the local or licensee corporations, named as co-defendants, are its agents, or in such relation to it that service upon them is such service upon it as to bring it personally before the court, and subject to its jurisdiction.

Do the returns upon their face show a legal and valid service on the American Bell Telephone Company, such as will require it to appear and make defense herein, or suffer the consequences of default?

They recite, in parenthesis, that said company is doing business and found within the Southern and Northern districts of Ohio, and that it was served by reading or delivering a certified copy of the subpæna to the president or vice-president of the local corporation, with the statement or recital that such local corporation was "the partner or agent" of the said American Bell Telephone Company within the state of Ohio.

Looking to the averments of the bill in relation to the business done in Ohio by the American Bell Telephone Company, it is doubtful whether they can be considered as charging anything more than that said company was a copartner, associate, or part owner with the local or licensee corporations in the business carried on by the latter in The bill alleges that said American Bell Telephone Company is present and found, and has property and does business, in the state of Ohio, under and by virtue of said Bell patents, "and by the means and in the manner hereinafter set forth." It then proceeds to show "the means and the manner" in which said company is so present and found, and conducting the business of telephony under its said patents, in said district; that it is the owner of all the telephone instruments used in the state of Ohio; that the local corporations are the owners of the wires, poles, etc., used in connection with the business, and which they contribute as their shares, respectively, of the capital of the business; that the American Bell Telephone Company "furnishes" the franchise and exclusive right of said patents and the telephone instruments, together with a contract stipulation with each of said local companies that said American Bell Telephone Company will also supply counsel, and maintain suits, and do all things to make the business an exclusive and close monopoly, without charge or burden to the local company or corporation; that the local association, copartnership, or joint-stock company thus formed divides the profits of the business with the American Bell Telephone Company on terms agreed upon between the parties; and that the

share of the American Bell Telephone Company is set apart weekly, and accounted for by said local company, and is collected by agents of the American Bell Telephone Company, who visit said local company for that purpose, or otherwise paid to said American Bell Telephone Company. After thus showing, especially and distinctly, that "the means and manner" in which the business of telephony is carried on, created and established the relation of copartners between the American Bell Telephone Company and the local corporations, the bill proceeds to state the great extent of the business throughout the United States; and then avers that said local or subcompanies "are part owners and copartners, agents, and representatives of said American Bell Telephone Company within each of the divisions and districts of Ohio, and that said American Bell Telephone Company is entitled to and has an interest in all and singular the property, rights, and business of the other said defendants."

This interest in "the property, rights, and business" of the local corporations the Bell Telephone Company has, as previously set forth, by virtue of its copartnership relation to them. Following this, the bill states "that the American Bell Telephone Company does business in each of said divisions and districts by the sale and grant of licenses to use said patents; by renting or lease of said telephone instruments; by sharing in the earnings and profits of each of said local companies; by holding stock in the same; by having an interest in the rights, property, and business thereof; by supporting and maintaining each of said companies in litigation; by the employment of officers, agents, and servants in each of said divisions and districts; and by divers other means and devices."

These averments, which supplement the allegation of a copartnership between the American Bell Telephone Company and the local corporations, may be regarded either as a general summary of what was previously set forth, or be treated and considered as charging that the American Bell Telephone Company, in addition to its partnership connection with the local corporations, was itself engaged in carrying on business in the state by the sale and grant of licenses to use said patents; by the renting or lease of telephone instruments; by the holding of stock in the local companies; and by the employment of officers, agents, and servants in each division of the state. Without this latter construction, there is no clear or distinct allegation that the American Bell Telephone Company is itself transacting business in the state. Other allegations of the bill only show and charge that the American Bell Telephone Company and the local corporations are copartners in the business of telephony carried on by the latter, or that it "is entitled to and has an interest in all and singular the property, rights, and business of the other said defendants."

It is not alleged that the local companies are the "officers, agents, and servants" employed by the American Bell Telephone Company

in each district of the state; nor that the sale of licenses to use its patents, or the renting of its telephone instruments, is done by the American Bell Telephone Company through or by means of the local corporations as its agents. The only sale or grant of licenses to use said patents, and the only renting or lease of telephone instruments set forth in the bill, are made to the local corporations. tainly do not, as the officers and agents of the American Bell Telephone Company, sell licenses or rent telephone instruments to them-This would be a manifest absurdity. It will be proper, therefore, in considering the question as to the sufficiency or validity of the service, to treat the bill as charging that the American Bell Telephone Company is carrying on business in Ohio, both as copartner for the local corporations, and separately for itself, by the employment of agents, officers, and servants of its own, in the selling and granting of licenses to use its patents, in the renting or leasing of its telephone instruments, and in the ownership of stock in the local corporations, or otherwise. Reading the returns in the light of these jurisdictional averments of the bill, do the recitals therein contained, that each of the local corporations on whose chief officer service was made was "the partner and agent" of the American Bell Telephone Company, constitute, "prima facie," a legal and valid service on the latter? It is clear that if the statements made in the returns, that the local corporations served were "the partners and agents" of the American Bell Telephone Company, are to be construed as meaning that the latter companies were "agents," by reason of the copartnership relation charged in the bill, the service would not be sufficient to bring the American Bell Telephone Company, as a non-resident corporation and partner, personally before the court. The bill claims that the alleged copartnership embraces, not the patents sought to be canceled and annulled, but only the business of telephony transacted in Ohio. The local companies, as the copartners of the Bell Telephone Company in carrying on the business of telephony in this state, if that relation can legally exist between such corporations, would be the agents and representatives of the latter as to the copartnership transactions and affairs, but not further or otherwise, in the absence of express arrangement, which is not alleged. In respect to that copartnership business, the interest therein of the non-resident partner may be subject to the local jurisdiction, if the copartnership is properly served with a process in conformity with the statutes of the state. It is, however, well settled that the non-resident partner cannot be brought personally before even the local courts, or be subjected to judgment in personam, by service upon the resident partners. This court certainly could not recognize or act upon any such service, as against the non-resident. The Ohio statute relating to non-resident partners provides (Rev. St. § 5011) that "a partnership formed for the purpose of carrying on a trade or business in this state, or holding property therein, may sue or be sued by the usual or ordinary

name which it has assumed, or by which it is known." The service may be made (Rev. St. § 5042) "by leaving a copy at its usual place of doing business," and the judgment rendered against the partnership by the firm name "shall operate only upon the partnership property." This statute, being special, must be strictly pursued, in order to bind either the partnership or its property. Smith v. Hoover, 39 Ohio St. 249. It cannot serve to support the present returns, which do not conform to its provisions and requirements, or to give jurisdiction in personam to this court over the American Bell Telephone Company. The authorities clearly establish these propositions. D'Arcy v. Ketchum, 11 How. 165; Hall v. Lanning, 91 U. S. 160; Pennoyer v. Neff, 95 U. S. 714; Renaud v. Abbott, 116 U. S. 277; S. C. 6 Sup. Ct. Rep. 1194.

But suits in equity in the federal courts are regulated, not by the state statutes, but by the judiciary acts, and the rules of equity practice adopted for and governing said courts. Equity rule 13 provides "the service of all subpœnas shall be by delivery of a copy thereof, by the officers serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family." The court can acquire jurisdiction over parties in equity suits only by the service of process within the district in compliance with the requirements of this rule, or by their voluntary appearance. The requirements of the rule are not complied with by the returns in question, if the statements therein made as to the relation of the local corporations to the American Bell Telephone Company

mean nothing more than a partnership agency.

But how stands the question on the assumption that the bill impliedly, if not expressly, charges that the American Bell Telephone Company is doing business in Ohio other than that carried on by the local or licensee corporations, as its copartners,—such as the sale and grant of licenses to use its patents, the renting or lease of its telephone instruments, and the employment of officers, agents, and servants in each district of the state. The officers and agents so employed, or the "agents" who (as stated in the bill) visit the local companies at regular periods to collect its share of the profits arising from the partnership business, would be more properly the representatives of the American Bell Telephone Company, for the purpose of the service of process, than the local copartner corporations in whose "rights, property, and business" it had only an interest. But no such service is shown, although both the subpænas and the returns recite that the American Bell Telephone Company is doing business and found here, not merely as a copartner, but personally. Under such circumstances, a return stating that service was made upon an officer of a local corporation, with the recital, in parenthesis, that such local company was "the partner and agent" of the American Bell Telephone Company, fails to show affirmatively the facts required to constitute

a valid service, either under the judiciary acts, the rules of practice governing this court, or under the statute of Ohio relating to service on foreign corporations, which provides (Rev. St. § 5046) that "when the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent." It is nowhere alleged in the bill that the local corporations, on whom or whose officers service was had, were the "managing agent" or "agents" of said Bell Telephone Company. No presumptions are to be indulged in favor of such a return, so as to give the court jurisdiction over a non-resident corporation. Alexandria v. Fairfax, 95 U.S. 780; Grace v. American Cent. Ins. Co., 109 U. S. 283; S. C. 3 Sup. Ct. Rep. 207. The returns in question are furthermore irregular, and open to the objection that the marshal has not confined himself to a statement of what he did in executing the subpænas, but states conclusions of law and fact apart from what was done, in reciting that the local corporations were partners and agents of the American Bell Telephone Company.

Our conclusion, therefore, is that, under the allegations of the bill, the statements of the subpœnas, and the recitals of the returns, no valid or legal personal or constructive service on the American Bell Telephone Company is affirmatively shown, such as will require it to appear and make defense herein, or suffer the consequences of a default; and that said company's motion to quash said service for defects of insufficiency in law or illegality appearing on the face of the returns should be sustained.

But this conclusion as to the insufficiency of the returns upon their face will avail but little in finally disposing of the main question touching the jurisdiction of the court over the American Bell Telephone Company, as said returns may be amended upon proper motion, or new subpænas could issue, if the facts disclosed in the plea of abatement and exhibits thereto justify such an amendment or the issuance of further process. It becomes necessary, therefore, to consider the questions raised and presented by the plea in abatement. Under the thirty-third rule of equity practice, the complainants were at liberty either to take issue on this plea or to "set it down for argument." They have chosen to take the latter course, thereby precluding the defendant from an opportunity of establishing its plea by proof, and thereby admitting, as absolutely true, all the statements of the plea, however inconsistent with or contradictory of the allegations of the bill, or the statements and recitals in the returns. The truth of the plea being thus admitted by setting it down for argument, all facts material and pertinent to the issue raised by it stand, and are to be treated, as though established by proof, and, under the present rule of practice, are to avail the defendant "so far as in law and equity they ought to avail it."

The questions presented by the plea of abatement for the determination of the court are whether, assuming the facts stated in the v.29f.no.1-3

plea and exhibits thereto to be true, the American Bell Telephone Company was carrying on business in the state of Ohio at the commencement of this suit, and at the date of the alleged service of the subpœnas herein; and, if so, whether all or any of the local corporations were its agent or agents, upon whom service of process could properly be made, so as to bring said American Bell Telephone Company personally before the court, or compel it to appear and defend the suit.

These are mainly questions of fact, but in their consideration the distinguished counsel for the government and the Bell Telephone Company have, in able and elaborate arguments, discussed the general subject of suits against foreign corporations, and the present state

of the law in relation thereto.

For the complainants it is insisted that under the judiciary acts (Rev. St. § 739) and the act of March 3, 1875, a corporation is to be found and is amenable to suit wherever it is doing business, independently of the existence of any local law providing for suits against it; that the mere fact of carrying on its business in a state other than that of its creation will enable it to be found there, irrespective of any law or statute of such state authorizing suit against it, or against foreign corporations generally, by service upon their agent. No case yet decided by the supreme court, either directly or in principle, sustains this broad proposition. The supreme court has not yet gone to the extent of holding that a corporation can be found, under the judiciary acts, for personal suit, beyond the limits of the state creating or adopting it eo nomine, irrespective of the local law. In every decision of the supreme court asserting or maintaining the jurisdiction of either the federal or state courts over corporations created or located outside of the territorial limits of the state or district in which suit was brought against them, commencing with Lafayette Ins. Co. v. French, 18 How. 404, which made the first exception to the rule of the common law that a corporation could not migrate, had no legal existence, and could not be found, for the purpose of suit, beyond the limits of the sovereignty creating it, there has existed a local statute expressly or impliedly providing for or authorizing such suit as a condition of the corporations doing business therein, together with the further fact that the foreign corporation actually carried on its business, or some substantial part thereof, in such state by and through the instrumentality of agents appointed by itself. Except where the law of the state in which it carries on business and is sued imposes, expressly or by implication, a liability to suit there as a condition of its doing business in the state, a foreign corporation cannot be found, for the purpose of a suit in personam, outside of the jurisdiction or sovereignty creating it.

Without undertaking to review the authorities on the subject of a corporation's liability to suit in a state or district other than that of its creation, we think the decisions of the supreme court have settled

and established the proposition that, in the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the federal courts jurisdiction in personam over a corporation created without the territorial limits of the state in which the court is held. viz.: (1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign state or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition, express or implied, of doing business in the state. When the local law, expressly or by comity, permits foreign corporations to do business in the state; when it also provides for suit against them in a reasonable and proper manner, and within the just limits of the state's power and authority; and when a foreign corporation thereafter enters the state, and transacts its corporate business by means of resident agents coming within the terms of the local statute,—it may be found, and is liable to suit there in either the state or federal courts, by service of process on such agent. Lafayette Ins. Co. v. French. 18 How. 404; Railroad Co. v. Harris, 12 Wall. 65; Ex parte Schollenberger, 96 U.S. 369; Railroad Co. v. Koontz, 104 U.S. 5; St. Clair v. Cox, 106 U. S. 350; S. C. 1 Sup. Ct. Rep. 354; New England Mut. Life Ins. Co. v. Woodworth, 111 U. S. 138; S. C. 4 Sup. Ct. Rep. 364; Boston Electric Co. v. Electric Gas-Lighting Co., 23 Fed. Rep. 839. The underlying principle on which these decisions rest is that the state may impose conditions, not in conflict with the laws and constitution of the United States, on the transaction of business in its territory by corporations chartered elsewhere, or exclude them altogether, or revoke permission or license already given. Corporations engaged in interstate commerce do not, of course, come within such state authority, and no restrictive conditions can be imposed upon such corporations.

The judiciary acts (Rev. St. § 739) and act of March 3, 1875, providing that no civil suit or action shall be brought against any person outside of the district in which he resides or may be found at the time of the service of process, do not affect the general jurisdiction of this court, but merely confer a personal privilege or exemption upon the defendant which can be waived and is waived by a foreign corporation, not only by a voluntary appearance to the suit, but by doing business in a state imposing the condition or liability to suit there by service of process on its agent. It cannot be held sufficient to give this court jurisdiction in personam over a foreign corporation that it has property rights, however extensive, within the district, or that it has pecuniary interests, however valuable, in business managed and conducted by others. It must itself be carrying on business in its own right, on its own responsibility, and for its own ac-

count, and through or by means of its own agents, officers, or representatives, in order to bring it within the operation of the laws of a state other than that in which it is incorporated, making it amenable to suit there as a condition of its doing business in such state.

Under the authorities and principles stated, the American Bell Telephone Company, as a Massachusetts corporation, can only be found and be liable to suit within the territorial limits of this court within the meaning of the federal law or judiciary acts, by virtue of the laws of Ohio relating to it or foreign corporations generally doing business Except as to insurance companies, the statutes of Ohio impose no express terms or conditions upon foreign corporations coming into the state, and exercising their corporate functions. long-standing and well-recognized comity, all foreign corporations, other than insurance companies, are allowed to carry on their corporate business, and exercise their franchises, here without being required to designate an officer or agent on whom service of process shall be made, or to give any express consent to be found or sued The Civil Code of Procedure of the state provides, (Rev. St. § 5044:) "A summons against a corporation may be served upon the president, mayor, chairman, or president of the board of directors or trustees, or other chief officer; or, if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent," etc.; omitting the special provisions about foreign insurance companies. Section 5046 provides: "When the defendant is a foreign corporation, having a managing agent in this state, the service [of process] may be upon such agent." This section, in order to bring it within the just limits of the state's power and jurisdiction, must necessarily be construed as embracing or including within its operation only such foreign corporations as carry on business in the state. It cannot possibly have any extraterritorial effect, so as to bring within its operation, and bind or give jurisdiction over, a foreign corporation, in personam, which was not carrying on business within its limits, even though it might have a "managing agent" residing in the state. The true meaning and construction or proper limitation of this foreign corporation statute must therefore be that suit may be instituted against a foreign corporation doing business in the state by the service of process on its "managing agent." foreign corporation, to come within the operation of the statute, must carry on its own business and have a "managing agent" in the state. This was the construction placed by the supreme court upon a similar statute of Michigan in St. Clair v. Cox, 106 U.S. 357; S. C. 1 Sup. Ct. Rep. 354; Mr. Justice Field, in stating the opinion of the court, saving:

"We do not, however, understand the law as authorizing the service of a copy of the writ, as a summons, upon an agent of a foreign corporation, unless the corporation be engaged in business in the state, and the agent be ap-

pointed to act there. We so construe the words, 'agent of such corporation within the state.'"

When a foreign corporation carries on its corporate business, or some substantial part thereof, in this state, by means of an agent or representative appointed to act here, and having the charge and management of such business, it impliedly assents to be found and sued here in the person of such agent. Doing business in a state imposing such condition or liability to suit as this Ohio statute is treated by the authorities as an agreement or consent on the part of the foreign corporation to be "found" here, within the meaning of the federal judiciary acts, for the purpose of suit, and in the mode designated, if just and reasonable. If, therefore, the American Bell Telephone Company is carrying on its business in Ohio by a resident "managing agent." or was so doing at the commencement of this suit, it has voluntarily brought itself within the operation of the Ohio statute, and may be found here, and service had upon it, in the person of such managing agent. The defendant has urged that such suits must be confined or limited to causes of action originating in the state, and coming within the operation of its laws, and have cited several authorities to that effect. This would perhaps be a very proper limitation or restriction, but it can hardly be said to be established by the decisions. In Railroad Co. v. Harris, 12 Wall. 65, the cause of action originated outside of the District of Columbia: and in Mohr & Mohr Distilling Co. v. Insurance Cos., 12 Fed. Rep. 474, 475, Mr. Justice Matthews expresses the opinion that this foreign corporation statute of Ohio would cover all actions of a transitory character, wherever they may have originated. But, in the view we take of the present case, it is not necessary to express any opinion on this position.

Now, applying the foregoing propositions and principles to the facts set up by the plea of abatement, can it be maintained, either that the American Bell Telephone Company is carrying on its business in Ohio, or that it has a "managing agent" here on whom service of process can be made, so as to bring it personally before the court?

The material facts set forth in the plea, and which positively and directly contradict the statements and recitals of the returns, are that the American Bell Telephone Company was not carrying on business in the state of Ohio at the time of the service of the process herein; that it has no office or place of business in Ohio; that it had no officer or agent in the state representing it or its business at the date of said service and return; that neither of the local corporations on whom the process was served as its "partner and agent" bore towards it any such relation; that said local companies were in fact neither its copartners nor its agents, but merely licensees and lessees of its telephone instruments, with the right to use the same in certain defined territorial limits; that it is neither a citizen nor resident of Ohio, nor found within the limits of said state; that its legal

and actual "situs" and place of business is in the state of Massachusetts; that it has never used or operated a telephone, or built, constructed, or owned a telephone line, in said state; that it has never had in Ohio a telephone or telephones which it either actually operated, or had the right to operate; that it has no right of present possession or enjoyment of any telephone or telephone line in said state; that it has no agent or officer in connection with said local or licensee corporations; that it has never appointed, and has no right to appoint or remove, any officer, agent, employe, or servant of said local companies; that said local corporations alone carry on the business of telephony in Ohio for their own account and profit, and as their own business; that it does not share in their profits, or depend upon their profits, for its pay for the use of its telephone instruments; that all telephones used in Ohio are delivered by it to the local corporations at Boston, Massachusetts, and nowhere else; that all the money which the American Bell Telephone Company receives from the local companies it receives at its office in Boston: that it has neither demanded nor collected in Ohio money for the use of telephones; that it receives only what the local corporations under their license contracts agreed to pay by way of rent and royalty; that said rent and royalty so agreed to be paid by the local companies are based mainly on the number of telephones they receive; that in a few cases where this would not be a proper guide said rents and royalties are based upon the amount of business done, measured, not by net tolls, but by gross receipts; that the liability of the local company for the payment of said rental and royalty commences with the delivery and receipt of the telephones at Boston, and continues until the instruments are returned, or, if destroyed, their loss or destruction satisfactorily accounted for; and that said license contracts were all made and entered into at Boston, Massachusetts, and not elsewhere. The exact relations of the American Bell Telephone Company and the local corporations are set out in great detail, both in the plea and in the con-These contracts are drawn with great tracts exhibited therewith. precision, accurately defining the rights and liabilities of the parties thereto, and, both by their express terms and clear intent, state the relation between the American Bell Telephone Company and the local corporations to be that of licenser and lessor on the one side, and licensee and lessee on the other. For its protection, the American Bell Telephone Company has, by the terms and provisions of these contracts, reserved important rights and powers, which in certain contingencies it may exercise, but which, as the plea distinctly avers, have never been actually exercised by it. The plea sets forth what has actually been done under the contracts.

Whether the American Bell Telephone Company is carrying on business in Ohio must be determined by what it has done, or is doing, rather than by what it may hereafter do, in the event the local companies should make default in complying with the provisions of the

The right reserved to take possession and carry on the business of telephony in Ohio, on the contingency of the local corporations' failure to observe and perform the terms and stipulations of the license contracts, certainly does not constitute a present carrying on of business by the American Bell Telephone Company, such as would bring it within the provisions even of the Ohio statutes. When the Bell Company exercises its reserved rights and powers under the contracts, and takes possession of the telephones, lines, etc., in Ohio, and operates the same through agents or officers of its own, it may then with some propriety be said to carry on its business in the state, so as to be amenable to suit here under the Ohio statute relating to suits against foreign corporations, but not before. only thing presenting the appearance of an agency relation between the American Bell Telephone Company and the local or license corporations is found in that provision of the "private-line" contracts which requires the rents and royalties of telephones used on such private lines to be reserved to the licenser. But, when this provision is considered in connection with other stipulations of the contract, it will be found that these rents and royalties are transferred and assigned, even before created, to the licensee corporations, which have the right to collect and appropriate them to their own use so long as the contracts are complied with on their part. The provision was only intended to guard against the contingency of default by the licensee corporations, and to protect the American Bell Telephone Company against loss and embarrassment in the enforcement of its rights, upon the failure of the local companies to perform and observe the terms of the contracts. With the delivery of the telephone instruments at Boston to the licensee corporation it became entitled. by the terms of the contract, to all the rents and royalties that might arise from private-line customers, and acquired the right to collect the same as its own, for a year in advance, and to continue to do so, from year to year, while the contracts were in force, with no liability to account therefor to the American Bell Telephone Company. local corporations purchased these rents and royalties as a part of the rights they acquired under their license contracts. They alone had the right to collect them, and apply them to their own use, so long as they observed and performed the stipulations of the contracts. The local or licensee corporations, in fact, alone make such collections of the private-line customers. The American Bell Telephone Company has never had the right to collect, and has, in fact, never collected, any of said rents and royalties.

The contract provides that said second party, (the licensee corporations,) "so long as it makes, or causes to be made, the payments herein stipulated, and keeps all the terms thereof, may collect the rentals and royalties from the customers thereunder for a period in advance, not exceeding one year. Upon any default on its part which shall continue for more than 30 days after written notice thereof, the

licenser may, by written notice to it, or by publication in some newspaper in ______, revoke said authority to collect and revoke and cancel all the right and interest of every kind thereunder of the second party; and may in its name, or the name of the second party, if it shall deem such course more convenient, collect all rentals for telephones and lines furnished thereunder, or in accordance therewith, whether then due or thereafter to become due, and take possession and remove all telephones furnished thereunder, subject to such rights as such customers may lawfully have under licenses to be granted by it, in accordance with the terms thereof. For all rentals and royalties so collected by the licenser, and which accrued before the licenser gave notice as aforesaid, it shall account to the second party, first deducting all that may be due from said second party to it, and expenses incident thereto."

The contingent right thus reserved to the licenser for its protection, in the event of default on the part of the licensee corporation in making stipulated payments, and which, as averred in the plea, it has never, in fact, exercised, or had any occasion to assert, cannot be construed either as the carrying on of business in Ohio by the American Bell Telephone Company, or as constituting the licensee corporation one of its "managing agents." While the contract between the Bell Telephone Company and the local corporations is in force, the latter receives these private-line rentals and royalties as their own, and not as agents of the former. But, whatever may be the construction of this private-line contract, it is distinctly disclosed by the plea that the parties thereto have not dealt with these rents and royalties, or transacted the business, on the footing of any agency relation. plea clearly sets forth that the business in respect to private-line customers has in fact been and is conducted on the theory that the rentals and royalties arising from such customers belong to the local companies, as their purchased right, while the contracts are in force. The stipulations of the contracts are entirely consistent with the relation of licenser and licensee, even as to these private-line telephones; and the rents and royalties reserved thereon, and the actual course of dealing between the parties in respect thereto, will not harmonize with any other relation. An agency relation may in some cases arise or be established as a legal result from the facts, although contrary to the avowed intention of the parties; but no such rule can have any application to cases where it is sought to reach foreign corporations by service on a local agent. Such agent must be one actually appointed by and representing the corporation as a matter of fact, not one created by construction or implication, contrary to the intention of the parties. The present contracts leave no room to doubt that the local or licensee corporation acquired the right to collect and appropriate the rents and royalties in question until it made default, and the contract was canceled. Upon the cancellation of the contract in the mode provided, the rights and interests of the

licensee were to be terminated, and then, but not before, the Bell Telephone Company was entitled to resume and recover the rights it had parted with.

While the contracts are subsisting, the local or licensee corporation acts exclusively for itself, and for its own benefit, and at its own risk and expense, in collecting said rents and royalties. When the contracts are canceled the rights of the Bell Telephone Company reattach, so that no agency relation, in fact or in law, exists or was intended between said parties during the continuance of said contracts. In purchasing the right to collect and appropriate to its own use, for one year in advance, (and from year to year while it observes and performs the stipulations of the contract,) the rents and royalties to be paid by the user or customer of private-line telephones, the local corporations cannot properly be regarded as acting for or as representing the Bell Telephone Company in regard to such matters, or as establishing the fact that the latter is carrying on business in Ohio. It is disclosed in the plea that but few of these private-line licenses, with rents and royalties reserved to the Bell Company, were ever, in fact, issued or used. Under the facts stated in the plea, it is impossible to see in what way the American Bell Telephone Company has invoked either the comity of this state, or placed itself or its business within the jurisdiction or operation of its laws, so as to be found here. All that has so far been done by it in respect to the making and execution of the license contracts was actually done and transacted in Boston, Massachusetts. The existence of these contracts, with the rights conferred upon the licensee or lessee, and the rights and powers, however large, reserved to the licenser or lessor, does not constitute the carrying on of business in Ohio by the American Bell Telephone Company. The authorities do not define with exactness what is meant by the terms "carrying on business," but none go to the extent of holding that such transactions as the American Bell Telephone Company has had with the licensee corporations of Ohio, at its place of business. in Boston, and not elsewhere, will constitute the carrying on the business by it in Ohio. Assuming the truth of the facts set out in the plea, a judgment against the American Bell Company in the state court, based upon such service as herein presented, would not be enforceable or have any validity elsewhere.

The terms "managing agent" indicate the character of the business the foreign corporation must be engaged in transacting in order to be liable to suit here. They clearly imply the carrying on of the corporate business, or some substantial part thereof, by means of an agent who manages and conducts the same, within the limits of the state, for and on account of the foreign corporation. The business done must rise to the dignity and importance implied by the phrase "managing agent" in order to come within the operation of the statute. But we cannot understand how a local corporation, as a dis-

tinct and legal entity, in carrying on and conducting the business of telephony in Ohio, for which it was chartered and organized, can be regarded, either in fact or in law, as the "managing agent" of a foreign corporation in respect to that same business. How can the transaction of its own business by the local corporation make it the "managing agent" of another and a foreign corporation having separate and distinct corporate functions? This would be an anomaly in the law. If such relation could exist under such circumstances, its actual existence is positively and distinctly denied by the plea, and is neither disclosed by the contracts nor alleged in the bill. If a customer of the local corporation should sustain damage by reason of some neglect, misconduct, or default on its part in the reception and transmission of messages, or otherwise, would it be asserted, or if asserted could it be maintained, that such customer could, under the contracts in question, proceed directly against the American Bell Telephone Company as the real principal, and hold it liable for the injury sustained? Clearly not. The Bell Telephone Company cannot, therefore, be held or considered as carrying on the business of telephony conducted by the local corporation, and that is the only business done.

Furnishing the means necessary to enable the licensee companies to transact the business of telephony in Ohio, either upon a fixed rental and royalty on the telephone instruments used, or a percentage of the gross receipts of the business, does not constitute the carrying on of that business by the American Bell Telephone Company, or make the licensee companies its "managing agents," so as to render it amenable to suit here. The decisions of several states whose statutes employ similar terms to this foreign corporation act of Ohio uniformly construe the words "managing agent" as designating some principal officer of the corporation who, either generally or in respect to some substantial part of the corporate business, has a controlling authority in the particular locality. Thus, in Upper Mississippi Transp. Co. v. Whitaker, 16 Wis. 233, it was held that the captain of a steam-boat was not a "managing agent" of the transportation company which owned the boat. The court says: "This statute relates to an agent having a general supervision over the affairs of the corporation." See, also, Lake Shore & M. S. R. Co. v. Hunt, 39 Mich. 470. Reddington v. Mariposa L. & M. Co., 19 Hun, 405, the court say: "It is quite clear that the legislature attached importance to the term 'managing agent,' and employed it to distinguish a person who should be invested with general power, involving the exercise of judgment and discretion, from an ordinary agent and employe who acted in an inferior capacity." In Flynn v. Hudson River R. Co., 6 How. Pr. 308, the court held that a "managing agent" contemplated by the statute was one having "the same general supervision and control of the general interests of the corporation that are usually associated with the office of cashier or secretary." The Ohio process act (section 5044,

Rev. St.) classes "managing agent" with "cashier," "secretary," and "treasurer," and next after "president" or "chief officer" of the corporation.

Neither the averments of the bill, nor the facts set up in the plea or disclosed in the contracts, establish any such relation between the Bell Telephone Company and the local corporations as will constitute the latter the "managing agents" of the former, under the authorities, or the clear import of the terms. But it is insisted by counsel for the government that the American Bell Telephone Company, in acquiring the ownership and possession of the franchises and grant described in the letters patent issued to Alexander Graham Bell, has thereby ceased to be a state corporation, and has become national in its character, and is to be treated precisely as though it were a corporation organized under the laws of the United States, with authority to do business in any part of the Union; that, as a patent-holding corporation, it is "domesticated," and is to be "found" wherever its This position cannot be sustained. The franchise natent is used. which the patent grants consists altogether in the right to exclude any one from making, using, and vending the thing patented without permission of the patentee or owner of the patent. Bloomer v. Mc-Quewan, 14 How. 549. It is true that the privilege so granted extends to the utmost limits of the United States, and is wholly independent of the powers and jurisdiction of the several states. Patterson v. Kentucky, 97 U. S. 501; Webber v. Virginia, 103 U. S. 347; Ager v. Murray, 105 U.S. 126. But in permitting others to use the patented thing, the owner of the patent, whether a corporation or a private person, is not exercising any federal right, privilege, or franchise.

The right of the patent owner to permit or license the use of the invention is not the creature of the federal franchise or statute, but of the common law; and, in exercising this common-law right of licensing others to use its patent, the corporation owner is no more nationalized than a private owner would be under the same circum-The fact that a patent-holding corporation licenses others to use its patent in a particular state has no more effect and operation in domesticating it within such state than the same act on the part of a private owner would render him a citizen and resident of every state in which his patent might be used. The franchise right of the patent-holding corporation in no way serves to establish the fact that such corporation is carrying on its business, and is to be found wherever its patent is used. A franchise cannot be distinguished from other property, and property held by a corporation stands upon the same footing with that held by an individual. West River Bridge Co. v. Dix, 6 How. 507. But, aside from this, it is well settled that neither the patent law, nor the privileges secured to patentees thereunder, in any way enlarge, modify, or change the judiciary acts in respect to either the territorial jurisdiction of the federal courts, or the proper service of process upon defendants. Chaffee v. Hayward, 20 How. 208; Saddler v. Hudson, 2 Curt. 6; Ager v. Murray, 105 U. S. 126; Butterworth v. Hill, 114 U. S. 131; S. C. 5 Sup. Ct. Rep. 796.

The character of the American Bell Telephone Company's incorporeal rights or franchises, as the owners of said letters patent, can in no way affect the questions involved, or determine whether it is carrying on its business in Ohio by a managing agent or agents, or whether it has been properly served with process, so as to bring it personally before the court. The position that the American Bell Telephone Company is domesticated wherever its telephone instruments are used, even under license, is only restated by counsel for the government in another form when it is said that the American Bell Telephone Company is "carrying on the business of owning telephones in Ohio." But it will hardly do to say that the ownership of property in the state is the doing of business here, within the meaning and intent of the law, so as to make the owner personally present. undoubtedly true that, in respect to the particular property so owned and located within its limits, the state has the authority to proceed against it "in rem" for the purpose of taxation, or to subject it to the payment of valid claims and demands against the foreign owner. It cannot, however, serve to bring the person of such owner within its jurisdiction, whether that person be a private individual or a patentholding corporation. But in the present case the retention of the title to the telephone instruments, which are leased or rented at Boston, to be used in Ohio by the local or licensee corporation, with the reservation of the right to cancel such lease and resume possession in certain contingencies, is hardly to be considered a present ownership of the instruments, no default having occurred on the part of the licensee which would authorize the lessor to terminate the lease. that can be said of the lessor's title, under such circumstances, is that it is a suspended or deferred ownership, subject to the particular right and estate of the lessee while the lease is in force. Aside from this, would any court, state or federal, undertake to assume jurisdiction over the American Bell Telephone Company personally, by finding a lot of its telephone instruments stored in some warehouse, or with a commission merchant of Cincinnati? Hardly. And yet the presence of such instruments here would be just as much "the carrying on the business of owning telephones in Ohio" as the finding of such instruments in the possession of a lessee. Owning property is one thing; using such property in connection with business carried on by the owner, or others to whom he grants the right to use it, is another and quite a different thing. For one person to supply the means to another to do business with or on is not the doing of that business by the former. The jurisdiction of this court cannot be sustained on any such proposition as this, and it need not longer be dwelt upon.

It is next claimed by counsel for the complainants that the American Bell Telephone Company has entered its appearance in this suit. This claim is based upon that portion of the plea which, after reciting what is sought to be accomplished by the bill, proceeds to set forth that said alleged cause of action, if it exist, is exclusively of federal origin, cognizance, and jurisdiction; that the whole business of filing the applications, prosecuting them, obtaining and receiving said patents, and all communications with the patent-office, and with all officers thereof, relating to that business, were done, transacted, and had in Washington city, or in Massachusetts, and not in any particular in the state of Ohio; and that said cause of action arose, if at all, in the District of Columbia and state of Massachusetts, under the laws of the United States, and not under any law or statute of the state of Ohio. It is said that these facts are set up by said defendant to show that this court, sitting in Ohio, has no jurisdiction over the subjectmatter of the suit; that this portion of the plea is practically a demurrer to the jurisdiction of the court over the controversy, and is equivalent to a motion to dismiss for want of equity, which, in Jones v. Andrews, 10 Wall, 332, was held to constitute an appearance.

This position cannot be maintained. The defendant, in these statements and recitals of the plea, was simply negativing the facts that the cause of action or subject-matter of the suit had its origin in the state of Ohio, on the theory that the jurisdiction of this court over said defendant, if it existed under the Ohio statute, was limited to cases and causes of action arising from or under its business transactions in this state, as was held in Grover v. American Exp. Co., 11 Fed. Rep. 386: Smith v. Mutual Life Ins. Co., 14 Allen, 336: and Sawyer v. North American Life Ins. Co., 46 Vt. 697. The correctness or incorrectness of this theory does not affect the character or purpose of the plea, or make it a defense to the merits of the suit. The plea begins by saying: "This defendant, appearing specially and solely to object to the jurisdiction of this court, pleads to the jurisdiction of this court over it, and for cause of plea says that this defendant is not compellable to appear in response to said writs, and does not accept or waive service thereof;" and prays in conclusion, not for the dismissal of the suit, but as follows: "Wherefore this defendant prays the judgment of this honorable court whether it ought to be required to appear in accordance with any writ of subpæna issued in said suit." This plea cannot properly be construed as raising or presenting an issue upon the merits of the bill, such as will operate as an appearance on the part of said defendant. In Harkness v. Hyde, 98 U.S. 476, a motion was made to dismiss the action, but was argued as a motion to set aside the service, and was so treated by the court. Mr. Justice Field, in stating the opinion of the court in that case, says: "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity. It is only when he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

The various matters relied on to show that the American Bell Telephone Company is to be found in Ohio, and subject to the jurisdiction of this court,—such as its ownership of the telephone instruments used by the licensee corporations; the ownership of stock in one or more of the local companies; the rights and powers reserved to it of resuming possession of its telephone instruments, and taking control of the telephone business, in the event of default on the part of the licensee corporations in complying with the provisions of the license contracts; the sharing in the gross receipts of certain portions of the business done; the reservation of rents and royalties; the right to make changes; and the restrictions and limitations imposed upon the licensee companies,—neither singly nor in the aggregate establish the two essential facts necessary to bring the American Bell Telephone Company within the power and jurisdiction of this court, viz., that said corporation is now, or was at the commencement of this suit, carrying on its business in the state of Ohio, and that it had a "managing agent" or agents representing it here. The truth of the plea being assumed, the only relation existing between the American Bell Telephone Company and the local corporations is really and technically that of lessor and lessee, licenser and licensee; the Bell Telephone Company being merely the lessor of the telephone instruments, and the licenser of the right to use the patent embodied therein, on certain terms, as to rents and royalties and otherwise, agreed upon between the parties, the contracts being entered into, not in Ohio, but at Boston, Massachusetts.

Our conclusion, therefore, is that both the motion of the American Bell Telephone Company, so far as it raises objection to the legal sufficiency of the returns herein, upon their face, and its plea in abatement to the jurisdiction of the court over it, be sustained; that said returns be quashed, and the alleged service on said defendant be abated. The plea being sustained, and availing the American Bell Telephone Company "so far as in law and equity it ought to avail," it disposes of the case so far as said corporation is concerned. The bill is accordingly dismissed as to said American Bell Telephone Company for want of jurisdiction over it, but without prejudice to the complainants. Whether the case can proceed without said corporation and Alexander Graham Bell being before the court as material and essential parties it is not necessary now to decide.

Judges Welker and Sace, who sat with the circuit judge on the hearing of said motion and plea in abatement, concur in the reasoning and conclusion of this opinion.

SNYDER and others v. Bunnell and others.

(Circuit Court, S. D. New York. November 11, 1886.)

1. PATENTS FOR INVENTIONS-CONTRIBUTORY INFRINGEMENT.

Where a person makes and puts on the market an article which of necessity, and to the knowledge of such person, is to be used for the purpose of infringing a patent, such person will be held liable, under the doctrine of contributory infringement.

2. Same—Liability as Infringer.

But the doctrine that a party may be held liable as an infringer solely because an article sold by him might be used by the purchaser as one element of a patented combination would be too dangerous to be upheld.

8. SAME—PROOF OF CONTRIBUTORY INFRINGEMENT.

In order to hold a party liable under the doctrine of contributory infringement, there must be proof that what he did was for the purpose and with the intent of aiding infringement. Saxe v. Hammond, 1 Holmes, 456.

In Equity.

G. G. Frelinghuysen and A. C. Farnham, for complainants.

H. H. Morse and C. C. Leeds, for defendants.

Coxe, J. The defendants are charged with infringement of letters patent No. 103,383, granted to James P. Snyder for an improvement in electro-magnetic burglar-alarm apparatus. The invention "consists in an arrangement for setting in action automatically a secondary circuit, which will continue the alarm, although the circuit first set in action may be suddenly stopped again by the shutting of the door or window." The claim is as follows:

"An alarm indicator, arranged for automatically causing a secondary and independent circuit at the indicators by the action of the armature lever with a disk or other device, and the springs or other closing devices, and a secondary line of wire, I, H³, connecting the battery and the magnet, all substantially as specified."

The evidence of infringement is confined to the sale by the defendants on the seventeenth of December, 1884, of one instrument known as an "automatic drop," and the admission by one of the defendants that others like it had been sold by his firm.

It is conceded that this instrument may be used, in connection with the other apparatus described in the patent, so as to constitute an infringement. It is also conceded that it is susceptible of a perfectly innocent use. There is no proof that the defendants have ever used it in an infringing combination, There is, indeed, no direct proof that it was ever so used by any one. Certainly there is nothing to indicate that the defendants have sold an "automatic drop" knowing that it was intended to be used to infringe the patent. For aught that appears, every instrument sold by them may have been used in a perfectly legitimate manner.

If the defendants were doing what the complainants charge,

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

namely, "making and putting on the market an article which, of necessity, to their knowledge, is to be used for the purpose of infringing the complainants' patent," there would be little difficulty in holding that the complainants' rights are invaded. But it is thought that the evidence will not warrant so broad an accusation. If held liable for selling an "automatic drop," it might with plausibility be urged that they are equally inculpated by the sale of a galvanic battery or an electric bell, for these are necessary adjuncts to the patented combination.

The complainants invoke the doctrine of contributory infringement, the clearest illustration of which is, perhaps, found in Wallace v. Holmes, 9 Blatchf. 65. In that case the complainants had a patent for a burner in combination with a chimney. The defendants manufactured and sold the burner, leaving the purchaser to supply the chimney, without which the burner was useless. The burner could not be used without infringing the patent. All this the defendants knew. It was because of this use and this knowledge that they were held liable. See, also, Richardson v. Noyes, 10 O. G. 501; Bowker v. Dows, 3 Ban. & A. 518; Alabastine Co. v. Payne, 27 Fed. Rep. 559; Travers v. Beyer, 26 Fed. Rep. 450; Cotton-tie Co. v. Simmons, 106 U. S. 89; S. C. 1 Sup. Ct. Rep. 52.

In each of these cases the complainant succeeded because the article dealt in by the defendant was only useful when combined as provided by the patent in question, and was sold by him intending that it should be put to this unlawful use. A careful examination has failed to discover an authority holding a party liable as an infringer solely because an article sold by him might be used by the purchaser as one element of a patented combination. Such a doctrine would be too dangerous to be upheld. The case most nearly approximating the one in hand is Saxe v. Hammond, 1 Holmes, 456. Judge Shepley there says:

"As defendants only make one element of the patented invention, in order to hold them guilty I must find proof connecting them with the infringement. Different parties may all infringe by respectively making or selling, each of them, one of the elements of a patented combination, provided those separate elements are made for the purpose, and with the intent, of being combined by the party having no right to combine them. But the mere manufacture of a separate element of a patented combination, unless such manufacture be proved to have been conducted for the purpose and with the intent of aiding infringement, is not in and of itself infringement."

The record upon this branch of the case is too vague and uncertain to uphold the charge of infringement. Where a necessary link is absent in the chain of evidence, it cannot be supplied by mere suspicion.

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The bill is dismissed.

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NEWMAN v. WESTCOTT and another.

(Circuit Court, N. D. Iowa, W. D. October Term, 1886.)

1. EQUITY—REMEDY AT LAW—LEGAL TITLE—ACTUAL POSSESSION—EJECTMENT. Where a person holding the legal title to realty desires to assert that title, and to dispossess another party, the latter being in actual possession, there exists an adequate legal remedy for the wrong, and the action must be at law.

2. Same—Real Estate—Annual Value—Taxes on—Accounting.
Where a person has been dispossessed of land, the question of the amount of its annual value, and of the amount of taxes paid on it, can be settled in an action at law, and no necessity exists for going into a court of equity for an accounting of the same.

3. SAME-DEMURRER-LEGAL TITLE-EJECTMENT-DISMISSAL.

Where a bill is brought to decide conflicting titles, and to remove clouds from the legal title claimed by complainant, and it appears from the bill that complainant holds the legal title, and is seeking to obtain possession of the realty, the proceeding, in substance, is in the nature of ejectment, and the court, as a court of equity, having no jurisdiction thereof, will sustain a demurrer filed by the defendant, and dismiss the bill.

In Equity. Bill to recover certain real estate, and to have declared void certain tax deeds, etc. Dismissed on demurrer filed by defendants. The facts are stated in the opinion.

Rickel & Bull, for complainant.

Gatch. Connor & Weaver, for defendants.

Shiras, J. In the bill filed herein complainant avers that he is the owner, and seized of the fee-simple title of certain real estate situated in Sioux county, Iowa, and is entitled to the possession thereof: that the defendants claim some interest therein adverse to complainant, basing such claim upon certain tax deeds executed in 1872; that the defendant Westcott is in the actual possession of the property; that the tax deeds under which defendants claim are wholly void for various reasons set forth in the bill; that the defendant Westcott has received the rents and profits of the land for the last three years, the same being of the value of \$450; that complainant is ready and willing to pay all legal taxes that may have been paid upon said premises by the defendants or their grantors, upon their paying and accounting to him for the rents and profits; and complainant prays that the title to the realty, and the right to possession thereof, be decreed to complainant; that the clouds created by the tax deeds be removed; that an accounting be had between complainant and defendants of the taxes paid, and rents and profits received, and judgment be rendered for the balance thereof. To this bill the defendant Lindsey answers, averring that he has now no interest in said realty, having sold and conveyed said premises by warranty deed to his co-defendant on the thirteenth day of June, 1884. The defendant Westcott demurs to the bill on the ground that the facts

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averred in the bill do not constitute a cause cognizable in a court of equity, there being a plain, speedy, and adequate remedy at law.

In the case of Whitehead v. Entwhistle, 27 Fed. Rep. 778, this court had occasion to review the authorities upon this subject, and it is not necessary to do more than to refer to that case, and the authorities therein cited, upon the general questions presented by the demurrer.

It is too well settled to need argument, or a citation of authorities, that, in the courts of the United States, a bill in equity cannot be maintained if there exists a plain, speedy, and adequate remedy at law applicable to the facts of the particular case, and that where a person holding the legal title to realty desires to assert that title, and to dispossess another party, the latter being in actual possession, the action must be at law.

It it urged, however, on behalf of complainant, that in this cause a court of equity has jurisdiction, because an accounting of the rents and profits, and of the taxes paid, is prayed. In the action at law damages are recoverable, and the measure would ordinarily be the annual value of the land. There is nothing in the averments of the bill which shows that the legal right to recover damages is not a wholly adequate remedy. The question of the amount of the annual value of the land, and the amount of taxes paid by the defendants, can be easily settled in the action at law; and that, being so, no necessity exists for going into a court of equity for an accounting.

It is further urged that this suit is in the nature of a bill to redeem the land from whatever legal taxes may exist against it; being brought under provisions of section 893 of the Code of Iowa, which enacts that "Any person entitled to redeem lands sold for taxes after delivery of the deed shall redeem the same by an equitable action in a court of record," etc. This section is part of the chapter of the Code providing for the collection of taxes, and provides a method of redeeming lands sold for taxes, after the execution of the tax deed, by any parties who, under such circumstances, may be entitled to redeem. An examination of the bill filed in this cause shows that it is not based upon this section. It is a bill to quiet title, and it avers, not that by reason of some fact stated the complainant is entitled to redeem the lands from the tax sales, but that the pretended tax deeds are wholly void for fraud; that the taxes were never levied; and that, when it is claimed the same were levied, the county was unorganized and uninhabited. The prayer is,—not to be allowed to redeem. but that the clouds caused by the alleged fraudulent tax deeds be wholly removed, and that complainant be decreed to be the owner and entitled to the possession of the land. The mere fact that in such a bill the complainant offers to pay any and all taxes legally assessed upon the lands does not change the character of the bill, and make the proceeding merely a proceeding to redeem. It remains a bill brought to decide adverse titles, and to remove clouds from the legal title claimed by complainant; and as it appears from the bill that complainant holds the legal title, and is seeking to obtain possession of the realty, relying solely upon such legal title, it follows that, in substance, the proceeding is in the nature of ejectment; and, the law affording a speedy and adequate remedy, the court, as a court of equity, has not jurisdiction.

Demurrer must therefore be sustained.

Wiggins, (otherwise known as "Blind Tom,") by His Next Friend, etc., v. Bethune.

(Circuit Court, E. D. Virginia. October 2, 1886.)

1. COURTS—FEDERAL JURISDICTION—CITIZENSHIP—SUIT BY NEXT FRIEND.

In a suit brought by the next friend of one who is non compos mentis, federal jurisdiction cannot be based on the citizenship of the next friend, as he is only a nominal party. Hughes, J., dissenting, in case the next friend is the real plaintiff.

2. SAME—RESIDENCE OF LUNATIC—COMMITTEE.

If a committee of one non compos changes his residence from the state where he was appointed, and where the non compos also resided, to another state, and takes the latter with him, the latter becomes a resident of the state to which they remove, and retains such residence after the committee's death, notwithstanding he is afterwards taken away to his original state, and elsewhere, and another committee is appointed for him in such original state; and in a suit in the latter state, brought by him against said last-mentioned committee, a citizen of that state, the citizenship of the parties is such as to give jurisdiction to a federal court.

In Equity. Bill for an accounting. Plea of want of jurisdiction. Charity Wiggins, who sues as next friend of Thomas Wiggins, ("Blind Tom,") is a citizen of New York; James N. Bethune, the defendant, of Virginia.

A. J. Lerche and L. R. Page, for complainant.

S. Ferguson Beach, for defendant.

Bond, J. This is a bill filed by the complainant for an account, to which a plea of want of jurisdiction has been interposed. The facts, as they appear from the affidavits filed by the parties, and as they have been stated at bar by the respective counsel, are these: John G. Bethune, who at the time was a citizen of Virginia, having Blind Tom in his keeping, was, on the twenty-fifth day of July, 1870, by a probate court of this state, appointed Tom's committee, he being found non compos mentis. As such committee, Bethune took Tom from place to place, through the various states of the Union, giving musical entertainments, so that he was seldom in Virginia. Finally John G. Bethune changed his place of residence from Viginia to the city of New York, taking Blind Tom with him, and became a

resident of that state, where he died on the ——— day of February, Blind Tom was continued on his travels under care of a brother of John G. Bethune, his former committee. While Blind Tom was thus journeying in the state of North Carolina, James N. Bethune had himself appointed by a county court in Virginia as Tom's committee. Charity Wiggins, who sues as next friend, is the mother of Blind Tom, and is a citizen of New York. This being the fact, she could not sue, (being a merely nominal party,) unless her son is a citizen of New York also. He is the real party in interest, and the jurisdiction of the court depends upon the fact whether or not Blind Tom, at the last appointment of a committee for him, was still a resident of New York, where he had been a resident with John G. Bethune, his committee, up to and at the time of his death. There can be no doubt, we think, that the residence of his committee was the residence of Tom. He, non compos, had no ability to change it, and the fact that he was borne away by one who had no legal control over him to another state, away from his mother in New York, who was his natural guardian, cannot be held to change his residence. The fact that he was temporarily in Virginia, under the control of one who merely had physical domination of him, did not make him a resident of that state, and the appointment of a committee for him there, while he was absent in North Carolina, added nothing to the effort to change his domicile. The bill is framed under the view that both Charity Wiggins and her son, Tom, are citizens of New York, while the defendant is a citizen of Virginia, and we think the jurisdictional facts sufficiently appear. plea is therefore overruled.

Hughes, J. I concur on the ground that the controversy in this case is really between the mother of Blind Tom, a resident of New York, suing as next friend, and a resident of Virginia, claiming to be Tom's committee. Blind Tom, though nominally a party, is really the subject of the controversy, and is not party to the suit in such manner as, even if he were a citizen of Virginia, should defeat the jurisdiction of the court, where the substantial controversy is between citizens of different states. In many cases the prochein ami is merely a nominal party plaintiff; but in others, of which the present is an example, the real plaintiff is the prochein ami. Where this is the case, to treat the incompetent party to the record as the real plaintiff would be to allow a technicality to obstruct the course of justice. Technicalities were devised for the promotion of justice between suitors. So long as they serve that end, they should be respected; but when they operate to defeat justice, they should be discouraged by the courts.

For these reasons, whatever may be true on the doubtful point, where was Blind Tom's residence? I am of opinion that this court has jurisdiction to entertain this suit.

PHELPS, Assignee, v. Elliott and others.

(Circuit Court, S. D. New York. November 15, 1886.)

 EQUITY — JURISDICTION — EQUITABLE OWNER OF BONDS — SUIT TO RECOVER BONDS.

A suit by an equitable owner of bonds to recover the bonds, or their value,

is properly brought in equity.

2. Same—Pleading—Joinder of Parties—Personal Representatives of De-

CEASED PARTNER.

In a suit in equity by the equitable owner of bonds to recover them, or their proceeds, from the surviving members of a copartnership, all the members of which acquired the bonds with knowledge of his rights, it is not necessary to join the personal representatives of a deceased partner as parties defendant, although they would be proper parties, at the option of the defendants.

8. ACTION OR SUIT-JOINDER OF PARTIES-REPRESENTATIVES OF DECEASED

RECEIVER-SUIT IN EQUITY AGAINST SURVIVING MEMBERS.

A receiver, who had been appointed in a suit between the equitable owner of the bonds and a third person to hold them pending the determination of the suit, surrendered them to the other party before the termination of the suit, who sold them to the defendants. *Held*, that in a suit to recover their value the receiver, or, in case of his death, his personal representatives, need not be made a party.

4. BANKRUPTCY — LIMITATIONS — ACTION BY ASSIGNEE — BONDS SOLD BY BANK-

RUPT-REV. ST. U. S. SECTION 5057,

In a suit in equity by an assignee in bankruptcy to recover certain bonds vested in him by parties to whom they had been sold by the bankrupt, an averment in the bill that the assignee "had no knowledge, or means of knowledge, of the sale of said bonds until about the month of April, 1884," is insufficient to prevent the bar of the statute of limitations, requiring such suits to be brought within two years from the time the cause of action accrued. Section 5057, Rev. St. U. S.

Deuel & Wilson, for plaintiff. Stanley, Clarke & Smith, for defendants.

Wallace, J. Upon the allegations of the bill, for the purposes of this demurrer, it must be taken as true that the plaintiff, as the assignee in bankruptcy of one McDonald, was the equitable owner of the award made to McDonald, and assigned by the latter to White, and that this was so adjudged by the supreme court of the United States in a suit brought by the plaintiff against McDonald and White in the supreme court of the District of Columbia upon an appeal from a decree in that suit to the supreme court of the United States. As the supreme court of the United States must have determined that, by the proper construction of the statutes regulating its appellate jurisdiction, it had power to make such a decree as is alleged in the bill, the question as to the power of the court, or the scope or effect of the decree, is not open to discussion in this court.

The bill also alleges that one Riggs, during the pendency of that suit, was appointed a receiver by the supreme court of the District of Columbia, and had in his possession, as such receiver, certain bonds representing part of the avails of the award which he undertook to hold pending the determination of the suit "subject to plaintiff's claim

and right;" that, nevertheless, the bonds were obtained from him by McDonald before the termination of the suit, and were sold and delivered by McDonald, in fraud of the plaintiff's rights, to the copartnership of Riggs & Co.; and that Riggs & Co. had full knowledge of plaintiff's rights at the time. It is also alleged that Riggs, the receiver, was a member of the firm of Riggs & Co., and that he died in September, 1881. The defendants are the surviving members of Riggs & Co.

The case thus made by the bill is one in which the equitable owner of bonds seeks to recover them, or their proceeds, from the surviving members of a copartnership, all the members of which acquired them with knowledge of his rights. As he seeks to enforce an equitable title, his suit is properly brought in equity. His title is established by the decree of the supreme court. It is not necessary, in such a suit, to join the personal representatives of a deceased partner as parties defendant, although they would be proper parties at the option of the complainant. Neither is it necessary to join the personal representatives of Riggs, upon the theory that if he were alive he would be a necessary party to the suit. If he were alive, it is not obvious how he could have any interest in the controversy, or why his presence as a party would be necessary for the protection of the defendants. So far as appears, he did not claim any interest in the bonds, but was a mere stakeholder; and the decree in the suit, in which he was appointed receiver, and to which both McDonald and White as well as the plaintiff were parties, is conclusive as to the rights and interests in the bonds of all concerned, and will protect the defendants against any claim by either of them or their privies. These views dispose of most of the points urged upon the demurrer.

It is insisted, however, that the plaintiff's cause of action is barred by the statute of limitations. It does not appear that the defendants, or any of them, were within this state when the cause of action accrued; and it is therefore not necessary to consider whether the state statute of limitations would apply to the case. But, unless the transaction between McDonald and the defendants, out of which the plaintiff's cause of action against the defendants arises, was a secret or clandestine one, which was designed by the parties to it to be concealed from his knowledge, the suit is barred by section 5057, Rev. St. U. S. Bailey v. Glover, 21 Wall. 342; Rosenthal v. Walker, 111 U. S. 185; S. C. 4 Sup. Ct. Rep. 382. Being a suit in equity between an assignee in bankruptcy and persons claiming an adverse interest touching property vested in such assignee, the suit is not maintainable in any court, unless brought within two years from the time when the cause of action accrued. The cause of action accrued in June, 1875, that being the time when the defendants obtained the bonds with knowledge of the plaintiff's rights. There are no allegations in the bill inconsistent with the hypothesis that the defendants and McDonald intended to and did deal with the bonds openly, publicly, and in defiance of any right or claim of the plaintiff. There is nothing to show that the transaction was one which would necessarily conceal itself. The only averment in the bill intended to excuse the delay in bringing suit by the plaintiff is that he "had no knowledge, or means of knowing, of the sale of said bonds to Riggs & Co. until about the month of April, 1884." This averment is wholly insufficient to prevent the bar of the statute from commencing to run.

The demurrer is sustained. Leave is granted to the plaintiff to move for permission to amend the bill.

Hood and others v. First Nat. Bank of Tremont and others.1

(Circuit Court, E. D. Pennsylvania. November 18, 1886.)

RECEIVER-APPOINTMENT-LACHES.

An application for the appointment of a receiver, which has been allowed to sleep for six years, will be denied, although some testimony has been taken in the mean time.

In Equity.

George M. Roads, for complainants.

G. E. Farquhar, for respondents.

BUTLER, J. The material allegations of the bill are as follows:

"(7) That early in 1879 the said board of directors directed Wm. A. Huber, president, and Aug. W. Huber, vice-president, as aforementioned, to act in settling up the business of the said bank, and to sell the property, real and personal of the said bank, as president and vice-president, and also as trustees of said bank.

"(8) That said Wm. A. Huber, president, and Aug. W. Huber, vice-president, as aforesaid, as trustees for the First National Bank of Tremont, sold, on October 13, 1880. at public sale, certain interests and titles to 33 tracts or pieces of land, together with furniture, policies of insurance, and other personal property belonging to the said bank, without having entered into bonds, or given security of any kind, for the faithful discharge of their trusts, and for the protection of the minority stockholders.

"(9) That at said sale no information was given to inquiring bidders as to the titles of or incumbrances against said properties; one of the said properties (as per No. 15 appended sale-bill) being advertised and sold without any description, excepting that said property was a house and lot, 14x150 ft., on

Clay St., Tremont.

"(10) That No. 1 of said properties was sold at sheriff's sale at Pottsville, Pa., on February 13, 1880, and purchased by Wm. A. Huber, trustee, for \$5.400.

"(11) That the said property [No. 1] was sold at the aforementioned trustees' sale, held on October 13, 1880, to one Geo. D. Rise, a step-son of the said Wm. A. Huber, for \$500.

Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

"(12) That the said Wm. A. Huber, trustee, has admitted that the said Rise purchased said [No. 1] property for the personal use and benefit of said

Wm. A. and Aug. W. Huber.

"(13) That the said property [purchased, as aforesaid, for \$500 by the said Rise, for and to the use of the said Wm. A. and Aug. W. Huber] is the security for \$11,000 worth of bonds held by the said bank; said [No. 1] property virtually costing the said bank \$17,300.

(14) That the said Wm. A. Huber personally, and contrary to law, purchased, at the said trustees' sale, a large bank-safe, which formed a part of

the assets of the said bank.

"(15) That the majority of the sales at said trustees' sale were made to the said Geo. D. Rise, who made said purchases for the said W. A. and Aug. W.

Huber, for their own use and benefit.

"(16) That because of the meager description of the majority of the properties offered for sale by the said trustees, (as per amended sale-bill,) purchasers were greatly hindered from bidding; no other information concerning said properties being given than could be gleaned from the said bill of sale.

"(17) That your orators have good reason to believe that the said bank has been managed in a grossly negligent and fraudulent manner, and the valuable assets of said bank are being bought up by said trustees at their own sale, at nominal sums, to the great injury and loss of the creditors and stockholders of the said bank. Your orators are therefore in need of equitable relief.

"To the end, therefore, that your orators may obtain the equitable relief necessary to them, and that the said defendants may make answer to the premises, and make full disclosures pertinent to the plaintiff's case, may it please your honors to grant to your orators the writ of subpæna, to be directed to each of the said defendants. And also (1) to set aside the within-mentioned sale by the said trustees; (2) that a receiver be appointed of all the franchises and property, real and personal, wheresoever situated, belonging to the First National Bank of Tremont, with power to sue for and collect all sums and claims due to the said the First National Bank of Tremont, and to liquidate all claims and debts against the said bank."

The prayers were for the appointment of receivers, for an order forbidding the trustees parting with the property, and for other relief. Subsequently the property involved was sold by agreement of the parties, and this branch of the case has been disposed of. material remains but the application for receivers, based upon the allegation of mismanagement of the affairs of the bank. This application has been allowed to sleep for more than six years. Considerable testimony has been taken, but this should not have required more than a few months. Passing by the question whether the charge of mismanagement is sufficiently specific, we think the delay in pressing the motion for receivers should, of itself, require a denial of the application. Furthermore, an examination of the testimony taken has failed to satisfy us that the motion should be granted, had this delay not occurred. The mismanagement, charged in general terms against the respondents, is not made out with the clearness necessary to justify interference. The application for receivers is therefore denied.

EWELL, Adm'x, v. CHICAGO & N. W. Ry. Co.

(Circuit Court, S. D. Iowa, W. D. September Term, 1886.)

1. STATUTE OF LIMITATIONS—NEGLIGENCE—ACTION FOR DAMAGES FOR CAUSING

DEATH.—CODE lowa, § 2527.

Section 2527 of the Iowa Code, giving a right of action for a wrongful injury causing death, and declaring that "such action shall be deemed a continuing one, and to have accrued to such representative or successor at the same time as it did to the deceased if he had survived," gives one and not two rights of action,—one to the deceased and the other to his estate,—but one which accrues at the same time as it would have accrued had deceased survived.

2. Same—Exceptions—Commencement of Action.—Code Iowa, § 2592.

Under section 2532 of the Iowa Code, providing that "placing the notice in the hands of the sheriff for immediate service * * * shall, so far as the statute of limitations is concerned, be deemed the commencement of the action," the delivery of the notice to the sheriff, and not the filing of the petition, is the commencement of the action.

At Law. Action for damages for negligently causing the death of plaintiff's intestate. Demurrer to answer.

Mr. Warren and Jacob Sims, for plaintiff.

John N. Baldwin and N. M. Hubbard, for defendant.

Shiras, J. In this action, plaintiff, as the administratrix of the estate of Charles A. Ewell, seeks to recover damages against the defendant company on the ground that Ewell's death was caused by the negligence of the company. From the record it appears that Ewell was injured on the fifteenth day of August, 1883, by a train on defendant's road at Missouri Valley, Iowa; that he lived from one to three hours after receiving the injuries resulting in his death; that plaintiff was appointed administratrix of his estate in the spring of 1885; that the petition in this cause was filed in the district court of Harrison county, Iowa, on the twenty-ninth day of May, 1885; that no original notice was issued or served in the case; and that the defendant company entered its appearance in the action on the twenty-fifth day of August, 1885, at which time the company filed an answer, and also a petition for the removal of the cause to this court.

The demurrer presents the question of the statute of limitations, and in its determination it is necessary to ascertain when the action was commenced, and when the cause of action accrued.

Section 2599 of the Code enacts that actions in a court of record shall be commenced by serving the defendant with a notice signed by the plaintiff or his attorney. Section 2532 provides that the placing the notice in the hands of the sheriff for immediate service or actual service upon defendant, by some third person, shall, so far as the statute of limitations is concerned, be deemed to be the commencement of the action.

In Collins v. Bane, 34 Iowa, 385, it appeared that the petition was filed January 28, 1870, but the notice was not delivered to the sheriff

for service until June 17, 1870. On the nineteenth of April, 1870, an act of the legislature took effect, repealing section 2742 of the Revision, which was part of the statute of limitations, but providing that the repeal should not affect the rights of parties in actions pending at the time of the passage of the act. The supreme court of Iowa held that the repeal did affect the parties in that suit, because it was not the filing of the petition, but the delivery of the notice for service to the sheriff, that was the commencement of the action.

In the case at bar, therefore, the filing of the petition was not the commencement of the suit, and the period of limitation continued to run until the notice was issued for service, or the defendant, by a voluntary appearance to the action, obviated the necessity of service of the notice. It is admitted that no notice was ever issued or served, but that the defendant entered an appearance on the twenty-fifth day of August, 1885, and this, therefore, must be taken to be the date when the statute ceased to run.

By the provisions of section 2529 of the Code of Iowa, actions of this character are barred within two years "after their causes accrue." Hence the present action cannot be maintained, unless the cause

thereof accrued within two years prior to August 25, 1885.

On behalf of plaintiff it is argued that under the facts of this case. and the provisions of section 2526 of the Code, two causes of action against the defendant have accrued,—one in favor of the party injured, and one in favor of his estate. As it is admitted that Ewell was not instantly killed, but lived from one to three hours after receiving the injuries causing his death, it is clear that before his death a cause of action had vested in him, and, under section 2525 of the Code, the same passed to his administratrix upon his death. Kellow v. Central Iowa Ry. Co., 23 N. W. Rep. 740; S. C. 27 N. W. Rep. 466; Muldowney v. Central Ry. Co., 36 Iowa, 468. Whether the subsequent death of the party injured constituted, under the statute, a new cause of action in favor of the estate of the deceased, and for which an independent action might be brought, was discussed by the supreme court of Iowa in Sherman v. Western Stage Co., 24 Iowa, 515, but was not authoritatively decided. If it be held that, under such circumstances, a new or additional right of action is not created or conferred by the statute, then, in the case at bar, the right of action having accrued to the deceased during his life-time. the period of limitation began to run at the date of the wrongful act which caused the injury to the deceased, to-wit, August 15, 1883. Having commenced to run during the life-time of the party, no subsequent disability will suspend it unless the statute expressly so provides. Sherman v. Western Stage Co., 24 Iowa, 515; Hogan v. Kaertz, 94 U. S. 773; Harris v. McGovern, 99 U. S. 161; McDonald v. Hovey, 110 U. S. 619; S. C. 4 Sup. Ct. Rep. 142. None of the exceptions in the statute of Iowa are applicable to the case; and it follows that the limitation of two years, having commenced to run on

the fifteenth of August, 1883, became complete on the corresponding date in 1885, and would bar this action, as the same was not brought until the twenty-fifth of August, 1885.

If, however, the statute is to be construed to create, in favor of the estate, a cause of action other and distinct from that accruing to the person injured, then the question to be determined is, when does the statute begin to run as against such an action? The usual rule is that the statute begins to run when the right of action accrues; and, unless otherwise provided in the statute, the right of action is not deemed to have accrued until there is a person authorized to prosecute the same. Wood, Lim. 8; Sherman v. Western Stage Co., 24 Iowa, 515. If the statute remained unchanged, the ruling of the court in Sherman v. Stage Co. would be conclusive on the question, as it was therein held that if the cause of action accrued to the estate, and not to the deceased during her life-time, then the statute did not begin to run until an administrator had been appointed. That cause was decided under the provisions of the Revision, and the question is whether the Code of 1873 has changed the statute in this particular.

Section 2525 of the Code declares that all causes of action survive, and section 2526, that the right of civil remedy is not merged in a public offense, and that, when a wrongful act produces death, the damages shall be disposed of as personal property; and the first sentence of section 2527, that "the actions contemplated in the two preceding sections may be brought, or the court on motion may allow the action to be continued, by or against the legal representatives or successors in the interest of the deceased." So far, these sections substantially re-enact the provisions of sections 3467, 4110, and 4111 Then follows, as part of section 2527, the following: of the Revision. "Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the same time it did to the deceased if he had survived." No such provision existed in the Revision of 1860. Its enactment as part of the Code of 1873 is evidence of an intent, on part of the legislature, to either change the law, or render certain that which was left in doubt under the wording of the statute previously in force.

The discussion in Sherman v. Western Stage Co. showed that the judges then composing the supreme court of the state were not agreed in the interpretation of the statute in this particular, although they had agreed in holding that in case of instantaneous death the statute as then in force did not begin to run until an administrator was appointed. One of the points in dispute, and upon which no agreement was reached, was, in case the death resulting from the wrongful act was not instantaneous, whether two causes of action would arise,—one in favor of the party injured, and vesting during his life-time, and one in favor of his estate. As the law was left by that decision, it followed that if a wrongful act produced instant death the statute did not begin to run until an administrator was appointed, which

might be done at any time within five years, thus allowing an action to be maintained if brought within seven years after the death occurred.

In this condition of the law the legislature enacts the clause above cited. The declaration is that such action shall be deemed a continuing one, and to have accrued to the representative at the same time it did to the deceased if he had survived.

In argument, counsel for plaintiff urge that the use of the words "such action shall be deemed a continuing one" shows that the clause applies only to actions brought during the life-time of the deceased. Such a construction would deprive the amendatory clause of all significance. Under other sections of the Revision and of the Code, actions pending would not be ended by the death of a party, but could be continued by the proper representative, and would be deemed to be continuing actions. The provision in question must be held applicable to all actions contemplated in section 2526, and, as applied to cases of the character of the present one, the several clauses of sections 2526 and 2527 read as follows: "When a wrongful act produces death, the damages shall be disposed of as personal property belonging to the estate of deceased; and an action to recover the same may be brought by the legal representative of the deceased, and such action shall be deemed a continuing one, and to have accrued to such representative at the same time it did to the deceased if he survived."

There is no doubt that, if the party injured had survived, the cause of action would have been deemed to have accrued to him at the date of the wrongful act which forms the basis of the action against the wrong-doer. Under this construction of the statute as amended, it follows that the cause of action sued on must be deemed to have accrued on the fifteenth day of August, 1883; and, as two years had elapsed after that date before this action was brought, the limitation defeats the recovery.

In re GRAVES.

(District Court, N. D. Iowa, E. D. November 16, 1886.)

COURTS—UNITED STATES DISTRICT COURT—JURISDICTION—ARREST OF SUITOR IN ONE STATE TO ANSWER CONTEMPT OF FEDERAL COURT IN ANOTHER—REV St. U. S. § 1014.

The judges of the district courts of the United States have no power or authority, under section 1014, Rev. St. U. S., or under any other law or statute, to cause the arrest of a citizen of the state and district in which the judge resides, and to order his removal to another state, in order that he may be there imprisoned until he obeys an order made in a civil case pending in the United States court in that state.

Application for Order authorizing arrest, and removal into Northern district of Illinois.

Wm. J. Manning and W. J. Knight, for the application.

Henderson, Hurd & Daniels, contra.

Shiras, J. The question presented for determination arises upon the following facts:

On the thirtieth day of March, 1882, a limited partnership was organized under the laws of the state of Illinois, in which William A. Boies, B. B. Fay, and L. W. Conkey, residents of Chicago, were general partners, and J. K. Graves, a resident of Dubuque, Iowa, was special partner. The firm becoming insolvent, judgments were confessed in January, 1883, in favor of various parties, aggregating, in all, some \$200,000; the same being entered in the federal and state courts of Illinois, and executions thereon were issued and levied on the property of the firm, and, upon the sale thereof, the proceeds were paid to the plaintiffs in execution.

On the fifteenth day of March, 1883, one Chester C. Corbin, a creditor of the firm, filed a bill in equity in the nature of a creditors' bill, in the United States circuit court for the Northern district of Illinois, to which the members of the firm, and the several parties in whose favor judgments had been entered by confession, were made parties defendant. To this bill the special partner, Graves, entered his appearance, and filed an answer; and upon the hearing the court found and adjudged that the entering the confessions of judgment in favor of Graves and others was a fraud upon the creditors; and that two certain creditors' bills, filed by the Commercial National Bank of Dubuque and Bay State Sugar Refining Company, were filed in fraud of the rights of creditors; and that, by means of such proceedings, the said Graves had obtained control over, and had disposed of, for his own use and benefit, the sum of \$100,796.71, which in fact was a trust sum in his hands, and which should have been paid to the creditors of said firm,—the said amount being reached by adding together the sums paid to said Graves, to the Commercial Bank, the Dubuque County Bank, and the Importers' & Traders' National Bank: and thereupon it was ordered that said Graves pay to the clerk of said United States circuit court, in 30 days, the said amount above named. to be applied in payment of the amounts due creditors, under the further decree of the court. The sum so ordered to be paid not being paid to the clerk, on the twenty-ninth of December, 1885, an execution, in due form, was issued to the marshal of said Northern district of Illinois, against the property of said Graves, which was returned by the marshal unsatisfied; and on the sixth day of May. 1886, an alias execution was issued to the marshal, who returned thereon that he had served the same by reading same to the said Graves, and demanding the surrender of sufficient property to satisfy said writ, and also the surrender of such property as he had or owned, not exempt from execution, and that said Graves refused to pay said execution, in whole or in part, or to surrender any property whatever.

On the twenty-sixth of October, 1886, an order was entered in the cause requiring the defendant Graves to personally appear before the court on Saturday, October 30, 1886, and show cause why he should not be attached for contempt for failing and refusing to obey the order and decree of the court entered November 17, 1885; being the order for the payment into court of the sum of \$100,796.71. A copy of this order was served upon Graves at his residence, in Dubuque, Iowa, by one W. J. Cantillon, a resident of Iowa, on the twenty-seventh of October, 1886. He did not appear in the court at Chicago, and on the first of November, 1886, the following order was entered in said United States circuit court, at Chicago:

"And it also appearing that said motion to appear and show cause on said last-named day was continued until Monday, November 1, 1886, when said Graves failed to appear in obedience to said order, notwithstanding said order to show cause had been personally served on him, the said Julius K. Graves; and said motion now coming on for hearing, and the court being satisfied that the said Graves has deliberately and willfully violated the decree entered herein on the seventeenth day of November, 1885, by failing and refusing to pay to the clerk of this court the sum therein ordered to be paid by him, or any part thereof,—it is therefore ordered, adjudged, and decreed that the said Julius K. Graves is guilty of contempt of the authority of this court by said willful failure and refusal as aforesaid, and that an attachment do now issue, in due form, for the arrest forthwith of the said Julius K. Graves, directed to the marshal for the Northern district of Illinois; and that, when arrested by said marshal, he be committed to the county jail of Cook county, in the state of Illinois, and that he be there held in custody until he comply with the orders of this court, or until he is discharged by due process of law."

On the third day of November, 1886, a writ, in the following form, was issued by the clerk of said United States circuit court:

"To the Marshal of the Northern District of Illinois—GREETING: We command you to attach Julius K. Graves forthwith, if he shall be found in your district, for his contempt of the authority of said court; and, when arrested by you, said marshal, that you commit him, said Graves, to the county jail of Cook county, in the state and Northern district of Illinois; and that the said Graves be held in said county jail of Cook county until he comply with the orders of said court in that behalf, or until he, said Graves, be discharged by due process of law, and have you then and there this writ. Witness," etc.

A copy of the record in the cause of *Corbin v. Graves et al.*, containing the various orders above recited, with the original writ issued to the marshal of Illinois, is submitted, and an order is asked, directing the marshal of the Northern district of Iowa to arrest the said Graves, and deliver him to the marshal of the Northern district of Illinois.

In support of the application it is urged that section 725 of the Revised Statutes enacts that "the said courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: provided, that such power to punish contempts shall not be construed to extend to any cases except, * * and the disobedience or resistance by any such officer, or by any party, juror, wit-

ness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts;" and that under this section a proceeding in contempt is criminal in its nature, and authorizes the arrest and removal of the party proceeded against under the provisions of section 1014 of the Revised Statutes.

It is settled that proceedings for contempt may be of a twofold nature: (1) For the purpose of punishing the guilty party for his disrespect to the court or its order; and (2) as a means of compelling obedience to some lawful order, requiring the party to perform some act or duty required of him, and which he refuses to perform. Chiles, 22 Wall. 157. In other words, there are civil contempts, which usually consist in failing to do something which the party is ordered to do by the court for the benefit or advantage of another party interested in the litigation pending in the court: and criminal contempts, which embrace all acts disrespectful to the court, or which obstruct the orderly administration of justice, including disobedience or resistance to the process of the court, interference with property in custody of the court, misconduct of officers of the court, and the like. palje, Contempts, 25; Phillips v. Welch, 11 Nev. 187. In the latter case it was ruled "that, if the contempt consist in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed until he complies with the order. The order, in such case, is not punitive, but executive. If, on the other hand, the contempt consists in a threatened act, injurious to the other party, the process is criminal, and conviction is followed by a penalty of fine or imprisonment, or both, which is purely punitive."

Under the former practice in courts of equity, a decree which operated only in personam could be enforced only by means of a process in contempt. Daniell, Ch. Pr. 1032. When issued for that purpose, it was a civil remedy, used solely for the benefit of the party in whose favor the decree had been made. It may well be that, in a given case, a party may subject himself to be proceeded against both civilly and criminally. Thus, if a defendant, having in his possession a specific sum of money, or other property, is ordered to pay or deliver the same into the court for the benefit of the prevailing party, within a fixed time, and he willfully refuses to obey the order, it being within his power so to do, then the civil process of contempt may be resorted to as a means of compelling obedience to the decree; and in such case, as is said by the supreme court in Re Chiles, supra, "the party refusing to obey should be fined and imprisoned until he performs the act required of him, or shows that it is not in his power to do it." No fixed term of imprisonment is in such case pronounced, because the object is to secure obedience to the order or decree; and by yielding obedience, or by showing that it is not in his power to perform the requirements of the order, the party proceeded against will be entitled to be released. So, also, in the supposed case, the disobedience being willful, the offender may be proceeded against criminally; in which case he is charged with the offense, and, being put upon trial, he may be convicted, and be punished by fine or imprisonment, or both. In the latter case, the punishment is for an offense against the government.

In such case, however, the punishment inflicted must be fixed and be made certain when the sentence is pronounced. It certainly cannot be true that, as a punishment for a criminal offense against the government, even if the offense be in the nature of contempt, that the court could sentence the convicted party to imprisonment during the pleasure of the court. The punishment to be inflicted is said to be at the discretion of the court, but this discretion must be exercised when the sentence is imposed, and is exercised by determining the amount of the fine, or the duration of the imprisonment. It therefore becomes necessary to determine, in the first instance, what the nature of the proceeding for contempt, instituted in the present case, is,—whether it be civil or criminal in its object and purpose.

An examination of the record and papers submitted in support of the present application clearly shows that the United States circuit court for the Northern district of Illinois, in ordering the arrest and imprisonment of the defendant Graves, was and is seeking to enforce obedience on his part to the order found in the decree entered November 17, 1885, directing and commanding him to pay into court the sum named in the decree. In the order directing the arrest it is recited that the contempt consists in the willful failure to pay to the clerk the sum named, and the order is that the party be arrested, and be confined in jail until he complies with the orders made. the orders made and proceedings had, so far as the same have been made to appear at the present hearing, were made and had in the equity cause of Chester C. Corbin v. Boies et al., and are proceedings and orders, civil in their nature, intended to secure and enforce obedience, on part of the defendant Graves, to the decree made in that cause for the benefit of the complainant and other creditors of the limited partnership.

Upon the hearing, counsel for Mr. Graves cited authorities in support of the proposition that, under the rules now governing the practice in equity, and especially under the eighth general rule in equity, the circuit court in Illinois could not rightfully use the process of contempt and imprisonment as a means of enforcing payment of money; the claim being that, although such process could be formerly used by courts of equity for that purpose, the right no longer existed. This question is not before me for decision. The circuit court in Illinois, having jurisdiction of the case and the parties thereto, has held and decided that it has the right to enforce obedience to its decree for the payment of the money by attaching the person of the party, and imprisoning him until he yields obedience, or shows legal excuse for failing so to do, and it certainly is not for me to hear or pass upon

the question whether this ruling so made is or is not correct. The question submitted to me is one not decided by the court in Illinois, and which did not, and could not, arise until this application was made in Iowa; and that is, whether there is vested in the district judges of the United States any power, right, or authority to cause the arrest of a citizen of the state and district in which the judge resides, and his removal to another state, in order that he may be there imprisoned until he obeys an order made in a civil case pending in the United States court in that state.

It is hardly necessary to say that to cause the arrest of a citizen of Iowa in Iowa, and his removal into another state and jurisdiction, is the exercise of a very high and unusual power, and, to justify its exercise, the existence and the source of the power must be clearly It cannot be left to a mere inference, nor be based upon the argument that its exercise may be highly convenient, and that, if not possessed and exercised, the courts in a sister state or district may not be able to do justice in a case therein pending. No matter how weighty may be the reasons in favor of the enactment of a statute authorizing the arrest and removal of a party into another state. they are powerless to confer the right to so order upon any officer or court. The right must be shown to be confined by some positive enactment; and, in the absence thereof, it would be a usurpation of power on part of any judge to make such an order, and, if made, it would be wholly nugatory.

In argument of counsel it is claimed that section 1014 of the Revised Statutes confers the right to make the order asked for in the present instance. That section provides that, "for any crime or offense against the United States, the offender may, by any justice or judge of the United States, * * * of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned, as speedily as may be, into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; and, where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district, where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

This section, by its very terms, is intended to cover cases wherein, a crime or offense having been committed against the United States, the party charged therewith is arrested, and brought before a judge or magistrate for a preliminary examination, for the purpose of holding him in custody or under bail until the trial is had; it being also provided that, if the offender is committed in a district other than

that where the offense is to be tried, it shall be the duty of the judge of the district where such offender is imprisoned to seasonably issue a warrant for his removal to the district wherein the trial is to be had. This section confers authority to order the removal for trial of a person who, by the order of a competent judge or magistrate, has been held to answer to some crime or offense laid to his charge, but it clearly contemplates and requires that the order for removal must be based upon a previous order of commitment.

In practice, it is usual, where a crime has been committed, and an indictment has been found, or proper information before a magistrate has been made, for the officer charged with the duty of making the arrest to apply to the judge of the district wherein the offender is found for an order for his arrest. In making such an order, the judge is acting as an examining magistrate, under the first clause of If the evidence submitted satisfies the judge that the order of arrest should be granted, it is ordered; but it should require the offender, when arrested, to be brought before the judge, and on such hearing the party arrested may be heard to show any legal reason why he should not be further held in custody. If, upon such hearing, sufficient ground for holding the party for trial appears, the judge may, and usually does, at once order his removal for trial into the proper district; but in all such cases the order of removal must be based upon a previous order of imprisonment for trial. been the uniform rule in this district, having been settled by the rulings made by Justice Miller and Judge Love, as appears from their statements to be found in 1 Woolw. 422; and in which Justice MILLER holds "that the act of congress in question was not intended to authorize imprisonment without such preliminary examination by the committing magistrate as should satisfy him that there was enough evidence of the prisoner's guilt to justify a reference of the case to the grand jury of the proper district," and "that no authority exists in any judge to order a removal of Mr. Bailey into the district of Illinois until he shall have had a hearing, or been committed to prison. in Iowa, by some proper officer."

The case of In re Ellerbe, 13 Fed. Rep. 530, which was a proceeding upon habeas corpus before Judge McCrary, does not, when properly read, purport to lay down any different rule. That case holds that the courts of the United States have the power to punish contempts against their authority; that a failure to obey the writ of subpena to appear as a witness, when properly served, is a contempt, and constitutes an offense, criminal in its nature, for which the party may be proceeded against, and be tried and punished by the court whose writ is disobeyed; and that, when a proceeding to punish a party for a contempt is pending in one district of the United States, he may be arrested, under the provisions of section 1014, in any district where he may be found, and an order for removal may be made as therein pointed out; but it clearly appears that Judge

McCrary had in mind cases in which the removal was sought in order that the offender might be put upon trial and be punished for the contempt alleged against him. Thus, he states, on page 532 of the opinion, that "it was, no doubt, the duty of the marshal of the Eastern district of Arkansas to apply to the judge of this district for an order for the arrest of the petitioner, and it was the duty of the district judge to enter into such an investigation as was necessary to enable him to determine whether the petitioner should be sent out of the district to answer the charge against him." As reported in the Federal Reporter, a mistake is made in using the word "his" instead of "this," in the above extract; thus, at first glance, making it appear that Judge McCrary held that the marshal must apply for the order of arrest to the judge of the district wherein the proceeding was pending, instead of the district wherein the offender resided or was The context shows, however, that this must be a misprint, and, on reference to the report of the same case in 4 McCrary, 453, it will be seen that the correct reading is as I have quoted the same. From this extract, and from other statements found in the case, it is made clear, beyond doubt, that in that case it was made to appear that the application was for the arrest of the party, and for his removal for trial to Arkansas. The proceeding, therefore, was criminal in its nature, involving an offense against the government of the United States, whose process had been disobeyed, and the object of the arrest in Missouri was to procure the removal of the offender to This decision does not hold that a party may be Arkansas for trial. arrested under the provisions of section 1014, and be removed from the state wherein he resides, into another district, in order that the courts of that district may be enabled to enforce obedience to a decree or order made in an equity case. All that is held in that cause by Judge McCrary is that a proceeding to punish for contempt is criminal in its nature, and that, when such a proceeding is instituted in one district, the offender may be arrested in another district, under the provisions of section 1014, and be removed for trial into the district where the offense was committed; and the decision does not purport to change the rule laid down by Justice Miller, that no authority exists in any judge to order the removal of a person into another district, until he shall have had a hearing, or been committed to prison in Iowa by some proper officer.

The case of Fanshawe v. Tracy, 4 Biss. 490, also cited in support of this application, in fact recognizes the distinction between civil and criminal contempts. It appeared that affidavits had been filed in the court charging certain parties with a willful violation of a writ of injunction previously issued in the cause. The main point discussed by his honor, Judge Drummond was whether it was the proper practice to enter a rule to show cause why an attachment should not issue, or to issue the attachment in the first instance. After discussing this

question, the judge proceeds to say:

"Perhaps it may be proper for me to make a few remarks upon the general scope and effect of the proceedings for contempt, about which there seems to be some difference of opinion. As I understand it, a party against whom proceedings for contempt are instituted—a party who has conducted himself in such a way as to justify the court in punishing him for contempt, or for the disobedience of its order—has committed an offense against the United States. The court is the mere instrument or organ of the government in punishing the person for the offense which he has committed. As I said during the argument, if he is imprisoned by order of the court, it is the act of the United States. The United States is the custodian of his person. If he is fined by the court, the fine goes to the United States; and, although it may be a proceeding growing out of a civil action, it is distinct in its character in many of its essential particulars."

The whole reasoning of the judge shows that he had under consideration a proceeding to punish the offenders for their contempt, and the conclusions announced have reference solely and only to a proceeding of this character.

The warrant of arrest issued to the marshal of Illinois authorizes and commands him to arrest the said Graves, if he be found in the Northern district of Illinois, and, by its terms, it can be executed only in that district. To authorize an arrest of Mr. Graves in Iowa, a warrant for that purpose must be issued by some proper judge or magistrate in Iowa, having authority so to do, and only then when the necessary facts have been made to appear. If the application now made can be construed into an application for the committing order, under the provisions of section 1014 of the Revised Statutes. then the duty is imperatively placed upon the judge of ascertaining whether there is any proceeding pending in the Northern district of Illinois, the object of which is to cause the placing on trial of the person named in the warrant for the offense of contempt. The record and papers submitted wholly fail to show that any such proceeding is pending in any court, or before any magistrate; and counsel supporting the application do not claim that, if arrested and removed to Illinois, Mr. Graves will be put upon trial in order to ascertain whether he is guilty of the offense of contempt. The warrant placed in the hands of the marshal shows that it is not a warrant of arrest for the purpose of a trial, but a warrant of arrest for the purpose of enforcing an order already made; or, in other words, it is simply a mandate, issued by the circuit court of the Northern district of Illinois, for the arrest of the said Graves, if he can be found in that district, in order that the court may coerce him into obeying the order made for the payment of money in the civil case of Corbin v. Boies et al.

It will not do to confuse a remedy of a civil nature, used merely as a means of compelling obedience to an order for the payment of money in a civil suit, with a proceeding in which it is charged that a criminal offense has been committed against the government of the United States, and in which the party may be arrested, and put upon his trial. There is, as has been already stated, no evidence submitted showing that a criminal proceeding is pending in the United States

court in Illinois against Mr. Graves, or that he is in fact charged with the criminal offense of contempt; and therefore we are brought back to the question whether there is any authority of law for a judge in Iowa ordering a citizen of Iowa to be arrested and removed into Illinois, in order that the courts of Illinois may then arrest him, and keep him in custody until he pays into the court a sum of money found and adjudged to be by him held in trust for some other persons.

The record shows that before the warrant of arrest was issued two writs of execution had been placed for service in the hands of the marshal for the Northern district of Illinois. No one would claim for a moment that upon application of the marshal, and a showing that there was no property belonging to Graves, the defendant in the execution, to be found in Illinois, but that there was personal property belonging to him in Iowa, the judge of the district in which such property was found could order it to be seized, and be removed into Illinois, in order that the marshal of Illinois might then levy on the same in satisfaction of the writ of execution. It would be a strange anomaly, if it were true, that the rights to property are so sacred that the judge of one state or district cannot order its removal into another state, to be therein levied upon, and vet the judge may order the owner of the property to be arrested, and his body to be removed into another state, in order that when so removed he may be imprisoned until he pays the money sought to be made upon the execution.

If the position taken in support of this application is correct, what is there to prevent, in every case wherein a non-resident is sued, and a decree for the payment of money is entered against him,—as, for instance, upon the foreclosure of a mortgage,—and he fails to pay the same within the terms of the decree, that he be attached for contempt, and be arrested, and, at the expense of the United States, be taken from his residence, perhaps in California, to New York, to be there imprisoned, not until he is tried for a criminal contempt, but until he obeys the decree by paying the amount adjudged against him? In effect, this would be using the power of the United States government, and the laws and machinery enacted and provided for the punishment of crimes and offenses against the government, as a mere means of enforcing the collection of debts due private parties.

What I find and hold, briefly restated, is that it is not made to appear, but in fact is disclaimed, that there is pending in the United States circuit court for the Northern district of Illinois any proceeding of any kind, formal or summary, wherein it is charged that J. K. Graves has been guilty of a contempt, criminal in its nature, and in which proceeding it is proposed to examine into and determine the question of his guilt, with a view to punishing him for such contempt, if he be guilty thereof; that no affidavit or other evidence has been submitted tending or purporting to show that he has been guilty of, or is charged with, an offense against the United States, and therefore

no ground is laid for obtaining either an order of commitment, or a warrant of removal under the provisions of section 1014 of the Revised Statutes; that the record and papers submitted in support of the application made, show that the United States circuit court in Illinois has, in the equity suit of Corbin v. Boies et al., as a means of enforcing the performance on part of Graves of the order for the payment of a named sum of money into court, ordered his arrest and imprisonment until such order is obeyed; and that this is a civil remedy, in aid of which the judge of the Northern district of Iowa has no authority to order the arrest and imprisonment of the party proceeded against, and no authority to order his removal into Illinois. The application is therefore refused.

HAINES v. McLAUGHLIN and others.

(Circuit Court. N. D. California. October 22, 1886.)

Costs—Witness not Subpænaed—Traveling Fees.

Traveling fees of witnesses coming voluntarily upon the request of a party, without having been subpænaed, from another district more than 100 miles from the place of trial, and beyond the reach of a subpæna, cannot be taxed as costs against the losing party; following Spaulding v. Tucker, 2 Sawy. 50.

M. A. Wheaton and John Garlen, for plaintiff.

Hull McAllister and T. V. O'Brien, for defendant.

Before Sawyer, circuit judge, and Sabin, district judge.

Since the case of Spaulding v. Tucker, 2 Sawv. 50. SAWYER, J. decided in August, 1871, after careful consideration, and, as was supposed at the time, in accordance with the then existing authorities, the rule has been regarded as settled in this circuit that traveling fees of witnesses coming voluntarily upon the request of a party, without having been subprensed, from another district, more than 100 miles from the place of trial, and beyond the reach of a subpæna, could not be taxed as costs against the losing party. This principle was recognized and adopted by Mr. Justice McLean in Dreskill v. Parish, 5 McLean, 241; by Judge LEAVITT in Woodruff v. Barney, 2 Fish. Pat. Cas. 245; and by Mr. Justice Nelson and Judge Shipman in an anonymous case, (5 Blatchf. 134;) and the principle is the same acted upon by Mr. Justice GRIER in Parker v. Bigler, 1 Fish. Pat. Cas. 289. In Spaulding v. Tucker, after considering the cases herein cited, it was said by the judge delivering the opinion:

"I think, under the present statute, to attend 'pursuant to law,' is to attend under the obligatory requirements of the law. The party may request, but the law knows no request. It commands or is silent, and a party who attends 'pursuant to law,' attends pursuant, or in obedience to the commands of the law."

In a recent case, however, that distinguished jurist, Mr. Justice GRAY, of the supreme court, with the concurrence of Mr. Circuit Judge Colt, in the First circuit, overruled these decisions, in U.S. v. Sanborn. 28 Fed. Rep. 299, and on the authority of this case we are asked to reconsider the rule, as long established in this circuit. that case stand alone, I should not hesitate to yield my own impressions, whatever they might be, to authority so eminent. But we have seen that it does not stand alone, and that in three, at least, of the other circuits, the ruling has been different, having the sanction of three eminent justices of the supreme court. In U. S. v. Sanborn the court seems to attach some importance to the fact that the rule adopted, had long prevailed in that circuit, whatever the case might have been in other circuits. But the case is governed by the same statute, which is applicable to all the circuits. Whichever rule is the proper one, should, therefore, be followed in all the circuits, and it is highly important that the point should be authoritatively settled by a decision of the supreme court. With the utmost respect for those taking the other view, I shall, for the present, adhere to the rule heretofore established in this circuit; and my associate, for the purposes of this case, will adopt the view of Mr. Justice Gray. If desired, a certificate of opposition of opinion will be made, and it is to be hoped that the case will be taken up for an authoritative decision.

I will venture to make an additional observation in support of the rule, apparently adopted in the Second, Sixth, and Ninth circuits. The true rule rests upon the proper construction of the statute. Section 823 says in plain, unequivocal terms: "The following, and no other, compensation shall be taxed and allowed to * * * witnesses in the several states and territories, except in cases otherwise expressly provided by law." The provision is expressly prohibitory,—and "no other compensation" can be taxed and allowed, than such as is clearly "expressly provided." The only express provision of which I am aware, applicable to the case, is that found in section 848, which reads: "For each day's attendance in court pursuant to law * * * one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning." Do the words "pursuant to law" mean anything? Do they add anything—any qualification or limitation—to the provision? And, if so, what? And, if not, why were they so carefully introduced into the statute? It is one of the best-settled canons of statutory construction, that some force must, if possible, be given to every phrase and word of a statute. Does not "pursuant to law" mean, "upon the requirement of, or in obedience to, the law?" "to attend under the obligatory requirements, or pursuant to the commands, of the law?" Is this a strained or unnatural construction? If this be not the meaning of the phrase, then what meaning can be attributed to it, that will in any possible

degree add to, qualify, or limit the meaning of the other language used? Rejecting this construction, if some other rational, qualifying meaning, that the words will reasonably bear, cannot be suggested, then, it must be conceded, I think, that the phrase "pursuant to law" does not mean anything; and it will thus be stricken from the statute by judicial construction, in violation of the canon of statutory construction cited.

The law has fixed the limit to which a subpœna can run, and it has provided other and less expensive means for obtaining the testimony of witnesses residing beyond the jurisdiction of the court to send its subpœna. If parties can tax the traveling fees of witnesses who come, voluntarily, upon request, and not pursuant to the commands of the law, for a distance of 10 miles beyond the reach of a subpœna, they can do it for witnesses who come from any part of this wide world, and make the expenses of litigation intolerably burdensome to their opponent in case of final success, as in this case.

It is said as a reason for allowing traveling fees to voluntary witnesses, that testimony is often much more effective when delivered by the witness in person upon the stand, in the presence of the jury, than when taken by deposition. This may in some instances be so, but, when so, this mode of producing the testimony is for the special benefit of the party, who desires it in that particular form. If he thinks it more for his interest to adopt the mode more expensive than that provided by law, he ought, himself, to pay the extraordinary expense over that of the ordinary mode provided for obtaining the testimony. If this is not so, then it is suggested that congress, and not the courts, should amend the law by striking out from the statute the words "pursuant to law;" thereby leaving the section without any qualification or limitation.

Au, Adm'x, etc., v. New York, L. E. & W. R. Co.

(Circuit Court, N. D. Ohio. November 8, 1886.)

- 1. Negligence—Railroad Companies—Duty of Conductor.

 The highest duty of the conductor of a railroad train is to supervise its management with all reasonable skill, so that those whose lives are dependent on his care shall be protected from any peril of collision with another train, and it is gross negligence to omit that supervision to do other work about the train.
- 2. Same—Contributory Negligence of Fellow Servant—Case in Judgment.

 A train being upon a steep grade, and closely followed by another, the conductor employed himself about cutting out one of the cars, throwing the switches to side-track it, etc., neglecting the duty of seeing that the cars detached were held in place; and, a brakeman being asleep, that portion of the train escaped down the grade, killing, by collision, another brakeman on the second train. Held, that the company was liable for the want of careful supervision by the conductor, and that the negligence of the sleeping brakeman was immaterial.

3. Same-Contributory Negligence-Injured Brakeman Out of Place.

The fact that the deceased brakeman was known as the "middle brakeman," and generally assigned to work on the middle of the train, does not fairly imply that he was guilty of contributory negligence in being found on another part of the train at the moment of the collision; particularly not when the circumstances show that he might properly have been there a few minutes before the collision, while the engine was taking water at a tank.

4. Same—Directing a Verdict.

Where one defense is that the deceased contributed to the loss of his life by his own negligence, if the facts proved be such that the court would not sustain a verdict imputing negligence to him, it is proper to withdraw that subject from the consideration of the jury, by directing a verdict on that issue for the plaintiff.

5. SAME—STATUTORY DAMAGES FOR LOSS OF LIFE.

The statute does not give to the surviving dependents a solace for the sufferings of either themselves or the deceased, nor does it proceed upon any sentiment of indignation or punishment for the negligence, but allows compensation for pecuniary loss, and nothing else.

6. TRIAL EVIDENCE-POSITIVE AND NEGATIVE.

Positive testimony to the existence of a fact will prevail over the mere denial of another witness, who has no peculiar knowledge of it, but it is always for the jury to determine whether the denial is as well founded as the assertion.

Motion for New Trial.

There was a verdict for the plaintiff for \$4,000. The facts are stated sufficiently in the opinion of the court. The case was tried before Welker and Hammond, JJ., and the defendant moved for a new trial upon exceptions to the charge, and because the verdict was contrary to the law and the evidence, etc. The following is the charge of the court:

HAMMOND, J., (charging jury.) The plaintiff sues for the negligent killing of her intestate by the defendant. The negligence is denied. The burden of proof is on the plaintiff, and she must have satisfied you by all the evidence in this case that the negligence averred in her petition has been proved, or she cannot recover.

It is conceded by the plaintiff that she cannot recover if you find from the proof that her husband was killed solely by the negligence of the brakeman, Miles Sweeney; if for no other reason, because that negligence has not been charged in the petition. If, therefore, you find that he only was to blame.

your verdict should be for the defendant.

But if you find that the death was caused partly by the negligence of that brakeman, and partly by the negligence of the conductor, Dan Sweeney, or wholly by the latter, your verdict should be for the plaintiff; for the company cannot defend itself against the negligence of the conductor by showing that the brakeman was also negligent. The mere contributory negligence of a fellow-servant is no defense. The master or employer must be wholly without fault on his part, and if he, by his own negligence, causes the injury, the fact that some one else was likewise at fault cannot avail him, although that some one else bore the relation of fellow-servant to the injured party. Here the conductor represented the employer, and it was the company's negligence, if he was negligent.

It is therefore your duty to scrutinize with care the conduct of the conductor, say whether or not he failed to do anything that a reasonably prudent, careful, and skillful conductor would ordinarily have done under the circumstances of the situation, and the doing of which would have prevented this accident; or whether he did anything that a reasonably prudent, careful, and skillful conductor should not have done, which caused the accident.

Was he cautious, prudent, careful, and skillful in the discharge of his duty to those who were behind him on the approaching train?

You are not to impute negligence to him merely because an accident happened by which Christopher Au lost his life. Negligence must always be proved, and is never presumed. The fact that the accident did take place undoubtedly shows that some one was negligent, and grossly so. not necessarily follow that the conductor was to blame, in whole or in part, and it is for you to look to the proof, and say whether any neglect of duty on his part caused the disaster. It may have been exclusively the fault of the brakeman, and was so if you find that the conductor did his whole duty in the premises; for either one or the other, or both, of them are to blame, as there is no proof to place it elsewhere. What, then, did his duty as a conductor require him to do in the circumstances by which he was surrounded? That is the question for you alone to answer. You do not answer it wholly by his opinion, or that of other witnesses, as to what was proper to be done. You do not answer it wholly by the practice or custom of this conductor, or other conductors, on this road, in the same situation. You do not answer it wholly by the rules and regulations of this company, if anythere be, applying to it, whether they be those formally prescribed, or those permitted or imposed by the mode of doing business in this company or on this road. All those are important and substantial facts, which you should consider in making up your verdict, and they go to the question of the duty of the conductor in this matter. But, after all that may be said in that direction, the fact remains that the law imposed on this company, and on this conductor as its representative, certain duties in protecting the life of Christopher Au, and all its other employes on the train following that under his charge: It required him to do everything that a reasonable, prudent, careful, cautious, intelligent, and skillful conductor should do while cutting out a car upon a steep grade, under the particular facts of this case, as you have them in proof, to prevent the train from running back into collision with that immediately following it. His judgment in the particular situation; his practice or custom in like or similar situations; the practice or custom of other conductors in like or similar situations; the rules and regulations, either formally prescribed, permitted, or imposed by any means whatever, of doing the business of the road, are all alike required to conform to this rule of the law prescribing reasonable, careful, cautious, and skillful handling of this train, in all its movements, by the conductor, as its responsible commander.

As men of affairs, acquainted with business, familiar with the duties and responsibilities of human action in ordinary situations, and competent to decide what was reasonable, what was prudent, what was cautious, what was intelligent, what was skillful, and what he was required to do under the particular circumstances, our constitution and laws wisely impose on you, and you alone, the function of determining from the proof before you whether this rule of law that a conductor should act with reasonable care, skill, and prudence was complied with in this case; or, in other words, whether this

conductor was negligent, or faithful to his trust.

I am not going over this proof with you, to make any suggestions about it one way or the other. It lies within a very narrow compass, and there is no difficulty about it. I sedulously avoid, when I can do so, speaking of the proof in detail, lest I should unwittingly mislead a jury, or unduly influence it, by giving more or less importance to particular circumstances. I submit it to you as it is in the light of the arguments that have been addressed to you, and call on you to say, impartially, without prejudice, without sympathy for parties, and intelligently, whether or not this conductor was at fault, or at all negligent, under the rule laid down for your guidance. If he was, the company is liable. If he was not, it cannot be, however great the misfortune, or serious the injury, to the plaintiff. It is immaterial that the

brakeman was negligent. The whole question is whether the conductor was negligent. I think I have said all I need say to you on that subject.

We will now consider the alleged contributory negligence of the decedent. As to that, I have not the least hesitancy in saying that the court would not be satisfied with any verdict that imputed negligence to him in any sense whatever, and on that issue you are directed to find for the plaintiff. The whole defense and argument in support of it is based upon an unreasonable inference or implication, based on the words "middle brakeman." The proof shows that on some trains they have two brakemen, called "head brakemen" and "rear brakemen," and on some a third, called "middle brakemen;" but there is not a word to show that there is any special significance in those designations, except a general location of the men on the train. We can see from the nature of the service, with two or three men to do the work of immense trains like these, and abundantly from the proof in this case, that, necessarily, notwithstanding those designations, and this general location, they are not confined to any particular spot on the train, and that, necessarily, they must go wherever they may be ordered, or the exigencies of the service may require, and sometimes wherever their pleasure or whim may call them. It is preposterous, under such a service, to say that it is negligence to be found in any particular place where a brakeman may be ever required to be. Particularly so here, where it is in proof that it was his duty to cut out at the next station, at no great distance away, the very car on which his dead body was found, and that the engineer had been already complaining of lost time; and where it is shown that he might go to the engine or caboose to warm himself, if he chose to do so. But I hold, without the least doubt on the subject, that on the proof in this case as to this particular brakeman, in this particular service, and on this particular train, there is no evidence to be submitted to you from which you could reasonably imply or infer that the decedent was negligent in being at the place he was found killed, and that he thereby contributed to his death. That subject is therefore withdrawn from your consideration.

The only question in the case is whether the conductor was negligent or not. That has been submitted to you, and it is a grave, and, to these parties, most important, question, that demands at your hands your most intel-

ligent judgment.

If you find for the plaintiff, the question will arise as to the measure of damages. At common law there was no cause of action for negligently killing any one, and no damage arose to anybody interested in his life. Precisely why this should be so has never been satisfactorily explained, and modern legislation has changed the law. Now, under the Ohio statute, the widow or next of kin may recover damages for the loss sustained by them. But it is important to remember that this is not a solace given for affliction and wounded feelings of affection; not at all. It is a cold, unsympathetic, and unimpassioned matter of dollars and cents,—compensation for the loss of the decedent's services as a bread and meat winner, so to speak. It is for the pecuniary loss of this wife and son that you are to compensate them, and nothing else. The idea of punishment or of indignation for the wrong done, or of compensating them for their suffering, or for his suffering, in body or mind, does not enter into the calculation in the least. They are entitled to recover, if you find them entitled to a verdict, whatever will fairly and reasonably compensate them for the loss of a husband and father upon whom they depended for sustenance and support. In one sense, we all know that millions of dollars would not compensate either of them, particularly the loving wife who loses her husband, but the law proceeds on no such sentiment as that. It looks at the man as to his age, his physical condition, his capacity as a man of business, his kind of business, his earning power, and all that; and then at the dependents who sue, and their relation to him, and

their interest in his earnings, his future, and his life, as a source of revenue or pecuniary benefits derived from him,—and seeks to measure the damages by that standard, and none other. It cannot, in the nature of the case, be a matter of precise calculation. The law has no delicate scales to weigh the loss or damage. It depends upon the fairness, the good sense, the honesty, and the justice of the jury to fix it impartially, without prejudice, and intelligently, so that on the one hand there shall be no excessive adjustment, nor on the other any undervaluation, but only adequate compensation, under all the circumstances.

Take the case, gentlemen of the jury, and consider your verdict.

Mr. Russell, (of counsel for defendant.) I except to the charge of the court, as given, relating to the question of contributory negligence, and withdrawing that issue from the consideration of the jury, under the proof.

The Court. Very well.

Mr. Russell. I ask the court to charge the jury in these words: "If you find from the evidence that Christopher Au was killed while breaking a rule of the company, the plaintiff cannot recover, if you find that such breach of the rule was the proximate cause of his injury."

The Court. I decline to give that.

Exception.

Mr. Russell. I ask the court to charge the jury as to one matter that I think was omitted, and that is as to the relative force of negative and positive testimony on a disputed fact.

The Court. I have instructed this jury before quite fully as to the rules of evidence that govern them in the determination of all questions of disputed evidence.

There is a rule of law, gentlemen of the jury, that where there is a conflict of testimony, and one testifies positively to a thing within his peculiar knowledge or information, and the testimony of the other is a mere denial of that which is not within his peculiar knowledge or information, the positive testimony will generally prevail over the negative testimony. But it is always a question for the jury to determine whether the witness who testifies about a given fact, although it may be in denial of it, had the opportunity of knowing, seeing, and hearing as well as the other witness had. That is a plain rule of common sense and ordinary judgment of all men in determining such matters, which is to guide you in this case.

Take the case, and consider your verdict.

Skiles & Skiles and M. R. Dickey, for plaintiff. Russell & Adams, (Wm. L. Rice with them,) for defendant.

Hammond, J. I have read and reread the voluminous testimony in this case, taken so accurately by the stenographers, with a mind free from the exciting influences of the trial, and the result is that I am more than before satisfied with the verdict. Let us relate briefly the facts, precisely as the defendant company would have us to find them, laying aside, of course, any mere theoretical inferences or conclusions that may be urged in its behalf, through a predetermination to force a conclusion that will permit it to escape all liability, and leaving for separate treatment the defense of contributory negligence. So, favorably stated, the facts are that a freight train, ascending a heavy grade, which rises for the distance of a mile and one-half, was closely followed by another train of the same kind. The first train was manned with two brakemen and a conductor, and had orders,

known to all, to cut out the fifth car, and leave it at the next station. As the train approached that station, still on the up grade, the conductor and his rear brakeman from the caboose observed, as the others had done, that there was a signal requiring him to go to the telegraph office for orders. The conductor told the brakeman that he would go forward to cut out the car, and get the orders. He did go forward, leaving the brakeman at his proper place on the first platform of the caboose. The train was stopped, and the brake on the caboose The conductor and his engineer then went to the applied to hold it. telegraph operator, received their orders, and returned to the train. The signal was given to loose the brakes, which was done, the train pulled up, and stopped until the conductor, who stood at the coupling, could "get the slack," and release it. The five front cars were then pulled ahead, the conductor swinging behind the fifth until it had passed the switches, which he opened, and cut out that car, placing it on the side track. He then readjusted the switches, and returned the train to the main track, to be recoupled to the cars that had been left. But these, 12 in number, while the cutting out was going on, had receded down the grade, and, gathering momentum, crushed into the rear train at the foot of the grade, more than a mile The plaintiff's intestate and a companion brakeman upon the rear train were killed. The rear brakeman on the front train forgot that a car was to be left at the station, and supposing, when he loosed the brakes at the signal from the engine, that his train had pulled out upon his trip, retired to the caboose, lay down, and went to sleep, so soundly that he was awakened only by the collision. The conductor gave no signal to the rear brakeman to put on the brakes to hold the 12 cars to be left upon the grade. He did not wait to see whether they would remain stationary until his return, but went forward with the engine and the other brakeman to do the work already described. Neither did the rear brakeman receive any signal from the engine, or elsewhere, to put on the brakes to hold the 12 cars.

Surely, no more advantageous finding of the facts than this could be claimed by the company; and it contains, I believe, every essential circumstance in its favor that is even possible to be interposed as a defense against negligence on the part of the conductor, the negligence of the brakeman being conceded; and yet, if there were a special finding of these facts, I should unhesitatingly direct a judgment for the plaintiff, on the ground of the grossest negligence on the part of the conductor, or else, behind him, upon the company itself, for so inadequately manning its train as to impose duties upon the conductor which, if not necessarily, certainly had a tendency to distract his attention from the higher duty that belonged to him, namely, the protection of the lives of those upon the other train from such a calamity as came upon them. The company owed no more important duty to its men upon the rear train than full protection against

such tragic results as were occasioned in this case by the escape of the greater part of this train from its "commander," as he is shown to be in the case of *Chicago*, etc., R. Co. v. Ross, 112 U. S. 377; S. C. 5 Sup. Ct. Rep. 184.

It is idle to undertake by conveniently adjusted distribution of duties, as between brakeman and conductor, to transfer that care of the train which was necessary to prevent this disaster, from the conductor, who was the representative of the company, to the brakeman, who was only a fellow-servant. The most important and primary duty of a conductor is to look to the safe-handling of his train, so that no mistake fatal to the lives of others dependent on his care and skill shall take place. It takes all precedence of the work of coupling and ancoupling cars, following those cut out to open and close switches, etc.

If, for the sake of economy, his company imposes these latter duties on him, it must answer if the more important be neglected, or transferred thereby to others who neglect it. In our view, it is the conductor's duty reasonably to supervise the brakeman and other trainhands in their work, and that if he neglects such supervision, that neglect is the proximate cause of whatever injury occurs, and not the carelessness of the brakeman. We do not say that he is responsible, or the company for him, for every dereliction of duty by those under him, for this may happen with all his care, and after the closest attention from him; but we do say that, under the circumstances of this case, his duty was to know that those 12 cars were so blocked upon the height of that grade that they would not descend it while he was gone away to do the work of switchman and coupler, in cutting out the car. He could not, reasonably, leave the lives of those behind him at the peril of a collision, because the rear brakeman already knew that a car was to be set out, and knew that it would be his own duty to set a brake to hold those to be left unattached. should have stood by the unattached cars until the brakeman had performed that duty, or, at least, he should have known that he was in his place at that moment, and understood from his signals that it was the time to set the brakes. He should not have relied solely on the expectation that the brakeman would know when to replace the brakes at the proper moment, without a further signal. Indeed, I do not see how the brakeman, 12 cars back, could know, without a signal from some one, just when the uncoupling required him to replace the The backward motion of the cars might inform him, but prudence would require that he should have information before and outside of that, and it would be negligence to rely alone on such a movement, upon a grade like that described by this proof; particularly when it was known that there was another train following closely. and then about due at that spot; for the rear train had somewhat lost time, as its hands explain, by being too closely held with brakes on the grade just behind that on which this disaster took place. The

situation and circumstances of the moment forbade any uncertainty about those 12 cars being held to their place, and held promptly. If the brakeman himself tells the truth, he had time while the work of uncoupling was going on to get up from a recumbent position in the caboose, to answer the signal to loose the brakes which held the train at a stand-still, return to his resting place beside the stove, and fall soundly asleep, before the backward movement began. The conductor relied, according to his story, upon the fact that he left the brakeman on the platform, telling him what he was going to do about cutting out the car, and that he knew how to keep the detached cars from going back, and at the proper moment would set the brakes. But he left him while the train was approaching the station, and the brakeman says he did not hear him say anything about cutting out the car, and, although he knew that at some time and distance back they had received orders to leave the car, he had forgotten that fact.

Now, these circumstances show how careless it was on that grade to cut loose those cars, upon such a reliance as that, without any attention by the conductor to the rear part of the train. The truth is. I have no doubt, he forgot all about the danger to that train behind. The grade was not in his mind, which was absorbed in other purposes than that of looking to the security of those following him, by giving his careful attention to the 12 cars cut loose. Negligently, he gave too entirely his labor to the matter of cutting out the cars, and doing work that should have been done by others, or left undone until he had given his intelligent supervision to the more important matter of preventing the loose cars going down the hill. A skillful conductor would have had this danger in mind, and given his best attention to the more important duty devolved upon him. It is settled "that, if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed, or from inattention, is gross negligence." New World v. King, 16 How. 469, 475.

This is the case against the company on the most favorable statement of the facts. But if the jury had found that there was a good deal of nepotism about this affair; that the brother who was conductor fraternally permitted the brother who was brakeman, overworked, tired from loss of sleep, wet, and cold, to sleep beside the stove while he did the work of setting out the car, forgetting the grade, and the danger to those behind, I should not complain at their verdict, notwithstanding the positive swearing of these inculpated brothers to the contrary. Not because of their humble station, nor of their being witnesses for the company employing them, or the like, should they be discredited, if at all; but, as I said in a recent decision, where the station and pretensions of the witnesses were of the highest, I have long since ceased to believe a statement of fact simply because one intensely interested in its being true shall swear to it. We should have as much confidence in human testimony,

sworn or unsworn, as one can have who believes in the common honesty of men: but, as a trier of facts, we should scrutinize the oaths of all men who are interested to establish their property rights, or their characters, or to excuse themselves from blame for the loss of human life, and we should not, because the common-law doctrine of exclusion of such testimony has been abrogated, rush to the other extreme, and credulously accept every statement that is made by interested witnesses, upon the solemn sanction of an oath, in the trial of a cause. These two brothers made a favorable impression on the court, as no doubt they did upon the jury; but, after all, and analyzing their testimony in the closest way, the story that they tell is not corroborated by a single fact—I say nothing of opinions—established by other testimony than their own. It is not at all an impossible story that they tell, but it is not as probable, in its relation to the well-established facts, as is the inference that the brakeman was asleep when the train reached Ashland, and was permitted by the conductor to sleep on, in a kindly effort to get along without him.

How came the brother who was conductor to exclaim, "My God! my brother Miles is asleep in that caboose, and will be killed," immediately upon recognizing the awful fact that the cars had gone down the grade? How did he know that he was asleep, if he had not left him so? We are asked to believe that this was a rational inference from the fact that the cars had gone, but this is not wholly satisfactory. The proof shows that everything was done in a hurry, and that the stopping, going in for orders, return to the train, moving up and cutting out, was all done in a very few minutes; and if the conductor left the brakeman at his brakes, and he was there to free them when the train pulled up to loosen the coupling, why did not that situation suggest to the conductor, when he learned the train had receded, the inference that the brake had broken, or that some other such accident had occurred? Why did the notion of his being asleep in the caboose occur at all? It might have suggested that he had been hurt, or for some reason like that was not at his post, but the idea of being asleep in the caboose was not a necessary suggestion from the circumstances as they are now related. It was not the language of apprehension that he used, but the statement of a fact.

Again, the brakeman relates most graphically that he dreamed of an explosion of a gun, and when he awoke, amid the wreck, the idea occurred to him that his brother was in the caboose with him, and that he heard his cries for help. He actually extricated himself, followed the call, hunted amid the debris, and, after some time, found the fireman of the rear train, from whom the cries proceeded, and, yet thinking it to be his brother, set to work to help him; and all this time it never occurred to him that his brother had gone from the caboose to cut a car out, nor was there any suggestion to him of the actual facts as they must have been known to him if he were awake at Ashland, as he now says he was, only a very few minutes before the cars

started back. It was a time of confusion of ideas, no doubt, but it is significant that there was in his mind, all during this hunt for his brother, the notion that he was with him in the caboose, and never any trace of a remembrance of the actual occurrences of which he now says he was an active participant at the station. If he went to sleep while his brother was in fact in the caboose, his actions, and the thoughts accompanying them, were natural enough; but they were somewhat inconsistent with the facts as they existed in his mind, if he fell asleep at Ashland, after manipulating the brakes, as he says he did, at the very moment when his brother was away, and the retrograde movement must have commenced. Indeed, he had scarcely time to descend from the platform into the caboose, lay down, and go to sleep, from the moment he turned off the brakes until the cars started back, if the speed with which the train was jerked forward and back, "to get the slack," is correctly described by the witnesses.

There are other circumstances tending to support the inference that he was asleep some time before he confesses that he was, but it is not necessary to refer to them here, as, in any view of the facts, the negligence of the conductor is established. One circumstance only is against this inference, if it can be said to be proved by the testimony. The head brakeman says he set no brake to hold the train on its arrival at the station, and the engineer and others give the opinion that the train would not have stood on that grade without a brake, and could not have been started "to get the slack" for uncoupling unless the brake holding it had been unloosed. roborates, if the opinion be well founded that the engine would not have held the train without a brake, the testimony of the brakeman that he was awake, and set the brake on the caboose, and subsequently unloosed it, on the signal to do so. If that opinion be erroneous, however, or the brake had been set by his brother, the conductor, before leaving the train, as it might have been, if he wished to let him sleep, there is no other circumstance to corroborate them. I have closely examined this proof, with all charity of judgment, and it is my own belief that while perhaps it is not impossible, it is quite improbable, that this accident could have happened, as we know it did, if the brakeman had been on duty at the brakes, as he says he was, almost at the very moment when the cars commenced to go back; for he had scarcely time to re-enter, and fall asleep in the caboose as soundly as he did sleep. But all the peculiarities of the accident are consistently harmonized with the inference that this brakeman was asleep all the time, and that his brother, the conductor. permitted him to rest, while he undertook to get along without him.

Having thus disposed of the question whether the fault was that of the conductor, for which the company is liable, or only that of the brakeman, for which plaintiff concedes it would not be, we come to the other defense of contributory negligence. Were it not for the evidently sincere opinions of very able counsel, the court would think that defense frivolous. The second train had three brakemen,—head, middle, and rear brakemen,—and they were assigned to portions of the train indicated by those designations. The contention is that, as Au was killed on the car next the tender of the engine, he was negligently out of place, and that he would not have been killed if he had been in the "middle" of the train. Possibly this is so; and he would not, possibly, have been killed if, like the engineer, he had crouched behind the boiler-head, or, like the fireman, had risked a jump to the ground, notwithstanding the difficulties to which he called attention when he said, "We cannot jump here."

This kind of ex post facto knowledge which we now have, that in certain places on the train he would have escaped, cannot aid us in determining a question like this. The real inquiry is, was he negligent in being in the particular spot where death came to him? The train had been at the water-tank, had moved but slightly, and was barely under way, when Au, the other brakeman who was killed, the engineer, and the fireman, who were all in the cab of the engine, saw the red lights of the runaway train, which at first they did not com-When the engineer realized the danger, he told them to save themselves, and all attempted to jump; but, the engine being on a bridge across the creek or branch, only the fireman attempted that mode of escape. The engineer crouched behind the boiler, and the two brakemen, evidently trying to escape down the train, were caught and killed at the place before stated. Now, the train-hands examined as witnesses, dominated no doubt by the belief that if the "middle" brakeman had been "about the middle" of the train he would not have been killed, and, pressed hard by counsel to support that capricious theory, gave it as their "expert" opinion that Au ought to have been "about the middle" of the train, because he was

"middle brakeman." But it needs no "expert" to know, as we all do, that in the very nature of the work to be done by brakemen, such a confinement of them to particular places on the train is only a con-

wenience for this occasion, and altogether delusive.

When counsel was asked how many feet and inches from the exact middle of the train, either to the front or rear, he would draw the dead-lines beyond which it was contributory negligence to be found, and to tell us where the same fateful lines would come for the "head" and "rear" brakemen, and how it would be when there were only two, as on the first of these colliding trains; and how, where there were more than three,—there was and could be no satisfactory answer; and yet, common humanity would require that these lines should be defined with great precision, if they are to be drawn at all. How do we know that Au was not ordered by his conductor to go where he was, for some purpose unknown, or that some sudden emergency did not make it his duty to go there? We are asked to base an inference that he was out of place upon the bare fact that he was "mid-

dle" brakeman, and was not at the "middle" of the train; for no witness testifies that the middle brakeman could not be required to work elsewhere, if commanded to do so, or that he is not frequently required to work all over the train; and there is proof that he would have been required to do the work necessary to set out that very car on which he was killed when he should get to the next station, and that he knew that that car was not about the middle of the train. Moreover, not one of these witnesses but agrees, on cross-examination, that he might properly go to the engine to warm when the train was stopped, as it was, at the tank. True, it had resumed its motion, but only barely so, when he was killed, and it may be he was on his way "to the post of duty"—as counsel calls it—when he was killed. The witnesses say that, generally, the middle brakeman would go to the caboose to warm, but nothing forbade him to go to the engine, if he chose, as the head brakeman generally did. The caboose was a nicer place, and would be preferred, they say, but circumstances, or a whim, may have led him to the engine on this cold night. I did not submit such proof to the jury, because, on a motion for a new trial, I would not have sustained a verdict charging him with contributory negligence, and this was clearly right, upon authority. Randall v. Baltimore & O. R. R., 109 U. S. 478, 482; S. C. 3 Sup. Ct. Rep. 322; Metropolitan R. R. Co. v. Jackson, 3 App. Cas. 193; Marshall v. Hubbard, 117 U. S. 415; S. C. 6 Sup. Ct. Rep. 806; Anderson Co. v. Beal, 113 U. S. 227, 241; S. C. 5 Sup. Ct. Rep. 433.

The case bears no resemblance to that of Railroad Co. v. Jones, 95 U. S. 439. The duties of a brakeman may call him to be even upon the pilot, or he might be ordered there, as he might be anywhere upon the train. Therefore no contributory negligence should properly be inferred against him upon the bare fact that he is found dead in any particular spot, away from that part of the train where he generally works, in any division of labor between the brakemen on a

train.

New trial refused.

Ex parte Brooks.

(Circuit Court, D. Massachusetts. November 20, 1886.)

Jail and Jailer—Charlestown Prison, Massachusetts—Imprisonment of Persons Sentenced by United States Courts—St. Mass. 1884, Ch. 255, § 7—Rev. St. U. S. §§ 5541, 5542.

The state prison at Concord having been in express terms designated by statute as a prison in which offenders sentenced by the United States courts, for terms of more than a year, might be imprisoned, and the removal of the prison from Concord to Charlestown having taken place under St. Mass. 1884, c. 255, section 7 of that act, making the laws relating to the Concord state prison applicable to the Charlestown prison, authorizes the judges of the United States courts to sentence offenders to imprisonment in the Charlestown

prison as a prison allowed in terms of Rev. St. U. S. §§ 5541, 5542, by the state legislature for use for the confinement of persons sentenced for periods of over one year.

Application for Writ of Habeas Corpus.

D. Frank Kimball, for petitioner.

George M. Stearns and Owen A. Galvin, for the United States.

Before Colt and Nelson. JJ.

Nelson, J. The petitioner, Wentworth A. Brooks, sets forth in his application that at the last March term of the district court for this district he pleaded guilty to an indictment charging him with the embezzlement of letters from the post-office in Boston, in which he was at the time a clerk; that thereupon he was sentenced by the court to be imprisoned at hard labor, in the state prison at Charlestown, a part of Boston, in this district, for the term of three years; that under this sentence he was taken to that prison, where he has since been confined; that the court had no authority to impose the sentence, and that his imprisonment under it is illegal; and he prays that a writ of habeas corpus may issue to the end that he may be discharged from his imprisonment.

By Rev. St. U. S. §§ 5541, 5542, in every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, or to imprisonment and confinement at hard labor, the court, by which the sentence is passed, may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose. The only ground on which the sentence is claimed to be illegal is that the legislature of Massachusetts has never allowed the use of the state prison at Boston for the imprisonment and confinement of convicts sentenced by the courts of the United States, and therefore the court had no authority to direct the sentence to be executed in that prison. Reference to the legislation of the state in respect to the two prisons will show very clearly that this proposition cannot be sustained.

In May, 1878, the state prison, which had previously been at Charlestown, was removed and established at Concord, by the proclamation of the governor, under authority conferred on him by the statutes of the state. There can be no doubt whatever that while the prison was at Concord it was the state penitentiary, and could be used for the confinement of convicts sentenced by the United States courts, for, by Pub. St. 1882, c. 221, § 1, it was expressly enacted that "the state prison in Concord, in the county of Middlesex, shall be the general penitentiary and prison of the commonwealth for the reformation as well as punishment of offenders; in which shall be securely confined, employed in hard labor, and governed in the manner hereinafter directed, all offenders convicted before any court

of this state, or of the United States held within the district of Massachusetts, and sentenced according to law to the punishment of solitary imprisonment and confinement therein at hard labor." This act gave, in direct terms, the use of the Concord prison for the confinement of United States convicts. In 1884 the legislature passed an act for the removal of the state prison from Concord, and re-establishing it in the old prison buildings at Charlestown, then become a part of Boston by annexation, and for converting the prison at Concord into a reformatory institution for male prisoners. St. 1884, c. 255. Under this act the state prison was re-established at Charlestown, in Boston, by the proclamation of the governor, in December, 1884. This act did not declare, in express words, that the prison at Charlestown might be used for the confinement of convicts sentenced by the courts of the United States; but it contained this section:

"Sec. 7. From and after the establishment of the state prison at Boston, as aforesaid, all laws relating to the state prison at Concord, and to prisoners confined therein, shall be in full force and effect in relation to the state prison at Boston, and to prisoners confined therein."

It is argued in behalf of the prisoner that this section did not extend to the prison at Boston the law which permitted the confinement of United States convicts in the prison at Concord, but only such laws as related to the management of the prison, and the discipline and employment of prisoners confined in it. But no reason that is even plausible is suggested for any such limited construction of this section. The words, "all laws relating to the state prison at Concord, and to prisoners confined therein," are certainly broad enough to include the provision in relation to United States convicts. It is impossible to infer from this language that the legislature intended by it to prohibit the use for this purpose of the principal penitentiary of the state. This view is made still clearer, if possible, by section 23, which allows the use for the same purpose of the new reformatory established by the act. The manifest intent of the legislature was to have the new prison take the place of the old one in all respects, including the class of prisoners to be confined there; and to effect this purpose, instead of re-enacting in detail all the laws relating to the old prison, it made them all, by one sweeping clause, applicable to the new one. This must be held to include the provision as to United States convicts.

If, however, the petitioner's contention could be supported, it would by no means follow that his imprisonment would be illegal, so long as the state permits him to be detained in its penitentiary under the sentence. Ex parte Karstendick, 93 U.S. 396; Ex parte Geary, 2 Biss. 485. See, also, In re Hartwell, 1 Low. 536; In re Wilson, 18 Fed. Rep. 33; In re Depuy, 10 Int. Rev. Rec. 34. But I prefer to rest my decision on the construction I have given to section 7, that by it the consent of the legislature has been expressly given to the

use of the penitentiary as a place of confinement for United States convicts.

My own opinion is that the petitioner's application should be denied.

Colt, J., concurs. Petition denied.

United States v. Thompson and another.

(Circuit Court, D. Oregon. November 22, 1886.)

1. Conspiracy—Conspiracy to Defraud—Rev. St. U. S. § 5440.

The crime defined in section 5440, Rev. St. U. S., includes every conceivable case of conspiracy to defraud the United States by depriving or divesting it of any property, money, or thing otherwise than as the law requires or allows.

SAME—CONSPIRACY TO DEFRAUD THE UNITED STATES OF A PORTION OF THE PUBLIC LAND.

A conspired

A conspiracy by two persons to enter a certain tract of land in the name of one of them, under the timber culture act, with the money of the other, for the purpose of selling and disposing of the location, for the benefit of the party furnishing the money, to any one who might desire to enter the same, is not a conspiracy to defraud the United States of its title to or dominion over said land; but it may be a conspiracy to defraud the United States of the possession thereof for an indefinite period.

8. Same—Act done in Pursuance of Conspiracy—Rev. St. U. S. § 5440.

It is an ingredient of the crime defined by section 5440, Rev. St. U. S., that some act must be done by one of the parties to the conspiracy in furtherance thereof; but such act need not be in itself a crime or of a criminal nature.

4. SAME-INDICTMENT-AFFIDAVIT PRESCRIBED BY LAW.

Where the words of the affidavit required to be taken by an applicant for public land are set forth in the statute under which the application is made, it is sufficient, in an indictment, to refer to or describe it as the affidavit required of such applicant by law.

(Syllabus by the Court,)

Indictment for Conspiracy to Defraud the United States. Lewis L. McArthur, for the United States. Julius C. Moreland, for defendant.

DEADY, J. The defendants are accused by the grand jury of the district of committing the crime of conspiring to defraud the United States as defined by section 5440 of the Revised Statutes, which reads as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than \$1,000, and not more than \$10,000, and to imprisonment not more than two years."

The indictment contains two counts. In the first one it is alleged that on August 25, 1886, within the jurisdiction of this court, the defendants, W. F. Thompson and Thomas Ryan, did conspire to de-

fraud the United States of "its title to and dominion over" the S. W. of section 10, in township 1 N., range 20 E. of the Wallamet meridian, situate in The Dalles land-district, and being a portion of the public domain.

The second count contains the same allegations as the first one concerning the conspiracy to defraud the United States of "its title to and dominion over" this quarter section of the public land, by the following means: The defendants agreed (1) that Ryan should make a timber-culture application in his own name for said land, and make the affidavit required by law, and, before making such application or affidavit, he would make and deliver to Thompson a power of attorney, authorizing and empowering him to execute a relinquishment in Ryan's name of all right acquired by him under such application; (2) that Ryan would deliver to Thompson the receipts for fees and compensation paid on the application, while the latter would give the former the money with which to pay the same, and \$1.50 for making the application; (3) that afterwards, on August 26, 1886, in pursuance of said conspiracy, Ryan did deliver to Thompson such power of attorney, and the latter gave the former \$14 wherewith to pay said fees and compensation; (4) that thereupon Ryan made such application for the tract of land aforesaid, and the affidavit required by law, and paid such fees and compensation, the receipt for which he delivered to Thompson, who then, in consideration of the premises, gave him \$1.50. The defendant Thompson demurs to the indictment for that it does not state facts sufficient to constitute a cause of action.

This section, 5440, is compiled from section 30 of the act of March 2, 1867, (14 St. 484,) entitled "An act to amend existing laws relating to internal revenue, and for other purposes." In the compilation the phrase, "in any manner whatever," is changed so as to read, "in any manner or for any purpose." The manifest purpose of the act was to prevent and punish frauds on the revenue. But that is no reason why the universality of its language should be so restrained in its operation. It must therefore be construed to include every conceivable case of conspiracy to defraud the United States; that is, to deprive or divest it of any property, money, or thing otherwise than as the law requires or allows. "To defraud" the government of any portion of the public lands necessarily implies that the government is thereby deprived of its title or ownership of the same.

An entry under the timber-culture act of June 14, 1878, (20 St. 113,) consists of the application, and affidavit to the qualification of the applicant, and the declaration that the filing and entry is made exclusively for the benefit of the affiant, and not for the purpose of speculation; the payment of the fees and compensation to the receiver; and the cultivation of the land in timber for eight years, so that at the end of that period there shall be growing thereon at least 675 "living and thrifty trees to each acre;" and, on proof of these

facts by two credible witnesses," a patent will issue to the claimant for the same. If, at any time after the application is made, the claimant fails to comply with the requirements of the act, the land becomes thereby subject to entry under the homestead law, or by some other person under the timber-culture act; and provision is made for notice of such entry to the original claimant, and a contest if he desires it.

It is understood from the argument of counsel that the conspiracy with which the defendants are charged may be worked out as follows: Thompson, who is supposed to be a person of some means and enterprise, desires to speculate in desirable locations for settlement on the public lands by getting control of them in advance of the general occupation of the vicinity. To this end he gets Ryan to make an application under the timber-culture act, and furnishes him with the means to do so, and also pays him something for his trouble, as well as the wear and tear of conscience. At the same time Ryan gives Thompson a power of attorney authorizing him at any time to execute a relinquishment of all his right under such application. der this arrangement, Ryan, or his employer, make a show of complying with the act for six months or a year or even more, when a customer is found who is willing to pay Thompson something handsome, under the circumstances, for the privilege of taking the land under the homestead or timber-culture act, which is accomplished by Thompson's executing a relinquishment of Ryan's right in the latter's name.

Barring the perjury, and subornation of perjury, which appears to be involved in this transaction, the same thing, in effect, was done under the donation act in the early days of Oregon. Then the transient squatter, keeping ahead of the home-seeking settler, often camped on the choice locations in each valley or vicinity, and occupied them with his cabin and stock until the latter came along and bought him off,—induced him to abandon his possession,—and thus enable the purchaser to become a settler on the land under the donation law.

There is no doubt, on the case made in the indictment, that Ryan is guilty of perjury, and Thompson of subornation of perjury. But they did not conspire or intend to deprive or divest the United States of its title to the land in question, or of its ownership thereof. Their real purpose was to use and abuse the privilege given by the timber-culture act so as to get possession of the land in an apparently lawful manner, and thereby obtain money from any one who was willing to pay Thompson a sufficient premium for the opportunity of acquiring the land from the United States for himself. So long as Ryan complies with the law—plows the land and plants it in timber—the public have the benefit of his labor and expenditure; and, when he ceases to do so, the land is subject to entry by any other qualified person. But until it has been earned by cultivation in timber, as the act provides, for eight years, the title and ownership remain in the United States.

At most, the purpose of the defendants was to deprive the United States of the possession of this land for an indefinite time, or until a purchaser of the location was found. But the charge in the indictment is that the defendants conspired to defraud the United States of its title to the land, or the "dominion" over it, which is the same thing; and, although Ryan had taken the land in good faith for his own exclusive use and benefit, he might, at any time before the expiration of the eight years and the making of his final proof, have abandoned it generally, or in favor of some particular person for a valuable consideration, without violating any law. I do not wish to paliate the acts of the defendants, or apologize for their conduct; but they are not, in my judgment, guilty of the crime charged in the indictment.

The oath of the applicant was thought by congress sufficient to prevent one man being used by another to appropriate the possession of the public land for any purpose, either temporary or permanent. If it is found insufficient for that purpose, congress must be appealed to for further legislation in the premises. The remedy already provided for this case is a prosecution for perjury and subornation of perjury; and the proof that would support the indictment in this case would support it in the other.

Other points were made on the argument, but it is unnecessary to consider them. I may add, however, that the doing of some act in pursuance of the conspiracy is an ingredient of the crime defined by section 5440 of the Revised Statutes, and that fact must be duly alleged. The first count does not contain any such allegation. But such act need not be in itself criminal, or amount to a crime, as contended by counsel for the demurrer. And where, as in this case, the statute prescribes the oath which the applicant must take, it is sufficient to aver in the indictment that the party took the oath required in such cases by law. The very words of the affidavit being prescribed by law, the court will take notice of them, and so must the defendants.

The demurrer to the indictment is sustained; but, as it appears, on the facts stated therein, that the defendant Thompson has committed the crime of subornation of perjury, he will be held over to await the action of the next grand jury in that respect.

United States v. Thompson and another. (Circuit Court, D. Oregon. November 22, 1886.)

Indictment for Conspiracy to Defraud the United States.

DEADY, J. This case is similar to the foregoing one in all respects, except that the land in question is the S. W. 2 of section 22, in township 1 N., range 20 E. of the same meridian. The defendant Thompson demurred to the indictment, and the same was argued and submitted with the demurrer in the foregoing case. The demurrer is sustained, and the defendant held to answer as above.

BIDDLE and another v. HARTRANFT, Collector.1

(Circuit Court, E. D. Pennsylvania. 1886.)

CUSTOMS DUTIES—Non-Enumerated Article—Act of Congress of March 3, 1883.

The jury found that bichromate of soda, a non-enumerated article under the act of March 3, 1883, bears a similitude, in the use to which it may be applied, to bichromate of potash, an enumerated article in said act. *Held*, that bichromate of soda was subject to the same rate of duty that that act imposes upon bichromate of potash.

This was an action brought by the plaintiffs to recover money alleged to have been illegally exacted as customs duties upon a quantity of bichromate of soda, imported into the port of Philadelphia by the plaintiffs. Bichromate of soda is a non-enumerated article under the act of congress of March 3, 1883. It was classified as being subject to the same rate of duty as bichromate of potash, and that duty was exacted accordingly. Plaintiffs contended that bichromate of soda should have been classified as a chemical salt, under Schedule A of section 2502 of said act. The case was tried October 5, 1885, before McKennan and Butler, JJ., and a jury, when the jury found, in a special verdict, inter alia, as follows: "That bichromate of soda is a non-enumerated article under the act of March 3, 1883, which bears a similitude in the use to which it may be applied to bichromate of potash, an article enumerated in said act."

Edward F. Hoffman, for plaintiffs.

John K. Valentine, U. S. Dist. Atty., for the defendant, cited Arthur v. Fox, 108 U. S. 125; S. C. 2 Sup. Ct. Rep. 371; Stuart v. Maxwell, 16 How. 162.

McKennan, J. The jury in this case have found that bichromate of soda is a non-enumerated article in the act of congress, and that it bears a similitude to bichromate of potash. It is evident, from a reading of the act, that it was not necessary for the jury to find the first fact.

It has been argued by the counsel for the plaintiffs that bichromate of soda is an enumerated article, when considered in the light of what he calls the residuary clause of the act of congress; but this view is entirely erroneous, for the reason that this residuary clause refers to previous portions of the same act, and to other acts of congress which contain an enumeration of articles, and impose specific duties upon them.

The only question to be decided in the case is, does the similitude clause of the act contain a provision imposing a tax upon bichromate of soda? In the opinion of the court, the decision of the supreme court in the cases cited in the argument settles this question beyond

Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

controversy, and renders it liable to the same duty which is imposed upon the article that it resembles, thus constituting a provision in law for its taxation. The act of congress, therefore, applies in this case, and makes bichromate of soda subject to the same rate of duty as bichromate of potash. That was the duty exacted in this case, and the court must therefore direct judgment to be entered in favor of the defendant.

Butler, J. When the case was called for trial I was very much impressed with the reference made by the counsel for the plaintiffs to the provision of the act of congress upon which he based his argument, viz., a provision subjecting all salts to a specific duty. When, however, that provision is clearly examined, it will be observed that it refers only to articles enumerated not before provided for. What was before provided for? First, bichromate of potash is provided for at three cents per pound. Therefore it appears that bichromate of soda, although not enumerated, is specifically provided for when provision is made in the act of congress for bichromate of potash, and when it is ascertained that bichromate of soda is in the similitude of bichromate of potash.

The sections of the act relied upon by the counsel for the plaintiffs, although argued with ability, are inapplicable to this case, because they are applicable only to such articles as are not before provided

for in the act of congress.

Estes and others v. Leslie and others.1

(Circuit Court, S. D. New York. November 20, 1886.

TRADE-MARKS—INFRINGEMENT—"CHATTER-BOOK"—"CHATTER-BOX."

The name "Chatter-book," printed upon the cover of the defendants' books of the juvenile character of the general appearance of the complainants' books, being in the opinion of the court an imitation of the name "Chatter-box," which, by association, when used upon books of a juvenile character, points "distinctly to the origin or ownership" of the books to which it is applied, an injunction pendente lite is granted against its use.

Motion for Preliminary Injunction. G. G. Frelinghuysen, for complainants. Fullerton & Rushmore, for defendants.

SHIPMAN, J. The name "Chatter-book," as printed upon the cover of the defendants' books, is, in my opinion, an imitation of the name "Chatter-box," which, by association, when used upon books of a juvenile character, points "distinctively to the origin or ownership" of

¹ See Estes v. Leslie, 27 Fed. Rep. 22.

the books to which it is applied; and the use by the defendants of the name "Chatter-book" upon the books which are represented by the exhibits in the case, the same being books of a juvenile character, of the general appearance, style, and manner of cover of complainants' books, should be enjoined pendente lite.

HERMAN v. HERMAN.

(Circuit Court, S. D. New York. November 15, 1886.)

PATENTS FOR INVENTIONS — INFRINGEMENT — ASSIGNMENT AND LICENSE—IN-JUNCTION AND DAMAGES—PARTY ENTITLED.
 Where a patentee has transferred "the exclusive right to the use of the im

where a patentee has transferred "the exclusive right to the use of the improvements and rights secured to her by the letters patent," for the whole term of the patent, "by way of license, and not as transfer of a title to the letters patent," and stipulates to "defend the validity of the patent against all infringements," and, on due notice of infringements, "to proceed to seek to enjoin" such infringement, and to secure such damages as may be reasonable and commensurate with the injury done by such infringement to the rights secured" by the transfer, an action for damages for infringement and injunction should be brought in the transferee's name, as the patentee would not suffer damages by the infringement and he not suffer damages hy the infringement and he not made herself lighte for not suffer damages by the infringement, and has not made herself liable for

the payment of damages, and they would not belong to her if recovered.

2. Same—Preliminary Injunction—Former Employe—Implied License—
"Daisy Hood."

Where the affidavits show that inventor, while employed by a manufacturer as superintendent, had been accustomed to prepare new designs for the use of defendant's business, for some of which he had obtained patents, and that of defendant's business, for some of which he had obtained patents, and that this was part of his employment and duty, and that in the course of such employment he designed the Daisy Hood and applied for a patent therefor, the solicitor's charge for which was paid by defendant, and defendant, for several months, manufactured the design under the inventor's superintendence and by his permission, and without further compensation to him than his salary, and the inventor, having quit defendant's employ, assigned the patent-right in the design to his wife, and organized a new firm for the manufacture of the design, to which his wife assigned the exclusive right to use the patent-right, held, that a grant, license, or privilege to use the design was implied from the contract and relation of the pateigs and that a prelimwas implied from the contract and relation of the parties, and that a preliminary injunction should not be granted.

In Equity. Bill for injunction and damages. Walter R. Leggat, for complainant. Wm. B. Ellison and Chas. C. Gill. for defendant.

Brown, J. The complainant seeks to enjoin the defendant against the manufacture and sale of a certain form of "hood" known as the "Daisy Hood," the design for which was invented by her husband, Isidor Herman, and for which a patent was taken out, in the complainant's name, October 12, 1886. The defendant does not assail the validity of the patent, but denies the right of the plaintiff to bring suit in her own name; and also sets up a license in effect for the manufacture of the hood in question.

- 1. Prior to the commencement of this suit the plaintiff, on the eighteenth October, 1886, transferred to the firm of R. Herman & Co., of which she is also a member, the "exclusive right to the use of the improvements and rights secured to her by the letters patent," for the whole term of the patent. The transfer of the exclusive right is further stated to be "by way of license, and not as a transfer of a title to the letters patent." In the written assignment the plaintiff further stipulated "at all times to defend the validity of the patent against all infringements; and, on due notice of any infringement, to proceed with all reasonable dispatch to seek to enjoin by all lawful means all such infringements and to secure such damages as may be reasonable and commensurate with the injury done by such infringement to the rights secured" by the transfer; and she thereby charges herself with "defending the rights secured by the patent against any and all infringements." The present suit is for damages for infringement, as well as for an injunction. The stipulation of the plaintiff, above recited, does not bind her, it will be observed, to pay all damages that may accrue to the transferees from any infringements of the patent. She agrees only to defend its validity in case of infringement, and "to seek to enjoin infringements and to secure damages." The exclusive right to the use of the patent having been transferred to the firm of Herman & Co., the complainant did not individually suffer any damages from infringements. damages recovered would belong, not to her individually, but to her firm; and, as she has not made herself responsible to the firm for the payment of these damages, the suit should, I think, have been brought in the firm name, though prosecuted in their names, at her expense and charge. Such was the view taken in the case of Washburn v. Gould, 3 Story, 122, upon covenants substantially the same as those in the present case.
- 2. The above formal defect of parties might perhaps be remedied by amendment; but upon the merits, as they appear from the bill and the affidavits submitted, there is, I think, too much doubt of any exclusive right in the plaintiff, as against the defendant, to authorize an injunction before the final hearing. Poppenhusen v. Falke, 4 Blatchf. 493. Isidor Herman, the inventor, had been for several years associated in business with the defendants,-part of the time as partner, and later as a superintendent employed at a large salary. By a contract made in November, 1885, his employment with the defendant was continued for a term of one year from January 1. 1886, at a salary equal to 50 per cent. of the net profits of the business, with the right to draw \$7,500 during the year, in consideration of which Isidor Herman agreed "to devote all his time and energy, during the said period, in superintending the manufacturing department of said business, as well as in the buying and selling of goods belonging to said business." His duties were not otherwise specified; but the affidavits submitted show that the duties he had been accus-

tomed to perform embraced the preparation of new designs, many hundreds of which he had prepared for the use of the defendant's business, and for some of which he had obtained patents. I am satisfied that this was a part of the plaintiff's employment and duty; and that the skill, taste, and inventive resource of Isidor Herman in the preparation of new designs were an important part of the consideration of his employment, on which the success of the business was in part deemed to depend: and that it was within the contemplation and expectation of both parties that the defendant should have the right to use in his business all the designs of Isidor Herman made in this department, and in the course of his employment. The design for the "Daisy Hood" was invented by him in 1886, while thus employed, and in the course of his employment. Application for a patent thereon was made by him on the sixteenth of June, 1886. Two days before that date, he had paid to his solicitors \$25 for that purpose; and on the same day received a check from the defendant for \$35, \$25 of which was on account of the solicitor's charge, and entered on the defendant's books, not as a charge against Isidor Herman, but as one of the items of the expenses of the defendant's business. In August following, Isidor Herman left the defendant's employ, without any legal justification, so far as the papers submitted to me disclose; and, having assigned the patent-rights to his wife, he organized a new firm for the manufacture of the "Daisy Hood" and other articles. Before Isidor Herman left the defendant's employ, the defendant had been engaged for several months in manufacturing the "Daisy Hood" under his superintendence, by his permission, and without objection, and without further compensation. The case. as presented upon the affidavits, seems to me to fall within the principles of the decisions in McClurg v. Kingsland, 1 How. 202, and Chabot v. American Button-hole Co., 6 Fish, Pat. Cas. 71, in which a license, special privilege, or grant to use the invention is to be necessarily inferred from the contract, and from the relations and acts of the parties. See, also, Blanchard v. Sprague, 1 Cliff. 288.

The motion for an injunction should be denied.

Baltimore Car-Wheel Co. and others v. Bemis and others.

(Circuit Court, D. Massachusetts. November 24, 1886.)

PATENTS FOR INVENTIONS—LIBEL—INJUNCTION.

There is no jurisdiction in the United States courts of equity to enjoin a libel on the rights or title of an owner of letters patent.

Benjamin Price and William C. Williamson, for complainants.

Benjamin F. Thurston and Wilmarth H. Thurston, for respondents.

Heard by Colt and CARPENTER, JJ.

CARPENTER, J. This bill alleges that the complainants are the owners of and licensees under certain letters patent for cars and car axle boxes, and that the respondents have falsely and maliciously published statements and written letters to the effect that the complainants have failed in a suit for infringement of said letters patent brought against the respondents; that the axle boxes and gear manufactured by the complainants are infringements of certain other letters patents owned by the respondents; and that suits are about to be brought by the respondents, on account of such infringement, against the complainants, and those who shall purchase and use their axle boxes and gears. The bill further alleges that, by reason of the said false statements, those who desire to purchase and use the apparatus made and sold by the complainants are deterred from so doing through fear of litigation, and the business of the complainants is thereby injured; and prays for an injunction. To this bill respondents demur.

We think the demurrer is well founded. There is no jurisdiction in a court of equity to enjoin libel on the rights or title of the complainant. We understand this to be the settled law both in England and in this country, in the absence of statutory provisions conferring such jurisdiction. The question is so fully and clearly discussed in the leading decisions that we do no more than cite them. Prudential Assur. Co. v. Knott, L. R. 10 Ch. 142; Boston Diatite Co. v. Florence Manuf'g Co., 114 Mass. 69; Kidd v. Horry, 28 Fed. Rep. 773.

OSBORN v. Judd and others.

(Circuit Court, S. D. New York. November 20, 1886.)

Patents for Inventions — Infringement — Preliminary Injunctions—Banner Rod.

A preliminary injunction will not be granted to restrain the infringement of a "design for a banner rod, consisting of a conventional imitation of a straight twig with the bark, and slantingly cut ends;" the section which relates to design patents demanding, it may be supposed, the exercise of more genius than is exhibited by it.

Motion for a Preliminary Injunction against the infringement of a design patent. Denied.

Joshua Pusey, for complainant. Briesen & Steele, for defendants.

SHIPMAN, J. This is a motion for a preliminary injunction against the infringement of a design patent. The design is sufficiently stated in the claim, which is as follows: "The design for a banner rod, herein shown and described, the same consisting of a conventional imitation of a straight twig with the bark on, and slantingly cut ends."

I have great doubt whether there is anything which shows genius, or which indicates the work of an inventive mind, and therefore whether there is anything patentable in merely making a banner rod to imitate measurably a straight twig with the bark on. This natural and simple design for a banner rod would, I think, readily suggest itself to the upholsterer. There is so much reason to suppose that the section which relates to design patents demands the exercise of more genius than is exhibited in the patented design that the motion should be denied.

Union Paper-Bag Machine Co. and others v. Standard Paper-Bag Co. and others.

(Circuit Court, D. Massachusetts. November 26, 1886.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PAPER-BAG MACHINES.

Claims 8, 10, and 13 of reissued letters patent No. 8,357, July 30, 1878, for improvements in paper-bag machines, by opening the end of a tubular blank, and forming the first or diamond fold thereof by means of the conjoint action of two adjacent moving surfaces, these surfaces consisting of two revolving rollers into which the blank is fed, the lower roller drawing the free or lipped end of the blank in one direction, while the other roller, moving in another direction, pulls the other side of the blank by the seam connecting it with the preceding blank, this operation extending the mouth of the bag into a diamond fold shape, held not to be infringed by defendant's machine, which has only one roller, and no second divergent moving roller; the fold not being formed by the conjoint action of two diverging moving surfaces.

In Equity.

George Harding and M. B. Philipp, for complainants.

Chauncey Smith, for defendants.

Colf., J. This suit is brought for infringement of reissued letters patent No. 8,357, dated July 30, 1878, granted to Alfred Adams and Byron B. Taggert, as assignees of Charles B. Stillwell, for improvements in paper-bag machines. Three claims are involved in the present controversy,—the eighth, tenth, and thirteenth.

Claim 8 is as follows:

"(8) As an improvement in the art of forming satchel-bottomed paper bags by machinery, the method hereinbefore set forth, of opening the end of a tubular blank, and forming the first fold thereof, by means of the conjoint action of two adjacent diverging moving surfaces, substantially such as described, between which the blank is continuously fed, and to which surfaces the contiguous sides of the blank are caused temporarily to conform as they move over said surfaces by means substantially such as described, whereby the fold is formed, while the blank is in motion, simply by the strain upon the paper itself."

The tenth claim is like the eighth, with the addition of a compressor which presses the fold upon the blank. The thirteenth claim embraces the various operations of the Stillwell machine, whereby bags are formed from a tubular blank while passing continuously The improvements of Stillwell relate to through the machine. satchel-bottomed bags, which, when opened, have a rectangular bottom, so they will stand alone. In the present suit we are specially concerned with the improvement in the means for making the primary or diamond fold. By the conjoint action of two adjacent divergent moving surfaces the diamond fold is formed while the blank is continuously fed. These moving surfaces are in the form of two revolving rollers, into which the blank, when partially cut, is fed. The lower roller, by means of pins or grippers, draws the free or lipped end of the blank in one direction, while the other roller, moving in another direction, pulls the other side of the blank by the seam connecting it with the preceding blank. This operation extends the mouth of the bag into a diamond fold shape. The fold is then pressed between the upper roller and a third roller called the "compressor."

In defendants' machine there is one roller which draws away one side of the blank, and forms, or partially forms, a diamond fold on that side. At the same time a spear-pointed separator, acting conjointly with this roller, helps to bring the other side of the blank into shape; so that, when the blank passes through the second pair of rollers, the diamond fold is completed by the compression of the paper on itself. In this machine there is no second divergent moving roller, and the fold is not formed by the conjoint action of two diverging moving surfaces.

It is urged that the supporting plates near the separator, and the lower rollers, 1 and 2, of the defendants' machine, act as a second diverging moving surface. I cannot concur in this view. The formation of the diamond fold by the conjoint action of two diverging moving surfaces being the essence of the eighth claim, and the defendants not making their diamond fold by the employment of two such agencies, there can be no infringement. The means for making the diamond fold forming one of the elements of the tenth and thirteenth claims, it follows that there is no infringement of those claims.

Bill dismissed, with costs.

THE AURANIA AND THE REPUBLIC.1

OCEANIC STEAM NAV. Co., Limited, v. THE AURANIA.

CUNARD S. S. Co., Limited, v. THE REPUBLIC.

(District Court, S. D. New York. October 27, 1886.)

1 Collision—Two Steam-Ships—Fairway—Gedney's Channel.

In the afternoon of September 19, 1885, as the steam-ships Aurania, of the Cunard Line, and the Republic, of the White Star Line, were proceeding out to sea from the harbor of New York, they came into collision near Gedney's channel, the stem of the Republic striking the port quarter of the Aurania. The Aurania was but slightly injured, and continued her voyage. The Republic had her whole stem carried away to port, and was obliged to return to New York, where she was repaired at an alleged expense of \$35,000. Crosssuits having been brought by the owners for the damages respectively sustained by the vessels, it was held that both were in fault for the collision.

2. Same—Vessels about Abeam—One Drawing Ahead—Courses Slightly Converging—Crossing or Overtaking Rule.

At the time when whistles were properly exchanged between them,—i. e., when they were about a half mile apart and two miles from the Fairway buoy, which marks the entrance to Gedney's channel over the bar,—the vessels were on courses converging by at least three points. Their difference in speed, as deduced from careful computations, was not more than from one and two-tenths to one and five-tenths knots, and, it being found, therefore, upon very conflicting testimony, that each bore from two to three points forward of the other's beam, held, that in such a situation neither was an "overtaking" vessel; they were crossing vessels, under the sixteenth rule, and the Republic, leaving the Aurania on her starboard hand, was bound to keep out of the way, and was in fault for not doing so.

8. Same — Large Vessels — High Speed — Close Approach — Unchanged Courses—Imprudent Navigation.

From the evidence it appeared that the vessels, immediately prior to the collision, were sailing on courses converging by not more than one and one-half points. They were not distant from each other more than from 250 to 300 feet, and the apparent change, of course, which caused the stem of the Republic to strike the Aurania, while it might have been caused by porting, through miscalculation or misapprehension of an order to starboard, was more probably caused by the effect of the south wind acting upon the stern of the

Reported by Edward G. Benedict, Esq., of the New York bar.

Republic, while her forward part was in the Aurania's lee, and causing her stern to swing unavoidably to the northward, and her stem against the Aurania. Held that, whichever of these causes precipitated the collision, it was imprudent navigation in two vessels of such size, going through the water at a speed of about 15 and 16½ statute miles, respectively, upon converging courses, to have come so near each other, without any material effort by either up to that time to keep away.

4. Same—Duty of Vessel having Right of Way to Change Course, if Col-

LISION IMMINENT.

It was manifest to the Aurania, at least two minutes before the collision, that the Republic was not performing her duty to keep out of the way, but was keeping on in a manner that involved risk of collision. Held, that it thereupon became the duty of the Aurania, though she had the right of way, to do what she could to avoid risk of collision; i. e., in this case, to have ported, and kept away from the Republic. For her failure to do so, held, that the Aurania also was in fault for the collision.

5. SAME—RULES OF NAVIGATION APPLICABLE TO COAST WATERS—"HARBORS."

The question considered as to whether the international rules of navigation, (act March 3, 1885; 23 St. at Large, 438,) or the rules previously existing, (Rev. St. § 4233,) or the local rules of the supervising inspectors, are applicable to vessels navigating within harbors situated on the coast waters of the United States. The international rules adopted in this case, for the reason that the pilots and officers of each vessel apparently regarded themselves and the other vessel as sailing under the international rules.

6. Same—Dividing Line between Crossing and Overtaking Vessel.

Where vessels are sailing on converging courses, the range of the colored lights, i.e., two points abaft the beam, may be taken as the dividing line in determining whether the vessels are crossing or overtaking; if bearing less than two points aft of abeam when the need of precaution begins, they are crossing vessels, under article 16.

7. Same—When Collision Rules Apply to Approaching Vessels.

The rule of navigation applicable to approaching vessels depends upon the actual situation of the vessels at the time when the necessity for precaution begins. Everything prior to that is immaterial, except as it may give each some knowledge of the other's intention.

8. Same—Helm—Rate of Change of Heading—Steering under Reversed Engines—Stopping—Statistics—See Note to Page 121.

At about 24 minutes past 3 o'clock in the afternoon of September 19, 1885, the weather being fine, the sea smooth, the tide flood, and the wind light from the southward, as the steamship Republic, of the White Star Line, and the Cunard steamer Aurania, both outward bound from this port, and in charge of competent pilots, were about entering Gedney's channel to cross the bar, they came into collision; the stem of the Republic striking the port quarter of the Aurania about 50 feet from her stern, and at an angle of about 25 or 30 deg. The Aurania's stem was, at the time, about 100 feet to the westward of the Fairway buoy, which is situated in the middle of the western entrance to that channel. The Aurania, though somewhat damaged, was not so much injured as to prevent the continuance of her voyage. The Republic's whole stem was carried away to port, compelling her to return to New York for repairs, to her alleged damage of \$35,000. The above cross-libels were filed by the owners to recover their respective damages, each alleging that the collision was by the other's fault.

The Aurania is of 4,030 tons register, and 7,275 tons burden, 480 feet long by 56 feet beam, and she was drawing $26\frac{1}{2}$ feet of water.

The Republic is of 2,187 tons register, 3,700 tons burden, 420 feet long by 42 feet beam, and she was drawing 251 feet. The Republic passed Governor's island (Fort William) under full headway at 2:05 The Aurania was then a little behind, and not under full headway; but she overtook and passed the Republic about midway between Bedloe's island and Robbins reef. After passing the Narrows, the Aurania kept to the main or Horseshoe channel, around the south-west spit. The Republic took the Swash channel, being, at the time she left the main channel, from one to two miles astern of the The Swash channel is a short cut to the left; the main channel sweeps around to the right; and the distance to the Fairway buoy is about two and one-half miles greater by the main channel than by the Swash. The two channels are separated by shoals, impassable to such steamers, until within about one mile of the Fairway buoy, towards which the two channels converge by an angle of 25 deg., and there unite. At the place of widest separation the two channels are about two miles apart.

The speed of the two steamers, and the precise direction of their courses, as they approached the buoy, when from half a mile to a mile distant from it, are in dispute. The Aurania's speed was admitted to be not less than between 14 and 15 knots; the Republic's between 11 and 12. Their courses differed from one to two and a half points. About the time when the Republic was approaching the end of the Swash, or was already rounding out of it, the Aurania gave her a signal of one short whistle, to which the Republic replied with two, which, if the nineteenth article of the new rules is applicable, would indicate that the one was directing her course to the right, the other to the left. Each did so to some extent, but not enough to avoid collision.

Although there is sufficient water on the south side of the Fairway buoy, it is the most common practice for outward bound steamers, like these, to go to the northward of it in order the more easily to make the necessary turn to the southward after passing it; and the channel is not wide enough for two such steamers to navigate safely abreast of each other on the northerly side. The pilot and the master of the Aurania testified that it was their intention to pass on the southerly side of the Fairway buoy; that they steered for that buoy, keeping it, as they approached it, a little on the port bow; and that the blow of the Republic so changed the Aurania's direction that she passed the buoy close on its northerly side, instead of the southerly side, as intended. Both vessels were under full speed of their engines from the time of passing Governor's island, about 2:05, although there was some increase at least in the Republic's speed as the The Aurania did not slacken steamers proceeded down the bay. speed after her whistle, and prior to the collision. The Republic stopped and reversed her engines not more than a half minute previous, but without any material effect in checking her speed.

Most of the witnesses testified that shortly before the collision, and when the Republic's stem was from 60 to 300 feet from the Aurania's side, her stem seemed suddenly to fall upon the Aurania. The libelants contended that the Aurania was an overtaking vessel, and, as such, bound to keep out of the Republic's way; that she was also in fault for not keeping to the starboard side of the channel, in accordance with her signal, and for coming so near to the Republic's course, and then porting her wheel, as they allege she did, so as to throw her quarter upon the Republic's stem. The Aurania denies these alleged faults. She denies that she ported at that time, and denies that she was an overtaking vessel. She alleges that the vessels were crossing; that the Republic, having the Aurania on her own starboard hand, was bound to keep out of the way; and that the Republic brought on the collision by not doing so, and by porting her helm just prior to the collision, which porting the Republic denies.

Wheeler & Cortis and J. H. Choate, for the Republic. Owen & Gray and F. D. Sturgis, for the Aurania.

Brown, J. Considering that Gedney's channel across the bar is the principal, if not the only, thoroughfare for deep draught vessels in coming into and going out of the harbor of New York, it is a matter of surprise as well as of regret that where two vessels are going down the bay, and are approaching that fairway, the one by the Swash channel, and the other by the Main or Horseshoe channel, any doubt or uncertainty should exist which of them should keep out of the way of the other. It is still more to be regretted that any doubt should exist, since our adoption of the new international rules by the act of March 3, 1885, (23 St. at Large, 438,) whether the case is governed by those regulations, or by the rules previously existing and embodied in the Revised Statutes, (section 4233,) and by the local rules adopted by the supervising inspectors. And yet, at the very threshold of this case, I find a difficulty and embarrassment in determining which set of rules is applicable to vessels navigating in harbors within our coast waters that I have not been able satisfactorily to solve.

The enacting clause of the act of March 3, 1885, provides "that the following 'Revised International Rules and Regulations for Preventing Collisions at Sea' shall be followed in the navigation of all public and private vessels of the United States upon the high seas, and in all coast waters of the United States, except such as are otherwise provided for." Then follow the twenty-seven articles of the new regulations. The concluding section of the act is a repealing clause, declaring that "all laws and parts of laws inconsistent with the foregoing revised international rules and regulations for the navigation of all public and private vessels of the United States upon the high seas, and in all coast waters of the United States, are hereby repealed, except as to the navigation of such vessels within the harbors, lakes, and inland waters of the United States."

Both these vessels were, indeed, English; but the British act subjects British ships to these same regulations, whether within British jurisdiction or not. Orders in Council, April 14, 1879, (4 Prob. Div. 243;) Orders in Council, August 11, 1884, (9 Prob. Div. 247.) Article 25 of the new rules provides that "nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland navigation. If, therefore, by the exception in the repealing clause of the act of March 3, 1885, the old rules are in force in the navigation of harbors situated within our coast waters, they would seem to cover foreign vessels while navigating within such a harbor whether in going out or in coming in. The new rules have made important changes. See 1 Abb. Nat. Dig. 664. Besides those there mentioned, article 14, in relation to sailing vessels, is wholly changed in phraseology, and would seem to reverse the obligation to keep out of the way as it formerly existed under rule 12, in certain situations. See The Commodore Jones, 25 Fed. Rep. 506. The changes in the new regulations are so numerous and important that, in my judgment, it would prove practically impossible for the two sets of rules to be applied successfully to vessels engaged in foreign commerce, and upon the same voyage, on passing the indefinite line where a "harbor" might be supposed to begin; and only misapprehension, confusion, and fatal consequences can be expected from any such attempt.

The exception as regards "lakes and inland waters of the United States" seems to be surplusage, for the reason that lakes and inland waters do not fall within the enacting clause of the statute, which applies only to "the high seas and coast waters." This language may have been employed from superabundant caution, to indicate that the old rules were unchanged as respects the "lakes and inland waters." The word "harbors" cannot be construed in the same sense, a sociis, as meaning harbors only that are situated upon the lakes or inland waters, without taking from that word all effect whatsoever; since that meaning is already covered by the words "lakes and inland waters," without the use of the word "harbor;" while, as it stands, the word "harbor" has an important significance, as a strict excep-

On the other hand, inasmuch as the new rules are a revision of the old, and aim to supply several of their deficiencies; as they are designed to conform to the rules already adopted by the principal maritime nations of the world; and as they cover the whole ground of the former rules, and, in general, are plainly designed to supersede them; and as no object is apparent in retaining the old rules within the harbors of the seaboard; and as strong reasons exist against the retention of two sets of rules, applicable to the same ocean voyage,—it is difficult to suppose that it was the intention of congress, by this exception, to continue the old rules in force as respects ocean voyages terminating within the seaboard harbors. Moore v. American Trans. Co., 24 How. 1, 36; The Garden City, 26 Fed. Rep.

766, 773; U. S. v. Kirby, 7 Wall. 482, 486; U. S. v. Tynen, 11 Wall. 88, 92; Murdock v. City of Memphis, 20 Wall. 590, 617; U. S. v. Claflin, 97 U. S. 546, 552; U. S. v. Aufmordt, 19 Fed. Rep. 897.

Upon this view of the possible intention of the exception as respects the use of the word "harbor," if its effect were limited to trips confined to the harbor only, so as to give the word some effect,—that is, to navigation beginning and ending within the harbor,—the same practical difficulty would arise in another form, and the same liability to fatal confusion as between foreign bound vessels, and vessels navigating the harbor only; between which there is equal necessity for intelligible rules and a common understanding. I see no way out of these various difficulties that would not altogether nullify the effect of the word "harbor" in the exception, by rendering it wholly superfluous, like the words "lakes and inland navigation." The subject should receive, I think, further legislative consideration, and it is hoped that the difficulties referred to may be remedied.

The place of collision being inside of the bar, and upon pilotage ground, may be said, in a general sense, to be within the "harbor" of New York; and yet being in the lower bay, and not in a part of the bay where vessels could either moor or safely lie at anchor, it is not within the meaning of the word "harbor" in its most strict and proper sense; namely, "a safe station for ships; a place of refuge, shelter, rest." Worcest. Dict.

The fair inference from the pleadings and the testimony, moreover, is that the pilots and officers of each of the vessels regarded themselves and the other vessel as sailing under the new rules; and, this being the understanding of both, I shall treat the case, as respects the question of fault, according to the new rules, by which they both deemed themselves governed.

1. The first and principal question is whether, under all the circumstances of the case, the two steamers are to be regarded as crossing vessels, under the sixteenth article of the new rules; or whether the Aurania was an "overtaking" vessel, within the twentieth article. If the crossing rule governs, then the Republic is plainly in fault for not keeping out of the way of the Aurania, which was upon her starboard hand. If the Aurania was an overtaking vessel within the meaning of the twentieth article, then, under the language of that article, the overtaking rule controls, the Aurania was bound to keep out of the Republic's way, and was in fault for not doing so.

By article 20 it is declared: "Notwithstanding anything contained in any preceding article, every ship, whether a sailing ship or a steamship, overtaking any other, shall keep out of the way of the overtaken ship." Article 22 of the former regulations was to the same effect, excepting the words "notwithstanding anything contained in any preceding article," which are new. There is no doubt that the language of the twentieth article was intended to remove any doubt that might

formerly have existed as to which rule should govern in cases where the vessels were crossing, and at the same time one of them was an overtaking vessel. The Seaton, 9 Prob. Div. 1. Under the former rules applicable to sailing vessels. 19 and 22, there was, in certain situations, a similar ambiguity, which the new rules have removed. The Commodore Jones, 25 Fed. Rep. 506. While article 20 leaves no doubt that it governs all cases that fall within its provisions, the new rules do not define in what cases a vessel is to be deemed an overtaking vessel, rather than a crossing one. The question whether, in a particular situation, a vessel is one or the other, remains to be determined much as before.

The terms "crossing" and "overtaking" are not mutually exclusive. A vessel may be crossing another's course, and at the same time overtaking her, in a certain sense; or she may be overtaking another in a general or popular sense, or in reference to certain aspects, and clearly not be an overtaking vessel in the sense of the rules of navigation. A faster vessel, sailing a racing voyage across the Atlantic, and starting after her rival, might, in the popular sense, be said to overtake and pass the other whenever she got nearer to her destined port, though at no time sailing within sight of the other. So two vessels beating up stream, against a head wind, might be so navigated as to be always sailing on opposite tacks. The hinder vessel, if all the time gaining on the other, would in one sense be an overtaking vessel,—that is, overtaking in reference to their general progress; but she would not be an overtaking vessel in the sense of the rules of navigation so long as the two were running on opposite tacks. The vessels, in that case, would be crossing vessels, and the crossing rule would apply, though the one to leeward was gaining upon the When beating, and on the same tacks, the faster vessel, if behind, would be overtaking in the sense of the rules, and the overtaking rule would govern. So two vessels sailing in independent channels, separated by dry land, as in the two channels that pass Blackwell's island, or vessels sailing in channels separated for a considerable distance by impassable shoals, are not, for the time being, within the scope or intention of the rules of navigation, though the one that went ahead of the other in a different channel might be said, in a certain sense, to overtake and pass her. The rules are made to avoid collisions. They are applicable in circumstances only where there is some occasion for the vessels to heed each other, and from the time only when the need of precaution begins. The Nichols, 7 Wall. 656; The Cayuga, 14 Wall. 270. The terms used in the rules are, moreover, used in the nautical sense, and must be applied as seamen are wont to apply them. The Franconia, 2 Prob. Div. 8.

The libelants insist that the Aurania, in this case, was an overtaking vessel, because, at the time when the signal whistles were exchanged,—i. e., when the vessels were about a half mile apart and from one to two miles distant from the Fairway buoy, which may be assumed to have been the proper time for mutual precaution,—the Aurania was further than the Republic from the Fairway buoy, which was the immediate objective point of both. The Aurania claims that, inasmuch as she had once passed the Republic above the Narrows, and was from one to two miles ahead of the Republic when the latter took the Swash channel, if either was an overtaking vessel it was the Republic, which sought, by means of the short cut through the Swash, to head off and pass the Aurania before the latter reached the buoy.

Each of these contentions is, perhaps, correct, in a certain sense of the word "overtaking;" but neither, I think, in the sense of the rules of navigation. These rules, as I have said: have respect only to the liability to collision, and do not come into operation until the need of precaution begins. When the Aurania was at the south-west spit. in an independent channel, separated from the Republic, which was then in the Swash, by two miles of impassable shoals, and over three miles distant from the Fairway buoy, these rules had no application to them. Either vessel could move in any direction she saw fit without the slightest present danger to the other. Neither was in any way bound to pay attention to the other at that distance. rules, therefore, had no active operation upon either at that time, (The Monticello, 17 How. 152, 155; The Dexter, 23 Wall. 69, 75;) and, when they approached each other near enough to make it necessary or proper to regard each other's movements, the rules became applicable according to the situation in which they then were. immaterial how either vessel reached the situation in which the rules first became applicable. It would be wholly inadmissible to apply contrary rules to the same situation, according as the faster vessel had come through the Narrows, or from South Amboy; or had passed the other an hour before, or had not passed her at all. The rule applicable must depend upon the actual situation at the time when the necessity of precaution begins. Everything prior to that I hold to be immaterial, except as it might give each a knowledge of the other's in-So the mere fact that the faster vessel has a larger distance to travel to reach the point where their courses intersect is also immaterial. In almost every case of crossing vessels, one has a longer distance to travel than the other, for it is seldom that both are going at the same speed: but that fact does not bring them within the overtaking rule. The faster vessel may be approaching the other at any angle from abeam to eight points forward of the latter's beam, and may have a much longer distance to travel to reach the point of intersection; but no one would call such a vessel an overtaking one in They would plainly be crossing vessels under the the nautical sense. sixteenth rule.

In the case of Whitridge v. Dill, 23 How. 448, and The Cayuga, 14 Wall. 270, the supreme court, in stating the general rule as to the duty of an overtaking vessel, also indicate the meaning and the application of the rule. In the latter case the court say:

"Undoubtedly, where two ships are running in the same direction, the ship astern, if sailing faster than the ship ahead, is, in general, bound to adopt the necessary precautions to avoid collision. * * * Where a steamer astern, in an open sea and in good weather, is pursuing the same general course as the one ahead, and at greater speed, the steamer astern, as a general rule, is required to give way, or adopt the necessary precautions to prevent collision, as the steamer ahead is entitled to the road."

The Cayuga and the ferry-boat James Watt were in that case coming down the North river, converging at an angle of about three points; the former heading about S. S. W.: the latter bound from Hoboken to Barclay street, and heading about S. by E. The Cayuga claimed that the ferry-boat was an overtaking vessel bound to keep out of the way, and that, when a half mile distant, she bore off the Cayuga's starboard quarter. But the court found the facts otherwise, and that, though the Watt was somewhat faster, she was but a "little behind" the Cavuga when the need of precaution began. court held that the overtaking rule did not apply, and say that, even supposing that the Cayuga was at first slightly ahead, "the relative situation was that of the fourteenth, [crossing,] and not of the seventeenth, [overtaking,] rule. Precautions at that time were not necessary, as the distance between the two steamers, measuring east and west, [nearly abeam,] was very considerable; but they were moving on converging lines; and, as they advanced, that distance was fast reduced, which soon created the necessity for precautions to prevent collision; and the testimony entirely satisfies the court that, when the necessity for precaution commenced, the two were nearly abreast." As respects the greater speed of the ferryboat, the court sav:

"Every vessel overtaking another vessel, it is said, shall keep out of the way of the vessel ahead; but that rule cannot properly be applied in this case, as the two steamers were crossing or running on intersecting lines, in which case the question is not, in general, affected by the comparative speed of the two vessels, nor by the fact that the one or the other was slightly ahead when the necessity for precaution commenced. Undoubtedly, where two ships are running in the same direction, the ship astern, if she is sailing faster than the ship ahead, is, in general, bound to adopt the necessary precautions to avoid a collision; but it is clear that the rule does not, in general, apply in a case where the ships are crossing, or are distant from each other on a right line, and are running on intersecting lines."

The language of the new rule does not weaken the force of the remarks here quoted as regards the meaning of the phrase "overtaking vessel," in the sense of the rules of navigation. To constitute that relative situation one vessel must be ahead, and the other more or less astern, when the need of precaution first arises. A vessel coming up from abeam, or not aft of the other's beam, is not astern of the other, and is, therefore, not an overtaking vessel in the sense of the rules. On that ground, in the case of The Peckforton Castle, 3 Prob. Div. 11, that vessel was held to be a crossing vessel, and not an overtaking one.

The real difficulty arises in determining how much bearing aft of aboam shall be held sufficient to convert a crossing vessel into an overtaking one; and at what time or distance, in the approach of the faster vessel towards the other, their relations and obligations shall be adjudged and held fixed under the rules; for, when once fixed, the duty of keeping out of the way is not shifted till the danger is past. Mars. Coll. 312; The State of Texas, 20 Fed. Rep. 255; The Peckforton Castle, 3 Prob. Div. 11; The Seaton, 9 Prob. Div. 1. If there was any definite nautical usage or common understanding that determined at just what bearing aft an approaching vessel was considered to be an overtaking vessel rather than a crossing vessel, that, doubtless, would be sufficient. The bearings of vessels from each other, where neither is directly ahead or directly astern, are usually referred by seamen to three divisions of the ship: the bow, the beam, and the quarter. I doubt whether a seaman would ever speak of an approaching vessel that came in sight from only one or two points abaft his beam as astern of him at all; he would say she was so many points abaft his beam. And this might possibly be applied until the bearing became more upon the quarter than on the beam; i. e., four points or more aft of abeam. In the case of The Privateer, L. R. 9 Ir. 105, it was held that by a wind "aft," in subdivision 2, of the fourteenth rule, as respects sailing vessels, was meant a wind at least four points abaft the beam. In that view, any vessel coming up from less than four points aft of abeam would be a crossing vessel, and not an overtaking one. In the case of The Breadalbane, 7 Prob. Div. 186. Sir Robert Phillimore states that the Trinity brethren advised him, in that case, where the vessels converged one and one-half points, and one bore from four to five points abaft the other's beam, that they were crossing vessels, and not overtaking. The report of that case on this point does not seem clear. But there is no evidence in this case directly bearing on the general understanding of these nautical terms; and it is doubtful whether there is any fixed use or common understanding that would exclude the application of the word "overtaking" or "astern" from a range of less than four points aft of abeam. If there is no settled understanding, the courts before which the question arises from time to time must, in the absence of any statutory definition, give that construction to the rule which seems best to accord with nautical use, and to furnish the best practical guide for avoiding collisions. The Peckforton Castle, 3 Prob. Div. 11. In the case of The Franconia, 2 Prob. Div. 8, the range of the regulation colored lights, i. e., two points aft of abeam, was adopted by the court of appeal as the dividing line between an overtaking and a crossing vessel, on account of its practical convenience; and that rule has been, to some extent, followed in this court. The State of Texas, 20 Fed. Rep. 254, 256; The State of Alabama, 17 Fed. Rep. 847.

Whatever rule be adopted, it must apply at night as well as by

day; and it ought therefore to be a rule capable of practical and certain application both by day and by night. But to determine one's own bearing accurately with reference to the beam of another ship, at a sufficient distance to avoid risk of collision, is no easy matter by day; and by night it would often be well-nigh impossible without artificial aids. The colored lights furnish such aids, if the range of two points aft of abeam be adopted as the dividing line between a crossing and an overtaking vessel. Under the existing regulations, no other dividing line furnishes to the approaching vessel the requisite certainty or means of distinguishing in season on which side of the line she may The very object of colored lights is to enable vessels to avoid each other that are meeting or crossing. The fixing of the range of the colored lights at two points abaft of abeam for these purposes would seem naturally to determine also the range of vessels that should properly be deemed crossing. This rule promotes simplicity, harmonizes with the existing regulations, and avoids confusion, by treating all vessels approaching from within that range as crossing vessels.

In the case of The Peckforton Castle, 3 Prob. Div. 11, two of the judges stated that, without dissenting from this rule, they should consider it as open for further consideration in any subsequent case, but without indicating in which direction they thought the rule adopted might be modified. The case of The Cayuga, 14 Wall. 270, before cited, is in harmony with this view; for, though the ferry-boat was "a little behind" and "nearly abreast," she was evidently a little aft of abeam, but less than two points; and it was held to be a crossing, and not an overtaking, vessel. I shall continue to follow this rule, therefore, until some better is found, or until it is modified by some higher authority.

The time when the whistles were exchanged may be fairly taken as the time recognized by both ships when precaution as respects each other was necessary or proper. This was probably from five to seven minutes before the collision, and in ample time for either to avoid the They were then estimated to be about a half mile apart. They were in what is described as the "fourth situation" of the supervising inspector's rules, and their local rules, if applicable, (rules 2, 6,) required these two vessels, when within that distance, to signal each other in order to indicate their intentions, and to come to a common The crossing or the overtaking rule must therefore understanding. be applied, according to their relative situations, courses, and bearings, as they existed at that time. The Republic claims that the Aurania then bore several points aft of her beam; and many of her witnesses so testify. An equal number of the Aurania's witnesses say that each then bore forward of the other's beam. It is unnecessary to dwell upon the great contradictions and inconsistencies to be found in the direct testimony on this subject, because their bearings at the time of the whistles can be determined from the speed of the two vessels during the few minutes preceding the collision; and, although there is considerable diversity in the testimony on this point also, there are sufficient data to determine the speed approximately,—sufficient, at least, to determine the bearings of the two vessels from each other, as nearly as is necessary for this case.

Speed. The time and distance from Governor's island (Fort William) to the place of collision being known, the determination of the final speed of the two vessels during the six or seven minutes prior to the collision would be a simple computaton, were it not for two additional elements that need to be taken into account, viz., the effect of the tide, which operated unequally against the two vessels while the Republic was in the Swash channel; and, secondly, the fact that the Republic's speed was all the time increasing. Capt. Irving estimates this increase to have been from a speed of 10 knots through the water. when passing Governor's island at 2:05 p. m., to 111 knots through the water at the time of the collision, at 3:24 p. m. The pilot says that in the Swash the tide was ahead, and "a good deal stronger than in the main channel." Taking the difference to be a half knot an hour, the excess over the main channel rate, during the 18 minutes that the Republic was in the Swash, would be equivalent to an addition of 900 feet to the distance run by her. From the official chart (Exhibit 2) it appears that the distance from Governor's island, by the dotted course, through the Swash channel, to the Republic's place at the collision (550 feet west of the Fairway buoy) is 89,060 feet; to which if 900 feet be added, we have 89,960 feet traversed in 79 minutes, or an average of 11.24 knots against tide at the main channel rates. These rates, according to the official chart, are one and one-tenth knots below the Narrows, and nine-tenths of a knot in the upper bay. The pilot testified, if I understand him rightly, that in the vicinity of the collision the tide was about 1.25 knots; but, as the two vessels met the tide, which there runs in the last quarter somewhere between N. W. and N., at an angle of from one to four points. its retarding effect, if running N. W., would not exceed the rate of one Assuming, for the present, a N. W. tide in that vicinity, the head tide throughout would be only a little over one knot, except in the Swash, and the average rate of the Republic's speed would therefore be 12.25 knots through the water. Capt. Irving estimates the flood-tide at from half a knot to one knot faster in the upper bay than in the lower hay. If this were correct, it would add correspondingly to the Republic's speed through the water; but I consider the official chart more probably correct. If to the above average rate be added one-half of Capt. Irving's estimate of the increase in the rate of speed, the Republic's final speed, about the time of collision, would be 13 knots through the water, or 12 knots by land.

¹A convenient formula for these computations is the following: Divide the distance in feet by the number of minutes, multiplied by 101½. The quotient is the speed per bour in knots, reckoning 6,080 feet to the knot.

The Republic's log further states, however, that she passed the Narrows at 2:38 P. M. Taking Fort Tompkins for the point noted, that being the most southerly point, and yielding the least final speed, the distance from Fort William is 35,300 feet, which, traversed in 33 minutes, gives an average, against tide, for that part of the distance of 10.56 knots, or 11.46 knots through the water. The remaining distance (54,660 feet) to the place of collision, traversed in 46 minutes, gives an average of 11.73 by land, or 12.80 through the water. From a comparison of the averages of these two parts it results that, if the increase was uniform, the whole difference in speed was 2.68 knots, and the rate through the water at Fort William would be 10.90 knots, at the Narrows 12.02 knots, and at the collision 13.58 knots. testimony is that the Republic was all the time increasing her speed with the rising fires, and consequent greater steam pressure. There is nothing in the testimony to indicate whether the rate of increase was probably greater or less in the first half of the interval; but, even supposing that her rate of increase above the Narrows was twice her rate of increase below the Narrows,—an extreme hypothesis,—still her speed through the water on the above computations would be from 10.67 knots at Governor's island and 12.25 at the Narrows to 13.35 knots at the time of collision. There are some other circumstances that, taken into account, would slightly increase the final rate, and some that would slightly diminish it; such as, possibly, a minute's slowing while passing quarantine; a half knot's possible excess in the tide rate for one and one-half miles through the Narrows; and, doubtless, some 400 feet, at least, to be added to the Republic's distance from her curve in rounding for the Gedney course, and for the retarding effect of her port helm, and for going to the southward of the dotted course. I have carefully computed the probable effect of all of these, and find that, by making allowances for them all, the above computation would not be affected more than one-tenth of a knot either way,—a difference not material here.

One other entry in the kepublic's log, that, if correct, would aid in determining her speed, I am obliged to reject, for its obvious error, viz., the entry: "3:17 p. m. Sandy Hook Light abeam, bearing S. by W. ½ W. true. This would give a rate of less than 10 knots from there to the collision,—a rate so clearly incompatible with all the rest of the evidence, and with the other data, as to prove some error in the observation or in the entry.

If the flood-tide north of Sandy Hook, during the last quarter, runs, as is said, nearly north, the Republic would have been retarded but very slightly by the tide during the last four minutes; and this would reduce her average from the Narrows by about one-twelfth of a knot only, and make a corresponding decrease in her final speed; but in that case her speed by land would be nearly her speed through the water. From the data derived from the Republic's log her speed must therefore have been, for the few minutes preceding the collision,

somewhere from 13.17 to 13.50 knots through the water. This result might have been adopted from the simple average of 12.80 knots after passing the Narrows, with the addition of the mean increase that her witnesses testified to.

This result differs considerably from the testimony of the engineer and master as to the Republic's speed; but it is manifest that their testimony is from estimates only, made up afterwards, and not from any strict actual observation, made at the time. The number of revolutions per minute was not actually observed; no entry of the number was made; and the engineer's estimate of 45 or 46 at the time of the collision, with 10 per cent. slip, gives but 12.35 knots through the water, which is a half knot less than the average from the Narrows, counting nothing for the certain gradual increase in speed. The number of revolutions found entered in the log, viz., 39, would give but 11.63 knots through the water, which is far from sufficient to have brought the Republic to the place of collision. entry was from any actual observation, the observation must have been made not long after passing Governor's island. Not only, therefore, are the estimates of these officers insufficient, but any mere unverified estimates are entitled to little weight as against the results derived from the known time and the distance traversed.

Aurania's Speed. The Aurania, at 2:05 p. m., was but a little astern of the Republic, between Governor's island and Castle Garden. Her engines were then first put at continuous "full speed." She had been stopping, backing, and slowing before that; and it does not appear how long after 2:05 it would take for her to acquire full headway. She must have got full headway, however, by the time she passed the Republic, which, as the evidence shows, was not far from midway between Bedloe's island and Robbins reef, i. e., about 10,000 feet below Governor's island. The Republic must have reached that point about nine and a half minutes after passing Fort William. From this point to the Aurania's place at the time of collision, the distance by the sailing (dotted) course is about 94,700 feet. To this must be added the amount of the Aurania's loss of speed, at the rate of about two and a half to three knots, according to the evidence, during six minutes of "half-speed," while she was passing Flynn's knoll, viz., about 1,700 feet; and also 400 feet for the effect of her port helm (two revolutions per minute) in rounding 11½ points, and for the curve in her course,-making in all the equivalent of 96,800 feet, traversed in 691 minutes, an average of 13.74 knots, against an average tide of about 1 knot, or 14.74 knots through the water. If the tide north of Sandy Hook be taken as running north, the Aurania's speed through the water would be 14.63, and her speed by land nearly the same.

This agrees nearly with the rate (14.72) given by the 56 revolutions per minute, entered in the Aurania's log, and which the engineer said were the full-speed revolutions for the hour in which they are entered, as nearly as he could then judge. The entry of the rate between 2

and 3 o'clock is the same as that between 3 and 4 o'clock, viz., 56 revolutions during each hour. This indicates no substantial increase in her speed as estimated at the time. The engineer and the master so testify. There is no evidence, and there are no circumstances in the case, that tend to show any substantial increase of the Aurania's speed up to the collision, although, after 4:07 p. m., from a point about three miles east of Sandy Hook, she ran with the ebb tide 57 miles in 208 minutes, or at the rate of about 16.15 knots.

The time from buoy No. 10 to the collision also indicates that there was no material increase in the Aurania's speed, and agrees very closely with the previous estimate. The pilot testifies that he was off buoy No. 10 when he ordered "full speed" ahead after six minutes' "half speed;" and the entry in the log shows that the time was 3:05 P. M. The distance to the place of collision by the dotted course was 25,400 feet. To this should be added the 400 feet before mentioned. and probably 400 or 500 feet of the whole 1,700 feet, for loss of headway from the previous half speed. This would make about 26,250 feet traversed in 19 minutes, or the rate of 13.64 knots; i. e., very nearly the same as the whole average, and showing no increase. reason why the Aurania's speed did not increase is, according to the testimony, that she was allowed only a certain limited pressure of steam, viz., about 80 lbs., while upon pilotage ground, and that pressure was evenly maintained by the regulation of the throttle valve; while the Republic was not so limited, but was using all the steam her rising fires would give until complete full speed should be reached. The close approximation of these several results as to the Aurania's speed is pretty convincing proof of their substantial accuracy. They correspond more nearly than could have been anticipated, considering that, in noting and entering the time by the clock, fractions of a minute were disregarded.

Taking the mean of the above computations, the result is that the Aurania was going through the water, during the few minutes before the collision, at the rate of about 14.68 knots; the Republic, from 13.17 to 13.50 knots,—a difference of from 1.18 to 1.51 knots between the two vessels. This would make the Aurania a little less than two miles ahead of the Republic at the time the latter turned into the Swash channel, which agrees with the estimates of the Aurania's witnesses.

The Photograph. The conclusion drawn from the above data as to the comparatively small difference in the speed of the two vessels is strongly confirmed by the photograph of the Republic, taken by a passenger on the Aurania a short time before the collision. Upon careful examination I find that the conditions imposed by the photograph do not admit of a greater difference of speed than from one and one-fourth to one and one-half knots. The photograph was taken from a point on the Aurania's port-rail, 179 feet aft of her stem. The picture shows the Aurania then ahead. Computation

from the scale of the plate proves that the distance from the photographer to the Republic's mainmast (191 feet from her stem) was 724 feet, and that the line of vision formed an angle of 58 deg. 25 min. with her keel. That would make a line from the photographer, drawn at right angles with the Republic's path at that moment, intersect that path 185 feet forward of the Republic's stem. The evidence leaves no doubt that during the interval of from one to three minutes at least before the collision, both vessels were headed very nearly for the Fairway buoy; i. e., not above 100 or 200 feet off from it either way. Observing this condition, and also the distance and the angle of vision given by the photograph, no position can be found for the two vessels, within even the extreme outside limits of their courses as claimed in the Republic's theory, that will admit of a difference of speed of upwards of one and one-half knots. The position of the two vessels one and one-fourth minutes before the collision, indicated in the careful diagrams submitted on the part of the Republic illustrative of her contention, not only puts the Aurania's head much to the northward of the buoy, whereas the evidence of the Aurania shows that she was headed somewhat to the south of it; but the angle of vision in the diagram, instead of being 58 deg. 25 min., as the photograph requires, is 73 deg. 30 min., -a difference equal to the whole difference of convergence in dispute. If this angle in the diagram is made 58 deg. 25 min., the Aurania's position will be thereby advanced at least 175 feet; and then the difference in speed, up to the point of collision, will be found to be but about one and three-tenths knots, instead of three knots. Position R1 A1 in Exhibit 10 is correctly drawn for a time about 50 seconds before the collision, and it admits of a difference of speed of one and two-tenths knots only. In positions R³ and R⁵, A³ and A⁵, the vessels are not headed properly. By taking different positions more or less northerly or southerly with the angle of convergence 25 deg., as claimed by the Republic, and from one to four minutes before collision, an indefinite number of places may be found where the three conditions above specified may be fulfilled; but none of them admit a greater difference of speed than 1.50 knots; and the difference diminishes as the position assumed is further to the westward, and longer before the collision, until the Republic's curve out of the Swash channel is reached.

These conclusions, derived from data least liable to error or mistake, accord entirely with a great mass of evidence on the part of the Aurania; and, notwithstanding the opposing testimony of the Republic's witnesses, I cannot hesitate therefore to adopt them as fixing approximately, and beyond reasonable doubt, the difference in speed of the two vessels at the time of the collision as not greater than from one and two-tenths to one and five-tenths knots.

With this small difference in speed, it is immaterial, as respects the overtaking rule, whether the courses of the two vessels, after the Republic got straightened out for the Fairway buoy, converged at an

angle of 25 deg., as claimed by the Republic, or at an angle of from 10 deg. to 15 deg. only, as claimed by the Aurania; for, in either case, at the time when the whistles were exchanged, i. e., when the two vessels recognized their duty to navigate with reference to each other, and undertook to observe the rules which the existing situation imposed upon them, they were converging by at least three points, even if the Republic was then swinging out of the Swash channel, and probably by an angle of as much as four or five points; and upon the small difference of speed above found, each must have borne, at that time, and long prior thereto, from two to three points at least forward of the other's beam. A tracing of their positions backward from the point of collision demonstrates this. Even if the Republic rounded to the northward of the dotted course, as she claims, and straightened out upon a course of E. by S. southerly, when nearly one and one-eighth miles from the buoy, heading one-fourth of a point north of the buoy, each would all the time be forward of the other's beam until the Aurania, by her greater speed, had brought the Republic clearly astern. With vessels of such great length, their bearings should be taken from the corresponding points on each. The bridge, as the post of observation, is the most suitable point.

The place where, if anywhere, the Republic would have had the Aurania most nearly abeam, or abaft her beam, was at the moment when she got straightened out for the Fairway buoy after rounding out of the Swash channel. And at that time, whichever of the two theories as to their courses be adopted, the Aurania was not astern of the Republic, but abreast of her, or nearly abreast,—precisely as in the case of The Cayuga, ut supra. Her stem was probably no further from the buoy than was the stem of the Republic. that the Aurania was constantly drawing evidently ahead. Whether, therefore, the time when the whistles were exchanged, or the time when the Republic got straightened for the buoy, be adopted as the time when the rules became applicable, neither vessel was astern of the other; and, their courses being converging, it follows that they were crossing vessels, under the sixteenth rule, and that the Republic was bound to keep out of the way of the Aurania. She had ample time and space to do so,—if not by keeping more to the north, then by a little slackening of speed, and dropping astern,—and for not doing either the Republic must be held in fault.

2. In considering whether the Aurania, though having the right of way, is chargeable with fault in not doing all that was obligatory upon her to avoid this collision, it seems necessary to determine whether the two vessels were sailing under the larger or the smaller angle of convergence, as claimed by them respectively; and also to determine, so far as possible, what were the immediate causes that precipitated the collision, and what was the angle of convergence at which the vessels approached the Fairway buoy.

The Republic makes this angle of convergence, from the time she

got straightened out for the buoy, to be about 25 deg., by placing the course of each vessel outside of the dotted course on the official chart; i.e., her own course E. by S. southerly, some 300 feet to the north of the dotted course at the point of its divergence from the Swash channel; the Aurania's course E. by N. $\frac{1}{8}$ N., and from 100 to 200 feet south of the dotted course from the south-west spit. The Aurania places the course of each vessel considerably inside of these dotted lines; her own course E. $\frac{1}{4}$ N., and about 700 feet north of the dotted course; the Republic's E. $\frac{1}{4}$ S., and some 500 feet south of the dotted course from the Swash channel.

The compass courses of both vessels, as claimed by each, are mainly mere estimates, or opinions made up afterwards. With the exception of the wheelsman of the Aurania, none of the officers engaged in the navigation of either vessel observed her heading by compass. The masters and pilots of both say that they did not observe the compass, nor steer by it; but by the marks and buoys. Each, they say, headed for the buoy; the Aurania keeping the buoy directly ahead, or a little on the port bow; the Republic keeping it, as her witnesses say, one-fourth of a point on the starboard bow.

The effect of the flood-tide, aided by the southerly wind, was, however, such as to make the actual path of each about one-quarter of a point more northerly than her heading. Though this is unimportant as respects their relative progress, it is important in its bearings on the testimony as to the specific courses, and as to the headings of the vessels to which the witnesses have testified. As the Republic, after straightening out, kept the Fairway buoy about a quarter of a point on her starboard bow, she could not possibly have kept its bearing the same as she continued to approach it, if her heading by compass remained the same. The tide, and her own nearer approach, would have constantly caused the buoy to broaden off rapidly to star-To have kept a straight compass course for it, she would have been obliged to head about a quarter of a point to the southward of the buoy, and to have kept it a little on her port bow. however, she kept it on her starboard bow, she must either have changed her heading from time to time by porting, or else have approached it by a continuous curve under a slightly port wheel; and in either case, her heading, by these changes, would be considerably more to the southward when she got near the buoy than when she was first straightened out. Upon examination I am satisfied that this would have required a change on her part, during the interval, of nearly one point. If she first straightened out heading E. by S. southerly, she would have headed nearly E. S. E. at the collision even without any deflection from any other special cause; if headed E. 1 S. at first, she would have ended about E. by S. 1 S. would be less change in the course of the Aurania, from the fact that she was kept headed a little to the southward of the buoy. But the testimony of the pilot and wheelsman indicates that she was headed very nearly for the buoy; and, as she must have drifted considerably to the northward, and as, by the master's testimony, it appears that repeated orders were given to the helmsman "to mind his port wheel" I have no doubt that at least half a point's change of heading was made in the Aurania's course before the moment of collision, bringing her probably to head nearly east.

The probabilities of the case, and the weight of proof, in my judgment, show that, after the Republic rounded out of the Swash channel, the vessels were inside of the dotted lines, and upon courses not converging more than one and one-half points,—at least not until very shortly before the collision. A great mass of witnesses, including nearly all on the part of the Aurania, and many on the part of the Republic, whose depositions were taken before the trial, show that, when the Republic got straightened out for the buoy, the two vessels were quite near each other, much nearer than from 500 to 700 yards, which the Republic's theory requires, and going upon approximately parallel courses; differing, as the Republic's fourth officer estimated, by a point or a point and a half only. This could only be when both were much within the dotted courses.

The pilot and the master of the Aurania locate the Aurania above the dotted line. The open Point Comfort lights confirm it. Her porting afterwards, though denied by the wheelsman, is proved by several witnesses, some of them disinterested, who observed her diverging wake, and this porting, with her straight approach thereafter very nearly in line with the buoy, without again starboarding, necessitates the northerly course. Nothing in the depth of water on rounding the south-west spit, or in the other circumstances, renders this course improbable: while convenience in turning southwards after passing the buoy made a course north of the dotted line desirable. Baldwin. the wheelsman, says he did observe the wheel-house compass, about the time of the whistles, probably after the first slight porting, and that it was S. 82 deg. or 83 deg. E. This, with the 9 deg. correction for deviation, gives 1 deg. or 2 deg. N. of E. for her heading at that time, or nearly E. 1 N. for her actual path. This direction, subsequently changed, as it must have been, to keep the buoy nearly ahead, would have brought her path nearly east at the collision.

As respects the Republic, both her libel and her answer to the cross-libel state, in effect, that, not long after straightening out for the buoy, it bore E. ½ S., and a little on her starboard bow. All her witnesses say one-fourth of a point on her starboard bow. This would necessarily bring her below the dotted course. A party is not allowed any considerable departure from such deliberate allegations in its pleadings, under the exigencies of the trial, except on satisfactory explanation and clear proof, which certainly do not exist here. The Sarah Ann, 2 Sum. 206, 209; The S. Morgan, 94 U. S. 599-622. Besides the concurrence of a great majority of the witnesses, as above stated, there are other strong proofs that the Republic's course was not that which she now contends for.

(1) The pilot, as I understand him, states explicitly that in run-

ning out of the Swash channel he went deliberately to the southward of the dotted course in order to be able to make a direct course for the buoy. He refers to the chart in explanation, and the chart shows that in the new position of the buoy, 1,250 feet east of its former place, and somewhat to the northward, reasonable prudence, in avoiding the two shoal points that run southward from the tail of the Romer shoals, required him to round to the southward of the old dotted course, which ran to the buoy in its former position, and that he could not otherwise safely make a direct course for the Gedney buoy. A course E. by S. southerly would run directly over those shoal points. No prudent pilot in charge of such a vessel would do that, especially when the tide and the wind were setting the vessel further upon them. Upon that course, moreover, he would be straightened out for the buoy when considerably over a mile distant from it; whereas he testified that, when straightened out, he was but three-fourths of a mile from it,—a larger error than a pilot so familiar with those waters, and the location and distances of the buoys would be likely to make: whereas his estimate of distance agrees almost precisely with the Aurania's theory.

(2) Again, all say they did not begin to starboard in coming out of the Swash till below buoy No. 4, which is about 1,250 feet above the point of divergence. Capt. Irving says it was one or two lengths below. With her helm only two-thirds over, the Republic could not round from a position two lengths below No. 4, and be north of the

dotted course, but would fall considerably to the south of it.

(3) More conclusive is the fact that the course of E. by S. southerly, with the buoy one-fourth of a point on the starboard bow, which all her witnesses testify to, could not possibly have brought the Republic to the place of collision. That course adhered to, with the flood tide, would have carried her 600 feet to the northward of the

buov, far out of the Aurania's way.

(4) Equally conclusive is the further fact that if the angle of convergence had been 25 deg., as the Republic claims, the distance of the two vessels apart one minute before the collision would have been nearly 700 feet; or, if the Aurania's course were as she claims, about 500 feet only. But at either of these distances apart, one minute before the collision, with both vessels heading for the buoy, there is no possible explanation of the collision consistent with the Republic's theory and testimony. No possible suction, port helm, or other influence from the Aurania could have had any sensible effect upon the Republic at that distance, or have sensibly neutralized or delayed the effect of the hard a-starboard helm which her officers say the Republic was then under, and in spite of which, as they say, the vessels came together.

The facts show that the point of collision was about 550 feet west of the buoy, and not materially north of it. Had the Republic been sailing a course north of the dotted course, and at an angle of 25 deg.

or even of 20 deg., with the Aurania's course, and heading to the northward and eastward of the buoy, as they all say she was, she offers no explanation how she could have got to a point 550 feet west of the buoy when the tide and wind were all the time setting her to the northward of the buoy. From her assumed heading north of the buoy one minute before collision, and at an angle of 25 deg. or 20 deg. with the Aurania's course, she could not have reached the point of collision, west of the buoy, and so much to the southward of her former path, unless she went there under a port helm. The testimony of by far the greater number of witnesses to more nearly parallel courses, i. e., to a divergence of from one to one and a half

points only, must therefore be adopted.

I do not find anything inconsistent with this view in the testimony of Stephens, the first officer of the Aurania, or in the diagram illustrating it. A difference of a few feet only in his position at the moment when he noticed the four masts range all in one past the lighthouse would reduce the angle to one and one-half points, and that would agree well with his estimate of the distance and the time, viz., about a half minute before collision. But, besides this, the Republic, he says, was already swinging when he saw her, and this swinging must have increased her previous angle. The fourth officer of the Republic says they "got the course E. by S. southerly about the time [3:17 P. M.] when Sandy Hook light bore abeam S. by W. 1 W. true." This, as I have already said, is an erroneous entry, and I cannot attach any weight to it. He does not even say that he observed her compass heading at that time; and there is no reason to suppose that his idea of the ship's heading, which he was not called on to observe, and did not enter, is any more accurate than the entry which it was his business to make, and which is certainly incorrect. The great distance of the light (some two miles) doubtless made exact observation more difficult, and there was not then apparently any occasion for accuracy.

The shadow of the projecting grating against the ship's side, shown by the photograph, affords some confirmation of the Aurania's con-If the computations could be strictly relied on, they would tention. be conclusive. The length of the shadow is apparently about seventytwo one-hundredths only of the length of the grating; and that indicates an angle of 54 deg. 28 min. with the sun's position, or E. 35 deg. 48 min. S. as the course of the Republic at that time. If an error of one-third were allowed, and the shadow increased to equal the length of the grating, the angle of the ship's side with the sun's position would be 45 deg., and the Republic's heading would then be E. 26 deg. 20 min. S., a heading that could only be found while she was on the swing out of the Swash channel, or else within a few seconds of the collision; and of those two, evidently the former must be adopted. At what precise point the photograph was taken I do not find it necessary to decide. There is an indefinite number of places,

as I have already said, during the interval of four minutes before the collision, and within the limits of the dotted lines, where nearly all the conditions of the photograph, except as regards the shadow, can be fulfilled; and there seem, upon the testimony, to be such possibilities of error in the micrometric measurements of the shadow, or in variation in the position of the vessel that would affect the length of the shadow, that I prefer not to lay any stress on those computations.

Immediate Causes of Collision. The contentions of the parties are in direct contradiction as to the immediate causes of the collision. Most of the witnesses on both sides seem to agree that, shortly before the collision, apparently about one minute before, the stem of the Republic seemed to be approaching the Aurania's quarter more suddenly and more rapidly than their previous angle of convergence would account for. Accordingly, each charges the other with a change of helm; the Aurania alleging that the Republic ported, and thereby swung her stem against the Aurania; the Republic, that the Aurania ported, and thereby swung her quarter towards the Republic; and the Republic also charges that suction from the Aurania's propeller, and from the great displacement of the Aurania, also contributed to the result. The officers of each deny positively any such porting shortly before the collision.

The evidence leaves no doubt that the Republic's engines were stopped and reversed just prior to the collision. This order was probably given not more than half or three-quarters of a minute before they collided, because there was time only to get a few turns backward. A short time only before the order to stop and reverse, as the master and pilot testify, an order was given to put the helm hard a-starboard. The wheelsman testifies that he did starboard. pilot says that under this order she canted about a point to the northward. But this is not compatible with the rapid approach of the vessels, or with the place of collision. It is contrary, also, to the testimony of the master of the Republic; and the latter is more likely correct, for he says that, though the Republic usually obeys her helm readily, "the starboard helm [at that time] did not seem to have hardly any effect. That is why I reversed the engines principally." what he did between the two orders, the interval must have been certainly a third of a minute, and probably more; so that the interval from the order to starboard to the collision must have been one minute, and probably a little longer. He says that, when he gave the order to starboard, the Aurania's mizzen-mast was "about abreast of our bridge, perhaps a little further ahead; I would not be sure."i. e., from 180 to 200 feet ahead of its relative place at the collision; and that the vessels were then "perhaps half to three-quarters of a ship's length apart,"—i. e., 200 to 300 feet; and that "their courses were not then altered." This confirms the view as to the courses of the two vessels above adopted. When the master of the Aurania

shouted to the Republic to starboard, he says that the latter's stem was aft of him, and "perhaps between the two funnels," or from 170 to 200 feet ahead of its place at the collision: and that the vessels were then about 250 feet apart. While these distances or positions are not assumed to be exact, they pretty well agree in indicating that, at a time from a minute to a minute and a half before collision, the vessels were only from 250 to 300 feet apart, and the Republic's stem relatively to the Aurania only 200 feet in advance of its place at the collision, and that, at that time, her approach sideways was more rapid than was expected from the previous angle of approach, and was such as to threaten speedy collision. In such a situation it is evident from the testimony that no influence of suction from the Aurania could have been felt at that distance apart. With vessels of fine lines, going at less than the rate designed for them, the evidence of Capt. Watson, a most competent expert, is that there is no lateral suction at all. Whether there might not be some effect of this kind exerted upon a vessel only a few feet distant by another very large vessel, moving rapidly in water of a depth little exceeding her draught, I am not clear. But I do not credit the suggestion that it could have had the effect of deflecting the Republic's stem at a distance of 250 feet.

It is clear, also, that the Aurania could not have ported, and have thereby caused an apparent rapid approach, merely through the swinging of her stern towards the Republic. The proof shows that this effect would swing her to the northward only 25 feet in all; and would continue only during 24-seconds from the time the order was After that the stern would move away on the line of the curve. Considering that the Aurania, after 14 seconds, begins to cant at the rate of 5 deg. in 9 seconds, it is plain that had any such order to port been given, even a minute only before the collision, the Aurania, instead of swinging up to the Republic, would have canted two and onefourth points to the southward before the collision. The narrowness of the channel, however, did not permit so much change as that to the southward; but one-half of that change would necessarily have carried her south of the buoy, instead of north of it; and by that deflection to the south, moreover, she would have headed, at the time of collision, very nearly in line with the Republic, instead of being at an angle at the moment of collision, as the proof indicates, of about two or two and one-half points. Her testimony, that she did not port, is therefore confirmed, and must be received as correct.

The evidence of a great number of witnesses must be held to show that there was at least some deflection to the southward in the course of the Republic, just before the collision; for the great weight of proof is that the point of collision was nearly directly west of the buoy, and at least 550 feet distant from it, and not materially to the north of it. This, as above observed, was considerably to the southward and westward of the line of the Republic's course that she had been previously

following, which was to the northward and eastward of the buoy. Upon that course she had all along been headed until in some way deflected from it, shortly before the collision, enough to bring her 550 feet to the westward of the point she was aiming at.

So far as I can perceive, there are but two remaining causes which could have produced this deflection, viz., either her own porting, or the unavoidable swinging of her stern to the northward through the effect of the southerly wind.

As respects porting there are but two alternatives: either that this was done deliberately, by the order of the officers, in order to go astern of the Aurania, as was their duty to do if there was not room to go to the northward, which order was too late, and failed through some miscalculation of the distance, or of the speed at which the Aurania was gaining on the Republic; or else that the wheelsman, though ordered to starboard, in fact ported by mistake, possibly from having been anticipating an order to port, and so misinterpreting the order actually given. The first of these alternatives involves direct perjury in the testimony of all the officers concerned in the navigation of the Republic. The second involves two separate concurrent mistakes on the part of the wheelsman and of the master; for, not only does the wheelsman say he did starboard, but the master says that, before ordering to stop and reverse, he went to the "tell-tale" in order to see, and did see that the helm was hard a-starboard, and that it did not seem to have much effect, and that "after watching a few seconds longer, when it didn't seem to draw clear, the pilot called out, 'Stop!' and he ran to the telegraph, and rung 'full speed astern.'" Of course, it is possible that much of this might have occurred in reference to an order to port, instead of to starboard. That the Republic, however, did cant somewhat to starboard, as if under a port helm, when some 250 feet distant from the Aurania, seems to me beyond doubt, from the fact that the place of collision was clearly to the southward (notwithstanding the flood tide) of the course towards the northward of the buoy that she had all the time previously been keeping. Had her helm, moreover, been put hard a-port a minute before the collision, as it would have been had it been ordered to be ported at all for the purpose of going astern of the Aurania, considering that such steamers cant a point in going a length, or a little less, she would have turned, up to the time of collision, at least three points, making the angle of collision fully four points, -- considerably more than is at all probable upon the evidence. The porting of the wheel, and the curve in the Republic's wake, that several of the Aurania's witnesses testify to ob-

In collision cases a knowledge of the rate at which steamers turn under a hard a-port or hard a-starboard helm, and the effect of a reversal of the engines on steering, is so useful that the following facts, derived from experiments with the Aurania, made by Capt. Watson, are here abstracted from the record.

In a calm sea and no wind, the Aurania, 480 feet long by 56 feet beam, going at 14 knots, her helm was ordered hard a-port. The helm is moved by steam, and goes hard ever in about 12 seconds, and reduces the speed from one-half to three-fourths of a

over in about 12 seconds, and reduces the speed from one-half to three-fourths of a

serving, may have been merely the slight porting, which, as I have above said, (ante, 115,) must have taken place in order to enable the Republic to keep the buoy from broadening off widely through the effect of the tide. This was an immaterial porting, in order to preserve her course; not the material porting here considered, which would

carry the Republic south of the buoy.

The position of the Republic in reference to the Aurania was, however, such that it was quite possible that the wind may have canted the Republic's stern to the northward, and have thereby produced all the deflection from her course that is necessary to explain the results witnessed. Reardon, a pilot called by the Republic, says that he was, at the time, beating down the lower bay, and that the wind was a "four-knot breeze" from the south. This wind, though moderate, could not but affect the Republic unequally, and operate with considerable force, when the whole after half of the Republic's hull was presented to it, while the forepart was in the lee of the Aurania, which had a freeboard 24 feet out of the water, and was higher than the Republic. This unequal influence of the wind was operative for over two minutes; but the full effect of it would not be felt until the whole after half of the Republic's hull had got astern of the Aurania. which was about one and one-half minutes, or a little over, before the collision, i. e., very near the time when, according to the Republic's testimony, she was seen unexpectedly drawing towards the Aurania. That this cause would deflect the Republic's course to some extent there can be no doubt. A slight change of less than half a point in the Republic's heading to the southward during the two minutes preceding would have been sufficient to bring the Republic to her place

knot. A change of heading was first observable in 14 seconds after the order was given. From that time her bows canted to starboard very regularly at the rate of 5 deg. in every 9 or 10 seconds, making a change of 102 deg. in 3 minutes and 9 seconds, or 1 point in going about 490 feet, i. e., about a length, and turning upon a radius of about 2,500 feet, or a little over five lengths. The rate of change, compared with the length of the vessel, is a little less than appeared in the case of The Lepanto, 21 Fed. Rep. 651. See White's Naval Architecture, 630-637. Her center of rotation is 114 feet aft of her stem; her center of gravity 120 feet further aft. Her engines being reversed at the same speed, the action of her helm during the first minute after reversal is normal to a much reduced extent, canting her only from 5 deg. to 10 deg. at most. After that, her headway diminishing, and her propeller being right handed, her bows fall rapidly to starboard, through the action of the propeller alone, and the helm has little or no effect until her headway is fully stopped; and this continues the same when she acquires stern-way. Reversing full speed, at 13 to 14 knots speed, she is stopped dead in the water in 3 minutes 59 seconds after the engines are put full speed astern, and in a distance of 1,740 feet. The Oregon, the same, or nearly the same. And, in general, whatever be the rate at which she is working ahead, if the engines are reversed at the same ever be the rate at which she is working ahead, if the engines are reversed at the same

ever be the rate at which she is working ahead, if the engines are reversed at the same speed, she stops in the same time.

In some experiments with the Frisia, (24 Fed. Rep. 495,) 350 feet long, 40 feet beam, and 2,313 tons net, and full speed 12 knots, it was stated that, going full speed ahead, if the engines were reversed full speed, the bows canted one and one-half points to starboard, the propeller being right handed, whether the helm was put to port or to starboard (?) in the interval of two minutes until her headway was stopped; but with the rudder amid-ships, she fell off two points to starboard in the same interval. (The details of the experiment were not given in the testingony). Under orders to stop and reverse, the experiment were not given in the testimony.) Under orders to stop and reverse, the engines were stopped in seven to eight seconds after the telegraphic order was given, and reversed six seconds afterwards. It took 23 seconds to turn the rudder from amid-ships to hard a-port.

at the collision. While she was under such a swing, though slight, the action of the starboard helm would be delayed, as the master observed, and testifies that it was. In the excitement of the moment, the time allowed to observe the influence of the helm was probably short, no effect from it being ordinarily observable in less than a quarter of a minute; and, during the half minute following the order to reverse the engines, the helm would have but little normal effect; probably not more than enough to counteract the continuing swing of the stern to the northward. As this view may reasonably account for the facts, I adopt it rather than the theory of the Republic's porting, against the positive testimony of all those having charge of her navigation.

The nature of the damage to the Republic in knocking her stem to port, accompanied also by the gouging out of lines in the iron in a horizontal direction, shows only, as it seems to me, a combination of a swinging motion with a forward one. The forward force was, doubtless, that of the Aurania; the swinging motion might have been produced equally by the Republic's port helm, or by her stern's swinging through the effect of the wind, or by the swinging of the Aurania's stern, if she had ported. I find nothing decisive in this feature.

The best result I can arrive at, therefore, is that, while this collision may possibly have been precipitated by an order to port, made under an erroneous supposition that the Republic could drop astern in that way, or under a misapprehension of an order to starboard, it might also have been caused, and upon the testimony, as I find, was more probably caused, by the effect of the wind operating unequally upon the Republic's hull, while her forward part was in the Aurania's lee so as to swing her stern unavoidably to the northward; that is to

say, by one of the contingencies of navigation.

But, whichever of these causes precipitated the collision, it must be held to have been imprudent, rash, and blamable navigation that suffered two vessels of such size, going through the water at a speed of about 15 and 16½ statute miles, respectively, upon courses converging about one point, to come within 250 or 300 feet of each other, without any material effort by either up to that time to keep away. If they were converging by one point only, they were "approaching" each other sideways at the rate of about 200 feet per minute; and as I find that the Aurania was gaining on the Republic not more than from 125 to 150 feet per minute, and had to gain from 150 to 200 feet in order to clear her, I do not regard it as altogether certain, notwithstanding the opinions expressed by the Aurania's witnesses, that the vessels would not have collided, even if their previous courses had been perfectly preserved. Such proximity, under great speed for such large vessels, very plainly, in my judgment, involved "risk of collision," within the meaning of the rules. "Risk of collision" means, not merely certainty of collision if no efforts be made to avert it, but danger of collision; and there is danger or risk of collision whenever it is not clearly safe to go on. The John McIntyre, 9 Prob.

Div. 135. The distinction between the risk and the certainty of collision is fully commented on by Brett, L. J., in the case of *The Beryl*, 9 Prob. Div. 137, where it was held that the rules required efforts to avoid, not merely the certainty of collision, but the risk of it; and that the obligation of the ship that had the right of way to slacken or stop in order to avoid collision arose with the risk of collision, and not merely when it would otherwise be certain. Still more elaborately was the same point ruled and decided by the house of lords in the case of *The Khedive*. App. Cas. 876.

In my judgment, there was risk of collision, within the meaning of the rules, some time before these vessels had come within 300 feet of each other, and at least two minutes before the collision, by reason of their converging courses, their great speed, and their great bulk. which prevented rapid handling. Two minutes before collision the Republic's stem was already at least 150 feet behind the Aurania's stem, and the latter vessel was evidently going ahead and crossing the Republic's bow. Even, therefore, if the Republic had had the right of way, it would have been her duty, being already somewhat astern, and the intent of the other to go ahead being clear, to slacken speed at once, or stop if necessary, under the seventeenth rule. ing the right of way does not dispense with the seventeenth rule, nor supersede the obligation to stop, when actual risk of collision is im-This is settled by the English decisions last cited, and by many decisions of the courts of this country. The America, 92 U.S. 432, 438; The Sunnyside, 91 U.S. 218-224; The Columbia, 25 Fed. Rep. 844; The Frisia, 28 Fed. Rep. 249; The Hills, 23 Fed. Rep. 413; The Fanwood, 28 Fed. Rep. 373; The Nacoochee, 22 Fed. Rep. 859; S. C. 28 Fed. Rep. 462.

The same considerations, and the same authorities last cited, apply to the Aurania, although, as I have found, she had the right of way; because, at least two minutes before the collision, it was, I think, sufficiently manifest to the Aurania that the Republic was not performing her duty to keep out of the way by a safe and secure margin, either by steering sufficiently to the northward, or by slackening speed so as to drop astern; nor was she apparently taking any steps to keep out of the way, but was keeping on with unabated speed. This, from the Aurania's point of view, viz., that the Aurania had the right of way, showed to the Aurania gross violation of duty by the Republic in not keeping off earlier, and that the Republic's persistent keeping of her speed and course involved, at least, the risk of collision; since the close approach of the vessels left no margin for any of the unexpected contingencies of navigation. It is not to the purpose to say that if each had been kept upon exactly the same course, and if nothing unexpected had happened, no collision would have occurred, even if that fact were clear; or that the officers of the Aurania supposed so. Considering the great interests of life and property at stake, a reasonable provision for safety against unexpected contingencies, and even against slight mistakes or errors in the navigation of either vessel, is plainly obligatory. No rational judgment, as it seems to me, can hesitate to pronounce it to be an unwarrantable risk to calculate so closely on one's course that a momentary mistake or misapprehension of an order, or a brief and slight error on the part of either vessel, or a small unforeseen deflection from an unexpected cause, would be past all remedy and involve inevitable collision.

The duty to keep out of the way, as this court has recently held, embraces the duty to keep away by a prudent and safe margin, having reference to all the contingencies of navigation. (The Laura V. Rose, 28 Fed. Rep. 104; The Columbia, 9 Ben. 254;) and when the Republic was plainly and grossly neglecting her duty in this regard, and had approached within 250 or 300 feet, their courses converging so that the risk of collision was becoming more imminent, it became obligatory upon the Aurania, though she had the right of way, to do what she reasonably could to avoid, not perhaps the certainty of collision, but the impending risk of it. Although, in my judgment, the vessels were "approaching each other" within the meaning of the seventeenth article, i. e., sideways, the Aurania was not, in this case, required to slacken speed, because in the situation as it then existed, inasmuch as slackening would have tended to promote collision, a departure from that rule, under the provisions of article 24, is proved to have been necessary; and she is therefore without fault in that re-But she could and ought to have ported her helm, and gone to the southward of the buoy. There was nothing in the way to pre-There was sufficient water for a considerable space to the southward. Her officers say that they were intending to go to the south of the buoy; but intended to wait until within a hundred feet of it before porting, and that their intention was thwarted by the force of the blow on the Aurania's stern, which swung her round, and forced her to go to the north of the buoy. I do not think the circumstances bear out this explanation. In my judgment, the intended porting, in order to go south of the buoy, was too long delayed. An elaborate mathematical computation by Prof. Compton, submitted as a part of the Republic's argument, would indicate the possibility, at least, that the Aurania may not have been deflected by the blow more than onequarter of a point. Whether this be a correct estimate or not, other circumstances indicate that the Aurania was already so far to the northward; before the collision, that she could not, by porting subsequently, have gone south of the buoy, even if the collision had not occurred; for if, at the time of collision, she was within 50 feet of a line running east and west through the buoy, her stem being from 100 to 200 feet only from the buoy, upon porting to go south of it, the force of the tide and the swing of her stern under a port helm would have carried her stern across the buoy. On the other hand, had she, at that time, been more than 50 feet south of such a line, and heading a little south of the buoy, the blow upon the Republic could not have swung her stern so much as to cause her to go north of the buoy without running over it, except by a change of her heading of nearly four points to the northward,—a change much greater than the evidence admits. She passed northward of the buoy, and some 40 feet clear of it; her port side being, therefore, 96 feet from it. There seems to me no probability that the blow could have made any such great change in her course, or that there was any such change as approximated to four points. The evidence indicates that her port side went 96 feet north of the buoy without much deflection from her previous course. The pilot says he did not port till the Aurania's stem was past the buoy, and he thinks not till her stern was past it. The unavoidable inference is that, at the moment of collision, she was nearly in line with the buoy, heading about east; and this is to some extent confirmed by the repeated statements of Capt. Hains in

his previous reports.

The evidence, in my judgment, all points, therefore, to the conclusion that the Aurania had gradually drifted to the northward of the regular course, through the effect of the flood-tide, not having been kept headed sufficiently to the southward of the buoy to counteract that effect; so that, at the time of the collision, she was nearly due west of the buoy. This would make easier her necessary turn beyond the buoy, and was, I think, in part at least, designed by the pilot. Nor, aside from the Republic's close approach, was there anything wrong in this. Having the right of way, the Aurania had the right to the whole of Gedney channel, if, as the witnesses of the Republic say, that channel was not wide enough for two such vessels to go safely abreast in it; and she had the legal right to go on either side of the buoy that was customary, or most for her convenience; and it would have been the corresponding duty of the Republic, as the vessel bound to keep out of the way, to yield her all of these rights, without obstruction, if there were no other circumstances affecting this right. But that does not affect the Aurania's final obligation, when the Republic was plainly neglecting her duty to keep out of the way, and was threatening collision, to do what she could to avoid it by porting sufficiently to clear the manifest danger. Rule 22, indeed, requires that the vessel having the right of way shall keep her course; but that is in order to avoid collisions, not to run into them. Rule 24 declares: "Nothing in these rules shall exonerate any ship from the consequences * * * of the neglect of any precaution which shall be required by the ordinary practice of seamen, or by the special circumstances of the case." Whenever danger of collision has become manifest, and the vessel previously bound to avoid it is plainly neglecting her duty to do so, the circumstances are special, and the other vessel must do what she can to prevent disaster. If this rule were not acted on and rigidly enforced, disastrous collisions would arise daily, and the lives and property of innocent persons be sacrificed to a tenacious adherence to the mere right of way; and that, not only when the consequences of the negligence of the one ressel were easily avoidable by the other, but as often, also,

as there was any miscalculation, or even honest mistake as to which vessel had the right of way, as is alleged in this case.

Rule 21 declares: "In narrow channels, every steam-ship shall, when it is safe and practicable, keep to the side of the fairway or mid channel, which lies to the starboard side of such ship." The Aurania did not keep to the starboard side of the channel by any certain or reasonable margin, as the place of collision shows. If she was not to the northward of the middle line of the channel at the time of the collision, she was very nearly, if not fully, up to that line. The one whistle which she had previously given also indicated, under the nineteenth rule, that she was directing her course to starboard. Without expressing any opinion as to the applicability, in this situation and on pilotage ground, of the inspector's rules, which are clearly incompatible with the new regulations, I think both vessels meant and understood the whistles to be indicative of their intentions; and this confirmed also her obligation, under rule 21, to keep to the starboard side of mid channel, or to the southward of the buoy.

"The special circumstances of the case" also, under rule 24, which is a substitute for the former rule as to departures, in view of the Republic's neglect of duty, and the close approach of the two vessels, required the Aurania to go to starboard; because that course would have been away from danger and from risk of collision; and because, in the situation of the two vessels, porting could not possibly have tended to thwart any movement of the Republic to avoid her. The Aurania, therefore, could have done something to avoid this collision, by porting enough to keep southward of the mid channel by a reasonable distance, and to go south of the buoy; and this, in my judgment, would have avoided the disaster. Notwithstanding the fact that it was the primary duty of the Republic to keep out of the way, I am constrained to hold, though not without much hesitation, that the Aurania is also to blame. The reason of the rules and the policy of the law, which, for the safety of life and property, demand that no reasonable effort to avoid collision shall be neglected by either vessel, compel me to hold both in fault, and that the damages be divided.

THE J. L. PENDERGAST.1

Chisholm v. The J. L. Pendergast, etc.

(District Court, S. D. New York. November 15, 1886.

SEAMEN—WAGES—MASTER'S LIEN—BRITISH VESSEL—LAW OF THE FLAG—MORT-GAGEE IN POSSESSION, BUT OSTENSIBLY AGENT ONLY FOR FOREIGN OWNER—BRITISH MERCHANTS' SHIPPING ACT.

Libelant shipped in New York, as master of the bark P., knowing that she had a British registry, and supposing that she was owned by a British subject re-

¹Reported by Edward G. Benedict, Esq., of the New York bar.

siding in Quebec. In fact, one P. was mortgagee in possession, and running the vessel for his own account, though acting ostensibly as "agent for owners." Held, that libelant was entitled to the benefit of the British merchants' shipping act, as the law of the flag that governed the ship, and upon which he relied in joining her, and which was presumably the law contemplated by both parties, and that, under that act, libelant had a lien on the vessel for his wages.

Hill, Wing & Shoudy, for libelants. Whitehead, Parker & Dexter, for claimants.

Brown, J. The libelant, as master of the bark J. L. Pendergast, claims a lien upon the vessel for his wages, under the British merchants' shipping act, on the ground that she was run as a British vessel, and owned by a British subject, residing in Quebec, where the bark was registered. James F. Pendergast held a mortgage upon the vessel, and was in reality in possession, and running her for his own account, but acted ostensibly as "agent for the owners." The libelant knew her British registry; engaged as captain with Mr. Pendergast, in New York, supposing her, as he testified, to be in fact owned by her registered owner, who lived in Quebec; and he had no knowledge of Mr. Pendergast's interest, other than as agent of the vessel, and who signed as such in his dealings. Had the master known that Mr. Pendergast was a mortgagee in possession, and managing the ship for his own benefit, I think he could not have invoked the benefits of the English Merchants' Shipping Act. But Mr. Pendergast's act in dealing ostensibly as agent only, in effect concealed his true relation to the vessel. Mr. Pendergast was not, however, the actual holder of the mortgage. It had been assigned by him to E. D. Morgan & Co., as collateral security. I think that the libelant is therefore entitled to the benefits of the merchants' shipping act, as the law of the flag that governed the relations of those on board the ship, and upon which he relied on joining her, and which was presumably the law contemplated by both parties. The J. Friederich, 1 Wm. Rob. 35; Covert v. The British Brig Wexford, 3 Fed. Rep. 577. The mortgagee, therefore, has no equity to withhold from the master out of the proceeds of the ship the payment of the master's services. by which he has profited. The Geo. T. Kemp, 2 Low. 477; The Walkyrien, 11 Blatchf. 241; Pritchard v. Norton, 106 U. S. 124; S. C. 1 Sup. Ct. Rep. 102; The Gaetano, 7 Prob. Div. 1, 137; Chartered Mercantile, etc., v. Netherlands, 10 Q. B. Div. 521. I do not think that there is any such account in the case as should preclude the master from recovering the amount due to him.

Decree for the libelant for amount claimed, with costs, but without extra pay.

GARRETT and others v. New York Transit & Terminal Co., Limited, and others.

(Circuit Court, S. D. New York. November 27, 1886.)

1. COURTS - JURISDICTION - UNITED STATES CIRCUIT COURT - COLLUSION IN

JOINDER OF PARTIES.

The statute which requires a suit to be dismissed when it appears that a party has been collusively made or joined for the purpose of creating a case cognizable by the United States circuit court is not intended to restrict those who contemplate bringing a suit, from selecting as adversaries all those against whom any substantial relief may be sought.

2. EQUITY—PLEADING—PROFERT—JUDGMENT RECORD—FORMER SUIT.
Where the judgment record, made a profert in a plea, showed that the decree in the former suit was without prejudice to the right of the plaintiffs to bring a new action against all but one of the several defendants who joined in the plea, held, that the plea was bad.

3. SAME—SETTING UP IN PLEA FACTS REQUIRED TO BE IN BILL—RULE 94 IN

EQUITY.

A plea is bad which sets up matters of fact appearing on the face of the bill, and which sets up affirmatively, by way of defense, a fact which a plaintiff is required to allege in his bill by rule 94 in equity.

In Equity.

Edward W. Sheldon, (William W. MacFarland, of counsel.) for complainants.

C. A. Seward, for defendants.

Wallace, J. None of the pleas which have been set down for ar-The first plea is to the jurisdiction of the court. gument are good. and is an attempt to allege that three persons specified, who are made parties defendant, with others, should have been made parties plaintiff, but have been made defendants collusively, in order that the necessary diversity of citizenship between the parties may appear. The bill calls for relief against certain fraudulent acts of one Barnes and the corporation he dominates, as to which the three defendants have similar interests to the plaintiffs; but it also calls for an account to ascertain and establish the claims and liens of the plaintiffs, of the three defendants, and of Barnes, as between each other, growing out of the joint adventure which culminated in the frauds of These three defendants are adversary parties to the plaintiffs upon the issues to which the second and third prayers for relief in the bill are addressed. No facts are alleged in the plea to show that these are not genuine issues; but the plea states merely legal conclusions. The statute which requires a suit to be dismissed when it appears that a party has been collusively made or joined for the purpose of creating a case cognizable by the circuit court is not intended to restrict those who contemplate bringing a suit from selecting as adversaries all those against whom any substantial relief may be sought.

v.29f.no.3-9

The second plea is bad because the judgment record, made a profert in the plea, shows that the decree in the former suit was without prejudice to the right of the plaintiffs to bring a new action against all but one of the several defendants who joined in the plea. Without aid from the record the plea would be bad, because it does not deny the allegations of fact contained in the bill respecting the bringing of the former suit, the matters in issue therein, and the decision and judgment rendered.

The third plea sets up matters which, if material in any aspect, should be relied on by demurrer; because the facts brought forward appear on the face of the bill, and present only an issue of law. The plea sets up affirmatively, by way of defense, a fact which a plaintiff is required to allege in his bill by the terms of the ninety-fourth rule in equity. Besides this, the ninety-fourth rule has no application to

a case like that made by the bill.

The pleas are overruled, with costs to the plaintiffs.

RINDSKOPF v. PLATTO.

(Circuit Court, E. D. Wisconsin. November 8, 1886.)

DISCOVERY—PARTIES COMPETENT WITNESSES.

A bill for discovery in aid of an action at law cannot be maintained where full discovery may be compelled by examination of the adverse party as a witness in the suit at law.

In Equity. Bill for discovery. Mr. Monroe, for complainant. J. V. V. Platto, in pro. per.

DYER, J., (orally.) This is a bill for a discovery. The discovery sought is of certain facts in aid of a suit at law pending in this court between the same parties. The bill is demurred to on the ground

that it is not maintainable upon the case presented.

The suit at law was brought by the present complainant to recover from the defendant certain amounts of money which the complaint in that case alleges he collected, as attorney for the plaintiff, upon a promissory note placed in his hands for collection. To that complaint the defendant made answer to the effect that, at the time named he collected upon the note the sum of \$1,350, and paid the same to the plaintiff; that subsequently he collected the further sum of \$251.38, which was indorsed upon the note, and retained in his hands to apply upon services. It is then further alleged in the answer that, at a later date, he collected, by virtue of certain proceedings which he says were instituted for the purpose, the further sum of \$2,487.15, and paid the same to the plaintiff. There is then a

further allegation that he rendered other services which were incident to the collection of the note, and that his entire services were worth the sum of \$500; and, after applying upon that sum the \$251.38 before referred to, he demands, in a counter-claim contained in his answer, a judgment against the plaintiff for the sum of \$248.62. This answer was amended so as to set out more fully and particularly the services which the defendant alleged he rendered for the plaintiff. Otherwise the amended answer is like the original. To the counter-claim thus set up the plaintiff replied, denying that there was anything due to the defendant for services rendered to the plaintiff, and alleging that he had been fully paid for all services performed by him in the collection of the note.

This suit at law being pending, the plaintiff therein filed this bill upon the equity side of the court. It is not, it should be observed, a bill for discovery and relief, but a bill for discovery purely, and the facts which the court has already stated are set out in the bill. It is. moreover, alleged in the bill that the defendant collected various sums of money, to apply upon the note in suit, from parties against whom the complainant's husband had held accounts and choses in action, which accounts and demands the bill avers had been placed in the defendant's hands for collection; and when collected the proceeds were to be applied upon this note. The complainant also states that, in consequence of the lapse of time, she is ignorant of various facts which are material to the trial of the issues in the suit at law, --particularly with reference to the payments alleged to have been made to the defendant on account of services; and she calls upon the defendant in aid of the trial of the suit at law, to discover all the facts in relation to such payments, and in connection with the transaction which is the subject of controversy between the parties. The bill concludes with numerous interrogatories addressed to the defendant. followed by a prayer for discovery, and for an injunction to restrain further proceedings in the suit at law until discovery is made.

The question to be determined is, is the bill maintainable? Under the chancery practice, and independently of any statute by virtue of which a party can be compelled to testify as a witness in a suit at law, we find the rule, as laid down by Mr. Story in his Equity Pleadings, (section 555,) to be as follows:

"In cases of a purely civil nature, courts of equity will not sustain a bill for a discovery in aid of a suit pending in another court of ordinary jurisdiction if that court itself can compel the discovery required; for, in such a case, the remedy elsewhere is complete, and the interference of a court of equity is unnecessary and vexatious. Thus, where a bill, among other things, was filed for a discovery of the value of the respective real and personal estates of the inhabitants of a parish, in which certain church rates had been assessed, and how the money collected by means of such rates had been disposed of, a demurrer was allowed, because the ecclesiastical court in which the suit was depending, and to which the ordinary jurisdiction belonged, was capable of compelling the discovery."

Before the passage of the statute of the United States which permits parties to be sworn and examined as witnesses in suits at law, I suppose there is no doubt that such a bill as this would lie, because the case would then be within the rule thus stated by Mr. Story. Discovery of the facts from the party could be in no other way obtained. But since the passage of the act of July 2, 1864, (section 858, Rev. St.,) which provides that no witness shall be excluded in any civil action because he is a party to or interested in the issue tried, a party to a suit may be a witness, may be called by the adverse party on the trial, and may be compelled to disclose all facts within his knowledge touching the controversy between them.

It was held by Judge Blatchford in the case of Heath v. Erie R. Co., 9 Blatchf. 319, which was a bill of discovery, that, since the passage of that act, a bill for the discovery of facts resting in the knowledge of the opposite party is unnecessary; for the discovery can be had by an examination of the party in the first cause. "The theory and basis of a bill of discovery in equity in aid of a defense in another suit is that the court in which such other suit is pending has no means of compelling a discovery from the plaintiff therein of the facts material to the defense."

Even more decisive and authoritative is the decision of the supreme court of the United States in *Brown* v. *Swann*, 10 Pet. 497,—a case not referred to on the argument, and which must have escaped the attention of counsel on both sides. That was a case arising under the statute of usury of the state of Virginia, and I read at some length from the opinion of the court, because the rule on the subject is clearly and fully stated. The court, referring to the statute, say:

"The third section of the statute is in these words: 'Any borrower of money or goods may exhibit a bill in chancery against the lenders, and compel them to discover on oath the money they really lent, and all bargains, contracts, or shifts which shall have passed between them relative to such loan, or the repayment thereof, and the interest and consideration for the same.' * * * The first question, then, to be considered is, can the bill of the complainants be brought within the operation of the section? We think not. Besides only making the contingent and prospective offer to pay the principal when the affairs of the intestate 'would admit of it,' which is altogether insufficient, as any other indefinite offer or acknowledgment of obligation to pay the principal would be, the bill is deficient in the material averment, essential to all such bills of discovery as this is, that the complainants are unable to prove the facts sought from the conscience of the defendant by other testimony; but, on the contrary, facts are stated in it from which a different presumption may be fairly raised.

"When the legislature of Virginia passed the statute, it fixed the nature and extent of the jurisdiction of a court of equity to compel a discovery upon oath from an interested party, in a suit either at law or in equity, and the rules which equity had prescribed to itself to enforce its jurisdiction in this regard. It knew the distinction between a bill for such discovery and other bills in chancery, which are also bills for discovery. One of the former is a bill for the discovery of facts alleged to exist only in the knowledge of a person, a party to a private transaction with the person seeking the disclosure, essential to the establishment of a just right in the latter, and which would

be defeated without such disclosure. In other words, it is a bill to discover facts which cannot be proved according to the existing forms of procedure at law. The jurisdiction of a court of equity in this regard rests upon the inability of the courts of common law to obtain or to compel such testimony to be given. It has no other foundation; and whenever a discovery of this kind is sought in equity, if it shall appear that the same facts could be obtained by the process of the courts of common law, it is an abuse of the powers of chancery to interfere. The courts of common law having full power to compel the attendance of witnesses, it follows that the aid of equity can alone be wanted for a discovery in those cases where there is no witness to prove what is sought from the conscience of an interested party. Courts of chancery have then established rules for the exercise of this jurisdiction, to keep it within its proper limits, and to prevent it from encroaching upon the jurisdiction of the courts of common law."

The court then cites some American authorities, and says finally:

"Many other authorities to the same purpose might be cited from English and American reports. Unless such averments are required, is it not obvious that the boundaries between the chancery and common-law courts would be broken down, and that chancellors would find themselves, under bills for a discovery from an interested party, engaged in the settlement of controversies by evidence aliunde which the common-law courts have procured under the process of a subpena; in delaying proceedings at law by pretenses that a discovery is wanted for the sake of justice; and in enjoining judgments upon indefinite allegations of the plaintiff having a knowledge of facts which give to a defendant an equity to be released, though the defendant might have availed himself of the evidence of third persons to establish the same facts in the progress of the cause, or of the powers of chancery to procure them, by a discovery to assist the court in deciding it, which last is the case now under consideration?"

As is obvious, this decision of the supreme court is directly applicable to the case at bar. What is sought by this bill is a discovery, by the defendant, of certain facts which it is believed are in his possession, and within his knowledge. All that would be accomplished if this bill were to be maintained, and a decree for a discovery made, would be a disclosure of those facts by the defendant. In the suit at law, as the present statutes of the United States provide, the defendant may be called as a witness, may be just as effectually examined as any other witness, and may be compelled to make just as complete a discovery as, in the absence of this statute, he could be compelled to make under a bill of discovery.

This being so, it follows that this bill is not maintainable. The demurrer will therefore be sustained, and the bill dismissed.

United States v. Minor and another.

(Circuit Court, N. D. California. November 23, 1886.)

1. Public Lands—Acquisition by Patent—Bona Fide Purchaser.

A purchaser in good faith for a valuable consideration from a patentee of United States lands, without notice of adverse claims, is entitled to rely on the record; and the patent, if valid on its face, will not be vacated, as to him, for matters dehors the record.

2. VENDOR AND VENDEE—BONA FIDE PURCHASERS—NOTICE BY POSSESSION.

A pre-emption claimant to an 80-acre tract, which he has included in his filing, but which he has never lived on, inclosed, or cultivated, and which is covered with a forest, though he has lived on, inclosed, and cultivated a portion of the lands he has filed on, over a quarter of a mile away from the land in question, has not had such possession as constitutes constructive notice to a bona fide purchaser.

In Equity. Suit to vacate patent to land on ground of fraud. S. G. Hilborn, U. S. Atty., and J. D. Chamberlain, for plaintiff. Hiram Smith, for defendant, Croghan. Before Sawyer, J.

Sawyer, J. This is a bill in equity to vacate a patent issued to defendant Minor to 80 acres of land, being the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of a certain section, on the ground that it had been fraudulently procured. Minor, having no interest in the land, made default, and the decision must turn on the rights of defendant Croghan upon the case as disclosed by the bill, answer, and stipulated facts.

The material facts, as appear by stipulation, and by the uncontradicted answer responsive to the bill, are as follows: Minor filed his declaratory statement for the land in question, as a pre-emptioner, October 23, 1874. He made his proofs as a pre-emptioner, and paid for the land in full. June 23, 1875. He made his proofs without notice to or knowledge of Spence, by and through the mistake and inadvertence of the land department in not noting a contest between Spence and Minor. A patent regular in form was issued to Minor, January 5, 1876. He had a house on the land, but had not made it his home, or inhabited the land, as required by law, when he made such proofs, and procured his patent. Being indebted to defendant, Croghan, in the sum of \$1,280, then due, on May 1, 1876, having, at the time, the patent in his possession, in consideration of said indebtedness, and the further consideration of an extension for six months' time in which to pay said indebtedness, on interest at 11 per cent. per month, Minor gave his note for the amount to Croghan, payable in six months, and, to secure payment, executed a mortgage on said Croghan, at the time of extending the time of payment and taking said mortgage, had in fact no notice of the fraudulent manner in which said patent had been obtained, but supposed it to have been in all respects honestly and properly issued, and no notice of any

claim made by Spence to said land, and no knowledge or notice in fact of any facts that should put him upon inquiry. But he, in good faith, supposing Minor's title to be good, took said mortgage in consideration of said indebtedness, fully and justly due, and of the further consideration of an extension of the time of payment of said in-He was a mortgagee in good faith, and for a valuable consideration, without notice of any defect in the title, or of any counter-equities. At the time he took the mortgage he lived 12 miles from the land, and did not know Spence, and did not know where At the time Minor filed his declaratory statement; at the time he made his final proofs, and paid for the land in question; at the time of the issue of the patent to him; and at the time of the execution of said mortgage to defendant Croghan,-Minor had no knowledge whatever of any claim by Spence to said land. He had never known or heard of any claim by Spence until after the execution of said mortgage to Croghan.

One Spence having, in 1872, settled upon the south 40 acres of the W. ½ of the S. W. ½ of the same section, with an intent to preempt that 80, and the 80 in question, adjoining on the north, on December 3, 1874, after the filing of Minor's statement, filed a declaratory statement covering the W. ½ of the S. W. ¼, and the W. ½ of the N. W. 1/4, of the section; the latter being the land in question covered by Minor's claim, constituting the two 80's, standing end to end to each other. Spence built a house upon the south half of the south 80, a quarter of a mile or more from the land in question. made sundry improvements on, and cultivated and fenced a portion of, the south part of the south 80, but he never made any improvements of any kind or lived on the north 80 in question, and there was nothing on the land in question, at the date of said mortgage, or at any time, to indicate that it was claimed by anybody, except the house owned by the patentee, Minor. The land was unoccupied, and not inclosed. The land on both tracts, and the surrounding country, was all heavily timbered with redwood. In January, 1878, long after the patent to Minor and mortgage to Croghan, Spence, in the landoffice, changed his pre-emption claim to a homestead claim; and in April, 1880, made his proofs on said homestead claim to both tracts, paid the required charges thereon, and sought a patent for the land.

In the mean time Croghan had foreclosed his mortgage, and purchased in the mortgaged premises, being the 80 in question, at the sale under the decree, and in due time received the sheriff's deed. He now holds the legal title, under the patent to Minor, in pursuance

of the transactions set out.

In my judgment, his title is valid against all the world. The title was probably voidable for the fraud of Minor, and mistake in the land-office, in the hands of Minor, but it was not void upon the face of the record. The patent, which is the final record of the title, (Beard v. Federy, 3 Wall. 491, 492,) was regular and valid on its

The proper department of the government had examined the case on the evidence presented, adjudged the right to be in Minor, and issued the patent accordingly in due form. The patent could only be assailed by matter resting in parol dehors the record. parties were entitled to rely upon the record. Croghan, relying upon the record, without any notice of any claim whatever on the part of Spence or of the United States, for a good and valuable consideration, and with the utmost good faith, took the mortgage; thereby securing a valid lien upon the premises in question, that was ultimately perfected into a legal title, which he now holds. Being a bona fide purchaser for value, without notice of any counter-equities or claims, there appearing no flaw upon the record, his title is impregnable. His equities are, at least, equal to those of Spence, and superior to those of the United States, the complainants herein, through whose negligence the patent was issued, by means of which Croghan innocently got into his present position; and, having the legal title, it must prevail. The position of the party having the legal title, with equal or superior equities, is best.

There must be a decree dismissing the bill, with costs; and it is

so ordered.

SHATTUC v. McARTHUR and another.1

(Circuit Court, E. D. Missouri. October 1, 1886.)

1. LIBEL—MEASURE OF DAMAGES—MITIGATING CIRCUMSTANCES. Where a man has to appear in court as plaintiff in a libel suit to vindicate himself against a charge reflecting on his personal or official character, he is only entitled, if there are mitigating circumstances, and not express malice, to such damages as will compensate him and make him whole.

2. Same—Expenses—Injury to Feelings

In such cases the plaintiff's expenses, and the outrage to his feelings, may be considered.

8. SAME—MITIGATING CIRCUMSTANCES.

The fact that the publication, though false, was an honest effort to repel an accusation made by the plaintiff against the defendant, is a mitigating circumstance.2

4. Same—Exemplary Damages.

Where a libelous publication is made through spite, personal ill will, or malice, exemplary damages may be allowed as a warning, and as a punishment for the offense.2

5. Same—Province of Jury.

It is the exclusive province of the jury to determine the amount of exemplary damages which should be allowed.

¹Edited by Benj. F. Rex, Esq., of the St. Louis bar.

²Provocation goes in mitigation of damages. Warner v. Lockerby, (Minn.) 18 N. W.

Rep. 821; Id. 145.

In the absence of actual malice, punitive damages should not be allowed. Neeb v. Hope, (Pa.) 2 Atl. Rep. 568; Templeton v. Graves, (Wis.) 17 N. W. Rep. 672. They are not given for implied malice. Eviston v. Cramer, (Wis.) 15 N. W. Rep. 760; S. C. 11 N. W. Rep. 556.

See, also, note to Shattuc v. McArthur, 25 Fed. Rep. 133.

6. SAME—STATEMENT HELD LIBELOUS.

The statement that S., the general passenger agent of a railroad company, "has grown rich by making his local ticket agents, or some of them, divide their commissions with him," is libelous.

See S. C. 25 Fed. Rep. 133. At Law. Action for libel.

The petition states that on or about the sixteenth day of May. 1885, the defendants published in a newspaper called the "Railway Register," at the city of St. Louis, in the state of Missouri, the following libelous words concerning the plaintiff, and of and concerning him in his capacity and occupation of general passenger agent of the Ohio & Mississippi Railway Company, viz.: "Mr. Shattuc [meaning plaintiff] has grown rich by making his local ticket agents, [meaning the local ticket agents of the Ohio & Mississippi Railway Company, or some of them, divide their commissions with him, meaning plaintiff;]" thereby meaning that plaintiff had improperly used his position as general passenger agent, as aforesaid, to force the ticket agents under him to divide with him the commissions received for the sale of railway tickets made by them as agents, under the plaintiff, of the Ohio & Mississippi Railway Company.

The defendant's answer admits the publication, but states that the commissions referred to were those received by said agents for the sale of railroad tickets over other lines of road, and that the publication complained of was made of and concerning the plaintiff, in his official capacity, as an officer of a quasi public corporation, and was made without malice, and upon reasonable cause, and was provoked by a statement published by the plaintiff to the effect that the defendant, McArthur, was a "parasite" and a "blackguard," and "had an itching palm," and by statements that he was a "black-

mailer."

Krum & Jonas and Garland Pollard, for plaintiff. Dyer, Lee & Ellis, for defendants.

TREAT, J., (charging jury orally.) Under the pleadings in the case, and the admissions of counsel, your duty is to consider a very limited line of inquiry. It is admitted that the defendants published the alleged libelous matter concerning the plaintiff, which was read to you from the paper of the date, I think, of May 16th. That, in the eye of the law, was a libelous publication.

The defendants do not attempt, in the language of the law, to justify that publication on the ground that it was true, but admit that it was false. Under the allegations of the pleadings they knew it was Consequently your verdict must be for the plaintiff. For what sum? is the inquiry. Ordinarily, in suits for libel, where a man has to appear in court to vindicate himself against a charge reflecting on his personal or official character, the jury will give him such compensation (if there are mitigating circumstances) as will make him whole with regard to the expenses and outraged feelings suffered by him for the false imputation resting upon him, and no more. But if the publication was made through spite, personal ill will, malice "express" in the language of the law, then the jury are justified in awarding "exemplary damages,"—sometimes called, also, "punitive damages" or "smart money." The object of the law in that particular is that one shall not falsely, and through malice, stab the reputation of his fellow-citizen, and escape merely because it so happens that the gentleman whose reputation was thus thrust at does not in dollars and cents suffer any injury which you can compute arithmetically. The object of the law, as the term itself implies, "exemplary" or "punitive" damages, is to inflict upon the libeler such a punishment in dollars and cents as will serve as a warning, and also as a punishment for such an offense.

Now, it is for you, and it belongs solely to you, to consider whether this was a publication made (it being admittedly false) through mere personal ill-will, spite, or express malice. If so, you, as 12 gentlemen familiar with the ordinary affairs connected with the rights of property, and the rights of person and personal reputation, must determine what you think would be just and proper, under the circumstances, in the nature of exemplary damages.

If, however, you reach the conclusion from the course of correspondence between these parties and their respective connections, one towards the other, that there was nothing but an honest effort to repel accusations made against the defendants themselves by the other party, then you will allow only what has been defined as compensa-

tory damages.

There remains, then, to sum up, this inquiry: First, were these defendants actuated by malice or spite or ill-will growing out of this controversy in publishing this libelous matter against the plaintiff? If so, you will award exemplary or punitive damages. If, on the other hand, you think that these parties, having engaged in a bitter controversy between themselves, did say these very improper things one against the other, it is for you to determine what will be a fair measure of compensation, taking into consideration the outraged feelings of the plaintiff, and the matters connected with the transaction,—what, in your judgment, would fairly compensate him for the wrong done, whereby he was compelled to appear in the tribunals of his country to vindicate his character against such aspersions.

United States v. One Hundred and Ninety-Six Mares. (Rust, Claimant.)

(Circuit Court, W. D. Texas. 1886.)

CUSTOMS DUTIES — MARES FOR BREEDING PURPOSES—INTENTION OF IMPORTER.

The statute of the United States providing that "animals specially imported for breeding purposes shall be admitted free, upon proof satisfactory to the secretary of the treasury, and under such regulations as he may prescribe," limits free importation of animals to such as are imported for the particular purpose of breeding; and it is a sufficient compliance with the statute that the importer, in good faith, intends them for that purpose, and it does not prevent his otherwise disposing of them if he afterwards finds it necessary or desirable to do so.

Libel of Information for the condemnation and sale of property for non-payment of customs duties. The opinion states the case.

Dist. Atty. Kleiberg, for the United States.

A. J. Evans, for claimant.

Turner, J. In the month of April, 1886, the claimant in this cause went to the republic of Mexico, and made arrangements to export into the United States mares, horses, and mules. He made application to import same, and claimed that the mares were desired for breeding purposes. He procured his necessary papers, imported the animals, and, after some little time, information was conveyed to the custom officers that the said mares were really intended to be placed upon the market, and sold whenever a proper opportunity presented itself. Whereupon, by direction of the custom officers, the mares were seized as forfeited to the United States because of the fraud practiced upon the customs by the claimant in pretending that he desired to import same for breeding purposes when in fact they were imported for the purpose of sale and profit.

The district attorney filed his libel of information with a view of having the said mares duly condemned, and sold as forfeited to the government for non-payment of duties. Mr. Rust, the importer, filed his claim to the property, denying the fraud. The mares, after seizure, were sold by the order of the court, and the proceeds are now in the hands of the register of the court awaiting judicial action.

The question raised, among others, is, what is the true interpretation of the statute upon the subject? It reads as follows:

"Animals specially imported for breeding purposes, shall be admitted free upon proof thereof satisfactory to the secretary of the treasury, and under such regulations as he may prescribe."

It is contended by counsel that all animals of the sheep, horse, or bovine species, capable of procreation, are to be admitted free of duty under this law, and counsel for the government insists that they are only admitted free of duty when desired by the importer for breeding purposes.

It becomes my duty to construe this statute. It is a rule of universal application that, in construing statutes, effect shall be given to every word contained therein, if that can be done. The words "for breeding purposes," in the statute, must be held to be a limitation upon the right to introduce animals duty free, and is equivalent to declaring that that is the use to which the animals are to be put in order to be admitted under this statute. The law provides that satisfactory proof shall be made, as may be required by the secretary. How can a man who imports animals for sale in the market state or swear that they are wanted for breeding purposes? In the nature of things he could do neither, and yet the law, and the rules prescribed by the secretary, require it.

I recognize the force of the argument of counsel for the claimant, based upon the proposition that long acquiescence in the construction of a statute is pursuasive of its correctness. The rule, however, applies more strictly to judicial interpretation than upon those which may be called quasi judicial, as in this case; and the rulings of the different secretaries upon the question involved in this case show the wisdom of the provision in the law that, in cases of this character, the interpretation of the secretary shall not be the rule of action whenever a judicial interpretation shall be finally made giving a different interpretation.

A judicial determination of the proper construction of the statute now brought in question has not, as I am aware, ever been had. The rule contended for by counsel for claimant—viz., when there is an ambiguity in the statute, (and especially one in its nature quasicriminal,) it should be construed most favorably to the citizen—is recognized. The question, then, is, is there an ambiguity in this statute? It reads as in the words above stated? It will be noticed that in punctuating this clause but two punctuation marks are used, each a comma, one after the word "purposes," and one after the words "secretary of the treasury."

Counsel for claimant insists that the word "specially" qualifies the word "imported," and counsel for the government insists that it applies to and qualifies the words "for breeding purposes." What other word may be used instead of "specially," and perform the same office? The dictionary referred to defines "specially" as "particular." Can it be said that, when an importation is made, that the secretary of the treasury would require proof that it was a particular importation? I think not, as every importation is, as to that importation, a particular importation. On the other hand, if we apply the word as is claimed by counsel for the government, it would be consistent to say that the secretary should and could require proof of the fact that the animals were imported for the particular purpose of breeding. To my mind the above construction does away with any just charge or claim that there is in fact an ambiguity, either latent or patent, in the statute under consideration.

It is not claimed by the counsel for the claimant that the rulings of the secretary are of absolute binding force, but that they are persuasive. The case cited, where the secretary interpolated words into the statute, and then made his rulings thereon, was reversed by the

supreme court, and most properly so.

The question presented here, however, is upon the very words of the statute as found in the statutes themselves, and it devolves upon the court to construe those words. If I had access to the debates in congress upon this subject, and could ascertain therefrom that the measure was one of public policy, then I would be prepared to give the most liberal construction to the words used, with a view to that end. On the other hand, if those debates showed the purpose was to confer a privilege to the individual man, I should be prepared to place a less liberal interpretation upon the words as used. If the object was to admit free of duty all females of the horse, sheep, and bovine species capable of propagating their species, we would conclude that they naturally would have said so, and would not have said "for the particular or special purpose of breeding," and would not have required proof to satisfy the secretary that they were for the particular purpose of breeding. Nor does this interpretation embrace the idea that a party importing for breeding purposes could never sell and dispose of such animals, but does imply that the intent and purpose of the importer was, at and before the importation, to use them for the purpose of breeding. I can well imagine how a man who in good faith imported animals for breeding could, under a change of circumstances, be justified in making sale of property thus situated. Suppose some unforeseen accident, misfortune, or other calamity overtook or beset him, or change in circumstances rendered it incompatible with his intention to devote them to breeding purposes, it could not be insisted that this changed condition of affairs could relate back to and affect the bona fides of his intention at the time he made the importation. No court would sanction such an unjust interpretation of the law.

For the reasons above given, which are more for the counsel than for the jury, I am constrained to put the case to the jury upon the question of bona fide intention on the part of the claimant at and before he made the importation.

Butler and others v. Bainbridge and others.1

(Circuit Court, S. D. New York. November 16, 1886.)

1 PATENTS FOR INVENTIONS—JOINT INVENTORS.

The defense that two persons to whom a patent has issued as joint inventors were not, in fact, joint inventors, is so purely formal that it cannot be regarded with favor, unless it be shown that the action of the patentees in that regard was disingenuous, or calculated to mislead the defendants.

2. Same—Defense of Want of Joint Invention—Pleading. Where the defense of want of joint invention in the patentees was not pleaded, nor fairly raised by the answer, but proofs to support it were taken, and the point made at the hearing, held, there was grave doubt whether the defense could be considered.

Same—Novelty, Proof of Want of.

Where devices which were definitely proved to have been before did not anticipate the invention and those which would anticipate were not definitely proved to have been before, held, that the evidence was too vague, uncertain, and indefinite to satisfy the mind of the court beyond a reasonable doubt, and to overcome the presumption of novelty arising from the patent itself.

4. Same—Invention—Presence of, how Determined.

In a patent case, the question of invention must depend upon the facts and circumstances of the case, and the perplexities which surround such controversies cannot always be solved by an examination of adjudged cases. They serve to illuminate the paths to be traversed, but he who desires to select the right one must depend largely upon his own judgment.

5. SAME—EMBOSSED CARDS.

A claim for "a circular or card having two or more folds, upon one or more of which are embossed or pressed out a raised panel or panels, to represent cards, upon which the printing is afterwards done, substantially as and for the purpose set forth," sustained although the art of embossing was old at the date of the invention, and cards having smaller printed cards pasted upon them, and papers struck up, with various figures, emblems, and devices, including small rectangular panels, were well known prior to that date.

B. SAWE

Although the invention may be a simple one, and it is hard to understand why the idea did not occur to some one long before, still if the fact remains that it never did, although something of the kind was long wanted, these circumstances warrant the conclusion that there was invention in producing it.

7. Same—Characteristics of Invention—Mechanical Skill.

"It is the presence of a thought like this which raises an ordinary mechanic to the plane of an inventor. Invention requires thought; mechanical skill does not. The one is the result of mental, the other of manual action."

In Equity. Bill for infringement.

James A. Whitney and L. E. Gilbert, for complainants.

Edwin H. Brown, for defendants.

Coxe, J. This is an action in equity, based upon letters patent No. 273,023, granted to Orlando W. Butler and Thomas W. Kelley, February 27, 1883, for an improvement in paper for cards and circulars. The purpose of the invention was to supersede the expensive and cumbersome method of pasting separate cards upon wedding invitations and similar papers, by substituting therefor a card having

¹Edited by Charles C. Linthicum, Esq., of the Chicago bar.

two or more folds, upon which the desired number of panels, to represent cards, are embossed or pressed out. On these raised panels the printing may afterwards be done. When the invitation is folded, the unsightly cavities produced by the process of embossing are concealed from view by one of the flaps of the paper. The eards when finished have the same general characteristics as their pasted predecessors, but, in addition, they are more symmetrical and uniform in appearance, can be manipulated with greater ease, are less liable to become soiled, and are about 50 per cent. cheaper. The invention has received the marked approval of dealers in stationery, and of the public. The patented cards have gone into general use, disolating the old devices referred to. The claims are as follows:

(1) A circular or card having two or more folds, upon one or more of which are embossed or pressed out a raised panel or panels, to represent cards, upon which the printing is afterwards done, substantially as and for the purpose set forth. (2) In an invitation-card, a portion upon which is embossed or pressed out, a panel or card for the invitation proper, in combination with folds, upon one or more of which is embossed a smaller card or cards, for the names of the parties substantially as herein shown and described. (3) The central portion, A, in combination with the folds, B, C, embossed cards, D, D, and embossed panel or bead, E, all constructed as described, and for the purpose herein set forth and described.

The defenses are lack of novelty and invention, and that the com-

plainants are not joint inventors.

Infringement of the first and second claims is admitted. The cards dealt in by the defendants are almost the exact counterpart of Fig. 2 of the drawings, and were sold in boxes marked with the date

of the complainants' patent.

The defense that complainants are not joint inventors is so purely formal in character that it cannot be regarded with favor, unless it be shown that the action of the patentees in this regard was disingenious, or calculated to mislead the defendants. Nothing of this kind appears, and it is thought that, upon principle and authority, there can be little difficulty in sustaining, upon the merits, the action of the patent-office in issuing the patent in its present form. Worden v. Fisher, 11 Fed. Rep. 505; Barrett v. Hall, 1 Mason, 447; Hotchkiss v. Greenwood, 4 McLean, 456, 461. There is, however, grave doubt whether the defendants are in a position to present the question. The defense is not pleaded, and there is nothing in the answer which can fairly be construed to put the matter at issue. Walk. §§ 440, 452.

The question of novelty and invention remains to be considered. It is entirely clear that at the time the complainants conceived the invention, in the fall of 1880, the art of embossing was old and well understood. Cards having smaller printed cards pasted upon them, and papers struck up with various figures, emblems, and devices, including small rectangular panels, were all known to printers, engravers, and stationers prior to this date. This, in brief, is a fair

general statement of the art as it existed at the time of the invention. The defendants have introduced in evidence nearly a hundred limiting and anticipating exhibits. It is not disputed that many of them are wholly irrelevant to the issues involved, and it is conceded that others had no existence prior to the invention. Of others, it may be said that the dates when they were first seen are wholly conjectural. In short, those which are definitely proved to have been before do not anticipate, and those which would anticipate are not definitely proved to have been before. The evidence is too vague. uncertain, and indirect to satisfy the mind of the court beyond a reasonable doubt, and to overcome the presumption of novelty arising from the patent itself. Unquestionably, however, the proof demonstrates that the field in which the complainants operated was at best a narrow one, and the question arises, is the patent, though it cannot be defeated for want of novelty, void for lack of invention? this question it is by no means easy to give an entirely satisfactory answer. Each case must depend upon its own facts and circumstances. The perplexities which surround such controversies cannot always be solved by an examination of adjudged cases. They serve to illuminate the paths to be traversed, but he who desires to select the right one must depend largely upon his own judgment. Although the present case is very near the border-line between invention and mechanical skill, it is thought that the doubt which arises should be resolved in favor of the patent. No one ever did before what the complainants did, viz., produce an invitation card with two or more folds, having panels to represent cards, embossed thereon, upon which the printing is afterwards done. This particular structure is new, useful, and inexpensive. It soon became popular; it supplies a need. Time and thought were required in its development. The obstacles which theretofore could only be surmounted by skilled labor were entirely eliminated. All this required something more than the work of the mechanic. It amounted to invention.

The whole matter is well illustrated by a question and answer quoted with approval upon the defendants' brief. One of the complainants was asked if he thought that prior to October, 1880, persons of ordinary skill in the art would have been unable to produce representations of cards by embossing upon paper, and the answer was: "If they happened to think of it, probably they would not." Exactly so. It is the presence of a thought like this which raises an ordinary mechanic to the plane of the inventor. Invention requires thought; mechanical skill does not. The one is the result of mental, the other of manual, action.

Grant that the invention is a simple one, that when viewed from our present standing-point it is hard to understand why the idea did not occur to some one long before, and yet the fact remains that it never did, though something of the kind was long wanted. After giving the subject the best thought of which I am capable. I am convinced

that to relegate these complainants to the condition of mere skilled

workmen would be to do them a grave injustice.

In the light of the present, the idea of substituting hard rubber for other material, as a plate for holding artificial teeth, or of providing tubular kerosene lanterns with an irreversible current of air by means of deflectors, seems simple enough, and yet the men who thought of these things conferred lasting benefits upon the world, and received the rewards of inventors. Lantern Co. v. Miller, 21 Fed. Rep. 514; Smith v. Goodier, 93 U. S. 486.

In Crandal v. Watters, 20 Blatchf. 97, S. C. 9 Fed. Rep. 659, the patent was for a box loop for carriage tops, made of thin metal, from which the loop was struck up. It was used as a substitute for the old leather housing. In sustaining the patent, the remarks of Judge Blatchford are so applicable to the case at bar that I quote briefly from the opinion. At page 102 he says:

"Various old devices are introduced. * * * But no article like the plaintiff's, capable of being taken and used for the purposes for which the plaintiff's can be used, without alteration and adaptation, requiring invention, existed before. Almost all inventions, at this day, that become the subject of patents, are the embodiment and adaptation of mechanical appliances that are old. In that consists the invention. When the thing appears it is new and useful. No one saw it before; no one produced it before. It supplies a need. It is at once adopted. All in the trade desire to make and use it, yet it is said to have been perfectly obvious, and not to have been patentable. Where an article exists in a given form, and applied to a given use, and is taken in substantially the same form, and applied to an analogous use, so as to make a case of merely double use, there is no invention. But it is very rarely that a thing of that kind secures a patent."

There should be a decree for the complainants for an injunction and an account, with costs.

Machesney v. Brown and others.

(Circuit Court, N. D. New York. November 26, 1886.)

PATENTS FOR INVENTIONS—ASSIGNMENT—ATTORNEY IN FACT—INSTRUMENT UNDER SEAL.

The assignment of a patent for an invention when executed by one acting as attorney, by an instrument under seal, must be executed in the name of the principal, and purport to be sealed with his seal, in order to bind the principal.

In Equity. Bill to restrain the infringement of letters patent for an invention. Plea allowed, with costs, and leave granted to complainant to move to amend his bill. The facts are sufficiently stated in the opinion.

Silas J. Douglass, for complainant.
William H. Bright, for defendants.

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Wallace, J. The bill in this case is to restrain the infringement of letters patent for an invention, granted to one Sweet, and the plea, which has been set down for argument, avers that the only title of the complainant to the invention is one derived by an instrument executed and delivered to the complainant by one Smith, which is set out in full in the plea. This instrument in its first clause describes Ira E. Smith as party of the first part. The second clause recites that Smith, by power of attorney from Sweet, became the attorney of Sweet for the purpose of selling and assigning the patent. The third clause recites that Machesney desires to purchase, and has paid a consideration to Smith, and that Smith does thereby assign and set over all the right, title, and interest he has in and to the said invention, and all the right, title, and interest that said Sweet has. Then follows an attestation clause, reciting that Smith has set his hand and seal to the instrument. The instrument is signed, "I. E. SMITH," and has a seal.

The assignment must be held to be inoperative to pass the title of Smith, upon the well-settled rule that a sealed instrument when executed by one acting as attorney, must be executed in the name of the principal, and purport to be sealed with his seal, in order to bind the principal. It is true that an assignment of a patent for an invention is valid without a seal. This is so because the statute which creates the property in inventions, and regulates the manner of transferring the title, only requires an assignment to be in writing. But such an assignment is a muniment of title to incorporeal property, and, whether under seal or not, the question whether, when executed by an attorney, it is in form to bind the principal, is to be determined by the rule applicable to deeds and formal instruments under seal. See Whart. Ag. § 285. As to the general proposition that a contract under seal, by an agent for a principal, is not binding on the principal, unless it profess to bind him, and be executed in his name, as his contract, it is sufficient to cite Elwell v. Shaw, 16 Mass. 42; Fullam v. Inhabitants of West Brookfield, 91 Mass. 1: Townsend v. Hubbard, 4 Hill, 351; Kiersted v. Orange & A. R. Co., 69 N. Y. 343.

Although the assignment recites that Smith has a power of attorney from Sweet to convey the title, and purports to convey that title as well as his own title, Smith assumes to transfer as vendor himself, and not as the attorney for Sweet. The remarks of Story, J., in Clarke v. Courtney, 5 Pet. 350, are apposite:

"The act does not purport to be the act of the principals, but of the attorney. It is his deed and his seal, and not theirs. This may savor of refinement, since it is apparent that the party intended to pass the interest and title of his principal. But the law looks not to the intent alone, but to the fact whether that intent has been executed in such a manner as to possess a legal validity."

If, as it was stated on the argument, the defendants claim under a title transferred to them directly by Sweet, and the real controversy is as to which title should prevail, the bill should make Sweet a party, and should contain appropriate allegations to show complainant's equitable title prior in point of time to the title of the defendants, and notice to defendants of the complainant's rights.

The plea is allowed, with costs. Leave is granted to the com-

plainant to move to amend his bill.

NATIONAL HAT-POUNCING MACHINE Co. v. Hedden and others.

SAME v. BROWN.

(Circuit Court, D. New Jersey. December 3, 1886.)

1. PATENTS FOR INVENTIONS—SUIT FOR INFRINGEMENT—DECREE NOT CONCLUSIVE AGAINST ANOTHER DEFENDANT MAKING A NEW CLAIM.

After the validity of a patent has been established in a suit, it may always

be shown, in another suit on the patent against another defendant, and even in answer to an application for a preliminary injunction, that the right claimed by the plaintiff in the new suit was not fairly in controversy in the former

2. Same—Preliminary Injunction not Granted.

In an action for an infringement of a patent, where there is doubt as to the priority of the invention, if the defendants are amply responsible, and the plaintiff sells licenses for a royalty, so that there will be no difficulty in ascertaining the damage, a preliminary injunction will be denied.

In Equity. Motion for preliminary injunction. Eugene Tredwell, for the motion. A. Z. Keasbey, contra.

Walks, J. Motion is made in each of these cases for a preliminary injunction on letters patent granted to Rudolf Eickemeyer, November 23, 1869, No. 97,178; also on letters patent granted to Edmund B. Taylor, October 21, 1879, No. 220,889,—both patents being for improvements in machines for pouncing hats. Complainant is owner by assignment of these patents, and sues for their infringement by defendants. The second claim of the Eickemeyer patent, and the fifth claim of the Taylor patent, are the only claims relied The second claim of the first patent is for "the on in these motions. arrangement and combination of a rotating pouncing cylinder with a vertical supporting horn, substantially as described, whereby the supporting horn may be used to support the tip, side, crown, or brim during the operation of pouncing the hat." The fifth claim of the second patent is for "the combination of the support for the hat and the self-feeding pouncing cylinder, whereby the hat is drawn over the support, B, in the direction of the motion of the pouncing cylinder."

The validity of the second claim of the Eickemeyer patent has been sustained by the United States circuit court for the district of Massachusetts, at the suit of this complainant against William B. Thom and others, begun July 10, 1879, and decided November 6, 1885. But none of the defendants here were parties to that suit. Hedden & Co. admit that they used the Eickemeyer machine, under a license from the complainant, from 1878 to the end of 1882, and that they paid royalties at the rate of six cents per dozen for fur hats, and three cents per dozen for wool hats; that in the latter part of 1882 they purchased a machine from the defendant Brown which would pounce a hat all over at one operation, instead of requiring two operations,one for the brim, and another for the body of the hat, as in the Eickemeyer machine; and that thereupon they gave notice to the agent of the complainant that they would no longer pay royalties for the use of its machine. They also assert that they did not know, and were never informed by the complainant, that its machine would pounce a hat all over at one operation. There was no concealment by Hedden & Co. of their acts, and they assigned the reason just stated for substituting the Brown machine.

Brown claims that he had constructed his machine at least a year before the date of the Eickemeyer patent, and, of course, long prior to the Taylor patent, on which he had pounced hundreds of dozens of hats; pouncing each hat all over at one operation, thereby anticipat-

ing the inventions of the patents now in controversy.

When these motions were first submitted to the court in May of the present year it was represented by the defendants that the machine now sought to be enjoined was seen in use by the complainant's agent in December, 1882, and no explanation was made in the moving papers for the delay in applying for an injunction for nearly four years; but upon the intimation of the court that, as the papers stood, an injunction could not issue in consequence of the laches of the complainant, further time was allowed for proof in excuse and justification of the delay. The excuse is that the complainant was waiting the result of the litigation in Massachusetts before prosecuting the users of the Brown machine, which is identical with the Taylor machine, and that the latter was decided to be an infringement of the Eickemeyer patent; that the complainant believed the case against Thom and others to be a test case, and that the trade generally would submit to its decision.

As a general rule, this would constitute a satisfactory reason for delay. Green v. Barney, 19 Fed. Rep. 420. But, admitting this, Hedden & Co. contend that the suit in the Massachusetts district was founded on three patents, and that only the second claim of one of these was sustained by the court, and that the machine now used by them is substantially the same which was made by Brown in 1868. They further say that they have used this machine only in their business as manufacturers, and are amply responsible to pay all damages

which might be recovered for any infringement of the right of the complainant, if such infringement should be established. Brown contends that as his machine was not before the court in the former suit. and he has had no opportunity of presenting his claim of priority of invention, his rights as a prior inventor have not yet been adjudicated. It has been held to be "well settled that, even after the validity of a patent has been established in a suit, and notwithstanding the presumption thereby raised that the patent is valid, it may always be shown in another suit on the patent, against another defendant. and even in answer to an application for a preliminary injunction in such suit, that the right claimed by the plaintiff in the new suit was not, either as to its nature or its extent, fairly in controversy in the former suit, or that material facts were not known or considered when the former suit was tried, or that there are relevant matters which were not adjudicated in the former suit." Page v. Holmes Burglar Alarm Tel. Co., 2 Fed. Rep. 336.

The affidavits, and counter-affidavits, filed in the present application, are voluminous, contradictory, and conflicting. But facts are proved or admitted sufficient to create some doubt of the propriety of granting these motions. It does not satisfactorily appear that irreparable damage will be suffered by the complainant in waiting for a final decree in either case; and as the complainant does not use the patents as a monopoly, but sells licenses to others to use them for a fixed royalty, there will be little difficulty in ascertaining whatever damages it may be entitled to if it finally prevails. Moreover, it is understood that Hedden & Co. are extensively engaged in manufacturing hats, employing a large number of hands in their business, and that a provisional injunction would work greater hardship on them than benefit to the complainant. For these reasons, and in view of the fact that there is some doubt on the question of priority of invention, the injunctions will not be granted, unless the complainant can show to the court that the defendants are not pecuniarily responsible. and are not now, or will not in the future be, able to pay any decree that may be rendered against them; in which case it may apply for an order requiring the defendants to enter into a bond, with sureties. in such sum as may be agreed upon by the parties, or determined by the court after hearing. In reaching this conclusion the practice is followed which was adopted by this court in Greenwood v. Bracher, 1 Fed. Rep. 861. See, also, New York Grape-sugar Co. v. American Grape-sugar Co., 10 Fed. Rep. 837.

THE A. H. JENNIE.1

(District Court, N. D. New York. October 4, 1886.)

SEAMEN—WAGES—CONTRACT OF SHIPMENT—CONFLICTING EVIDENCE.

When the contract of shipment is in parol, the court will, as between several versions, adopt the one that is most consistent with common sense and with the preponderance of testimony.

In Admiralty.

The libelant, on the twenty-eighth of April, 1886, shipped as fireman on the steam-barge A. H. Jennie, a Canadian vessel, and, with the exception of three or four days, remained on board until the twenty-sixth of June, 1886. He alleges that he was to receive for his services as fireman \$18 for the first month, and \$24 thereafter; that on the fifth of June, 1886, he was made second engineer, which position he filled until the twenty-sixth of June, when he was discharged; that for his services as engineer he was to receive \$30 per month, the usual wages. The respondent's version of the agreement is that the libelant was to receive \$12 for the first month, and \$15 thereafter, pro rata deduction to be made for the time he was absent from his post. The agreement was oral. The libelant admits that he received \$10, and it is undisputed that \$15.50 was tendered to him on the twenty-sixth of June. That he subsequently received and retained this amount is not denied. He received in all \$25.50. day or two after he left the barge, and without warning or notice of the nature of his claim, the libelant caused her to be seized at the port of Buffalo, and there detained until her master procured the necessary bond for her release.

Martin Clark, for libelant. G.'S. Potter, for respondent.

Coxe, J. I have carefully examined the testimony presented, and am convinced that the libelant cannot recover. His account of the transaction between himself and the master of the barge is wholly unsupported, and is inherently improbable. The respondent's version, on the contrary, besides being in accordance with common sense, is corroborated, in its principal features, by five witnesses.

The libelant was a young man 21 years of age. He had been a mason's tender, and had done "a little of everything." He had never before been upon a vessel. He had never touched a marine engine, and his knowledge of steam-power generally was confined to a threshing-machine and a saw-mill. That a careful master would employ such a person, without any previous knowledge of his capacity, and agree to pay him, after the first month, the wages received by experienced hands, and in about five weeks promote him to the posi-

Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

tion of second engineer, with no agreement as to the amount of his wages in the new position, is possible, but it is not probable. But when, in addition, it is remembered that libelant's story is overthrown by the great weight of evidence, the court has no alternative but to reject it altogether.

After making the proper deductions for the time the libelant was absent from the barge, he has received all that he is entitled to. The occurrence on the twenty-sixth of June, if not a payment, amounted, at least, to a tender of the sum due. The respondent's rights can in no way be affected by the fact that the libelant handed the money to the engineer. That the engineer subsequently paid it back to the libelant is undisputed.

Both parties are British subjects. They reside at the same place. The Canadian courts were open for the settlement of this trivial dis-

pute.

The evidence fails to show any justification of the libelant's conduct in "tying up" the barge in a foreign port, where her master was a comparative stranger, and could in all probability procure her release with less expense and annoyance by paying the claim than in any other way. The presumption is a strong one that the libelant was actuated by other motives than a desire to collect an honest debt. Though the courts are zealous always in guarding the rights of seamen in every meritorious demand, the libelant, as shown by this record, is beyond the pale of such protection.

The libel is dismissed, with costs.

THE NORTH STAR.

STORCK v. THE NORTH STAR, etc.

(District Court, S. D. New York. November 19, 1886.)

Collision—Two Schooners—Attempt to Cross Bows—Failure to Keep Course—Apportionment.

Where the schooner L., sailing free, and the schooner N. S., sailing close-hauled, approached each other nearly head on, in the night, and, when about abreast of the Stepping Stones light, in Long Island Sound, came in collision, it was held that the collision was due to the fault of both vessels,—the fault of the L. being an attempt to cross the bows of the N. S., by putting her helm hard a-port, when the circumstances did not justify porting; the fault of the N. S. consisting of a failure to keep her course, which the fact of her being close-hauled required.

In Admiralty.

Shipman, Barlow, Larocque & Choate, for libelant.

Abel Crook, for claimant.

Reported by Edward G. Benedict, Esq., of the New York bar.

Brown, J. The collision in this case took place on the night of the sixteenth September, nearly abreast of the Stepping Stones light, a little over a mile N. N. E. of Throg's Neck. The libelant's schooner was bound outward, and the schooner North Star bound inward. The channel course there runs N. N. E. and S. S. W. The evidence shows that the wind must have been a little south of west, and that the North Star was sailing close-hauled upon the starboard tack. Lillie, in rounding Throg's Neck, as her captain states, kept well off from the buoy, and was therefore probably a little to the eastward of the channel course which the North Star was pursuing. As the Lillie was rounding Throg's Neck, each saw the other's green light, when they must have been some two miles apart. The captain and lookout of the Lillie testified that the two vessels seemed to be approaching nearly head on; that the lights of the North Star changed several times from green to red and red to green; that he steered, not by compass, but by the Stepping Stones light, keeping it to leeward. Shortly before the collision he put his helm hard a-port, and the North Star struck the Lillie about amid-ships, and nearly at right angles, as both sides agree.

The captain of the Lillie states that the North Star seemed to be following him, as he kept off to the eastward, and charges the collision to that cause. The captain of the North Star testifies that he kept her upon her course, by compass, S. S. W., and did not change; that the green light of the Lillie was about a point off the North Star's starboard bow; and that there was no danger of collision, had not the Lillie, when near, ported, and run across his bows. He states, however, that he did not see any change of light of the Lillie

after seeing her green light.

As the Lillie was sailing free, and the North Star close-hauled, the former was bound to keep out of the way, and the latter to keep her I think the weight of evidence is to the effect that there would have been no collision had not the Lillie attempted to cross the bows of the North Star by porting. The circumstances did not justify putting her helm hard a-port when she did. The positions at the collision show that the captain could not have had and kept the other's red light in view for the length of time testified. I cannot, however, credit the testimony of the North Star that she kept her course. I find it impossible to account for the large angle at which the collision occurred, viz., at least seven points, unless the North Star had helped to make that great angle by keeping off to port, or else the testimony of the libelant's witnesses is untrue and fabricated; for, if the Lillie had changed as much as seven or eight points, she must have been previously, i. e., before porting, so far to the westward that only the green light of the North Star could have been vis-The channel is such that the two vessels must previously have been going upon nearly opposite courses, varying therefrom not over a point, and probably not over half a point; the North Star probably heading a little closer to the buoy at Throg's Neck than the distance at which the Lillie rounded it. The fact that the captain of the North Star did not observe any other than the green light of the Lillie convicts him at least of inattention. The lookout could not have noticed a little change of course to the eastward; and such a change would have been not unnatural, on the part of the North Star, to give Throg's Neck buoy, in the night-time, a wide berth. This seems to be more probable than that the entire testimony of the Lillie's witnesses as to the changes of the North Star's lights should be false. From the large angle at the collision, which I cannot otherwise explain, I must hold that the North Star contributed to the collision by a change of her course also to the eastward, and that the damages should therefore be divided.

THE WILLIE.1

THE LUDGATE HILL.

CAHILL v. THE WILLIE and another.

(District Court, S. D. New York. November 19, 1886.)

Collision—Canal-Boat in Tow—Steamer's Propeller—Unusual Construction of Propeller—Unjustifiable Position for Canal-Boat—Liability of Tug.

The tug W., with libelant's boat in tow, attempted to enter a slip, the opening to which, owing to vessels along-side the piers, was only some 60 feet wide. In going in, libelant's boat was swung under the counter of the steamer L. H., which was lying along the wharf, struck her propeller blade, and sunk. The steam-ship had double screw propellers, which are unusual in the port of New York, and project nearer the line of the vessel's side than ordinary single propellers. Held, on the evidence, that libelant's boat was swung under the steamer's stern to an improper and dangerous degree, even in reference to single screw propellers; that the tug was therefore solely in fault.

In Admiralty.

Carpenter & Mosher, for libelant.

Biddle & Ward, for the Willie.

Hill, Wing & Shoudy and C. C. Burlingham, for the Ludgate Hill.

Brown, J. On the ninth day of May, 1885, between 10 and 11 A. M., as the steam-ship Ludgate Hill was lying along the upper side of the slip between Piers 42 and 43 North river, with her stern about 30 feet inside the end of the pier, the tug Willie, with the libelant's canal-boat lashed on her port side, came into the slip, for the purpose of landing her tow. On the opposite side of the slip were two

Reported by Edward G. Benedict, Esq., of the New York bar

barges moored abreast, leaving a clear space between the barges and the steam-ship of about 60 feet. The Willie had previously landed another tow at Pier 36, and then came up the river into the slack-water near the piers, the tide being ebb, and undertook to land the tow through the narrow space above stated. In doing so she first headed towards the quarter of the steam-ship, and backed her engines when about a dozen feet from it. The boats continued under headway, and the swing of the bows brought the libelant's boat against one of the blades of the steam-ship's propeller, which was broken off by the blow. The propeller blade stove a hole through the boat, so that the latter sank in a few minutes.

The steamer had double screw propellers, each 15 feet in diameter. Measurements show that the end of the blade, when perpendicular, as she was then loaded, would be about three feet under the waterline, and that the blade, when horizontal, would project within about

seven or eight inches of the line of the vessel's side.

The tug claims that the steam-ship was in fault because double screw propellers are altogether unusual in this port, because the tug had no notice that the steamer had double screws, because such screws project at least four or five feet further towards the side of the ship than the blade of the largest single propeller, and because they were entitled to notice from the steamer of the danger from her novel construction; or else that the steamer should have furnished guards against collision, as is sometimes done.

The evidence shows that the blow received by the canal-boat was not upwards of four feet below the water line. That being so, and the top of the propeller blade, when perpendicular, being three feet below the water level, it follows that the position of the blade, at the time of the accident, must have been so near upright as to be about four and one-half feet inside of the line of the vessel. This confirms what some of the other witnesses testify to, viz., that the tow went considerably under the steamer's counter. As the propeller blade was broken, the blow must have been severe; so that it is clear that the tow would have swung considerably further inward if it had not encountered the propeller's blade. The position of the tow at the time of collision, considerably inside of the line of the steamer's side, and under her counters, very nearly approached the position of the blades of a single propeller. I have no doubt, therefore, that the canalboat was swung under the steamer's stern to an improper and dangerous degree, even in reference to single screw propellers. not made necessary or excusable by any of the circumstances, or by any necessities of the tug and the tow in entering the slip, and it was therefore at the risk of the tug. It was brought about, doubtless, by another and prior fault, viz., in coming up so near to the piers. After landing the other tow, the tug should have gone out into the river far enough to enable her to make a turn into the slip less sharp in landing the libelant's boat.

Considering that the tug had brought the canal-boat so far under the steamer's counter, and into a place where she had no business to be, I think it would be unjust to impose any part of the loss upon the steamer, notwithstanding the considerations that have been so ably urged. Had the collision occurred, as was first charged, outside of the line of the steamer's side, or even within a short distance only inside of that line, and where it was not unusual for tugs to go in the necessarily close navigation of the slips, the case would have been different. It seems reasonable to require that vessels of new designs, having concealed parts beneath the water dangerous to ordinary shipping, should give notice when practicable of their peculiarities, or have fenders to prevent injury to innocent persons having no suspicion of the concealed danger. The Bellerophon, 3 Asp. (N. S.) 58, 60, 62.

This steamer was, however, one of a line of three that had come into this same slip for at least six or seven months before this accident, and the tug had been accustomed to go to the French steamers on the opposite side of the slip very frequently during all this time. The pilot of the tug says he had no knowledge that any of the three steamers of the Hill line were double screw propellers. It seems almost incredible that notice of this fact should have escaped him. is not in accordance with the usual knowledge that men derive in their daily business of what is about them. These steamers had upon each rail, in line above the propeller blades, a semi-circular sponson, two and a half feet in diameter, projecting beyond the rail, and designed to fend the propeller off from the lines of the wharf,—a conspicuous peculiarity not likely long to escape the attention of those frequenting the slip. But, without further comment upon this part of the case, I think, for the reason above suggested, -namely, because the place of the collision was so far under the counter as to be unjustifiable in reference even to any propeller,—that the tug must be held alone in fault. Had the tug kept within the line that ordinary prudence and ordinary practice require, no injury would have been done. The steamer was properly moored at her wharf. She did nothing to lead the tug beyond that line, and therefore cannot be held The Granite State, 3 Wall. 310. in fault.

The libelant is entitled to a decree against the Willie, with costs; and the libel should be dismissed, with costs, as against the Ludgate Hill.

THE MAUD CARTER.1

(District Court, D. Massachusetts. November 19, 1886.)

MARITIME LIEN-CONFLICT OF LAWS.

If an English vessel, while in an English port, receives advances which, by the laws of England, constitute the advancer a lien claimant, it will become the duty of an American court, upon the arrest of the vessel, to administer and apply, as against her or her proceeds, the law of England exactly as it would be applied, under like circumstances, in an English court. The circumstance that no lien would be created by the American law, under like conditions, is immaterial.

Libel in admiralty to recover \$1,456 for supplies and advances furnished the schooner by the libelant, a shipping merchant in Boston. Under the libel the vessel was sold, and the proceeds (\$1,700) paid into the registry of the court. The mortgagee, George J. Troop, of Halifax, appeared and contested the allowance of \$157 of the amount, on the ground that the sum was paid as premiums for insurance upon the vessel, and no maritime lien existed therefor. He also disputed an item of \$90, acceptance of a draft given in payment of the vessel's indebtedness for spars furnished in her construction.

E. S. Dodge, for libelant.

C. I. Russell, Jr., for mortgagee.

Nelson, J., (orally.) This schooner is a British vessel, owned by British subjects, having her home port in Bay of Isles, Newfoundland, and is subject to British law. The libelants are citizens of Boston. and the mortgagee contesting his claim is a citizen of Halifax and a British subject. Two items in the account are contested. is for insurance premiums, which were paid at the express request of the ship-owner, for insurance upon the vessel, for his benefit, when she was in a British port. The second item is for the acceptance of a draft drawn by the owner in payment of the vessel's indebtedness for spars furnished in Halifax for the construction and original outfit of the vessel. If this was a United States vessel, the court would perhaps be obliged to reject both these items. The claim for spars, under the decisions of the supreme court, could not be recovered in rem, because no maritime lien is recognized for materials furnished in the original construction of a vessel. The only right of lien in such case comes from state statutes. The claim for insurance premiums would be disallowed upon the dictum of Judge Lowell in The Jenny B. Gilkey, 19 Fed. Rep. 127. In that case the court decided that there was not sufficient proof of authority from the owners to effect the insurance claimed, but intimated that, even if the insurance was authorized, there was no maritime lien upon the vessel for it, and the dictum of Judge Lowell is entitled to great weight.

¹Reported by Theodore M. Etting, Esq., of the Philadelphia Bar.

But this vessel is a British vessel, and subject to British law. der the circumstances, it is the duty of the court to administer and apply the British law exactly as it would be applied if the vessel were in an English court. The court, under the decision in The Riga, L. R. 3 Adm. & Ecc. 516, must hold that insurance, expressly authorized by the owners, is a "necessary," within the English act defining the jurisdiction of the admiralty court, and that, under that act, it created a maritime lien upon the vessel. The claim for payment for the spars used in the original construction of the vessel must also be allowed, because the English admiralty would allow it as a lien upon the vessel. The act of 24 & 25 Vict. c. 10, merely restores to the English admiralty the general admiralty and maritime jurisdiction of which the common-law courts had deprived it. While the United States supreme court has held that under the admiralty jurisdiction in this country there is no lien for materials furnished in the construction of a vessel, yet the general maritime law of the world gives such a lien, and the jurisdiction to enforce it has been restored to the English admiralty. As the lien would be recognized and enforced against this vessel in an English court, it can, as between the parties here, be enforced in this court. A decree will therefore be entered for the whole amount of libelant's claim, with interest and costs.

THE MERRIMAC.1

(District Court, D. Massachusetts. November 20, 1886.)

MARITIME LIENS—SEIZURE OF SEINE-BOAT AS APPURTENANT TO MACKEREL SCHOONER—USAGE—OBLIGATION TO TAKE NOTICE OF.

The seine-boat which always accompanies schooners engaged in the mack-

erel trade sometimes belongs to the owners of the vessel, but quite as frequently to others. In the latter event, it is sometimes hired by the crew or owners, from outside parties, for the season or trip. It draws a regular share in the catch, which goes to whomsoever furnishes it. When the boat and the vessel have a common ownership, the former, by usage, passes to the buyer of the latter, though it be not mentioned in the bill of sale. But it is only in the event of common ownership that the former is regarded as appurtenant to the latter. *Held* that, if the common ownership be divested by a sale, the subsequent hiring of the boat by the seller cannot serve to make the boat a part of the vessel, and liable to an attachment for the vessel's debts; that the new relation was in accordance with a usage of which the parties furnishing supplies were bound to take notice.

In Admiralty. Action in rem. Seizure of seine-boat of mackerel schooner at the instance of material-men, the furnishers of supplies to the schooner.

Libels by T. L. Mayo & Co. and James P. Nye for repairs and supplies furnished the mackerel schooner Merrimac. A large seine-

Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

boat, 37 feet long and $7\frac{1}{2}$ feet wide, was seized by the marshal as belonging to the schooner. Noah Mayo appeared by petition as claimant of the seine-boat, alleging that it was not appurtenant to the schooner, and not subject to the lien of the libelants. The only question in the case was whether the seine-boat was appurtenant to the schooner.

J. C. Dodge & Sons, for intervenors. Frederick Cunningham, for libelants. Noah Mayo, for seine-boat.

NELSON, J. This case was heard on the petition of Noah Mayo for the release from arrestment of a seine-boat seized by the marshal on a warrant of arrest, in a suit by material-men against the mackerel schooner Merrimac, her tackle, apparel, and furniture. libelants claim to hold the boat under the seizure as appurtenant to the vessel, and as subject to their lien for the supplies furnished. seine-boat, such as the one in question, always accompanies a vessel when engaged in the mackerel fishery, and is indispensable for the prosecution of the business. As it is too large to be hoisted and carried on deck, it is usually towed astern of the vessel in proceeding to and from the fishing grounds, and is there used in carrying out and setting the seine. It sometimes belongs to the owner of the vessel. but is quite as frequently owned by the crew, or is hired for the season or trip from outside parties. It draws a regular share in the catch,—usually a sixth or seventh after the great general bill,—and this share goes to the parties furnishing the boat. If the boat belongs to the owner, it is considered as attached to the vessel, and passes by usage in a sale of the vessel, though not mentioned in the bill of sale. But it is regarded as appurtenant to the vessel only when it belongs to the owner of the vessel, and is used in connection with it in the manner stated.

Such being the usage proved as to boats of this class, the libelants' lien never could have attached to this boat. When the supplies were furnished, the boat had become the property of the petitioner Mayo. It had previously belonged to the owner of the vessel, but had been purchased from him by Mayo. By the sale it was separated from the vessel, and was no longer attached or appurtenant to it. Its subsequent use by the vessel, in prosecuting its business, was under a contract of hiring, by which Mayo was to be paid for its service. This did not have the effect to annex it again,—to make it a part of the vessel. The libelants were bound by the usage to take notice of this new relation, and can therefore have no lien on the boat for the supplies. Petition allowed.

THE WATER WITCH'S CARGO.

(District Court, D. Massachusetts. November 23, 1886.)

Ships and Shipping — Duty of Master not to Take Average Bond after Adjustment of Loss—Form of Average Bond.

The question whether tender of an average bond, reciting that the owners claim that certain losses and expenses had been incurred which might constitute a general average, is sufficient to entitle consignees to a delivery of the goods from the master, cannot be decided (there being no contention but that the losses and expenses made a case of general average) after the adjust-ment has been made, there being no obligation on the master then to accept any bond.

In Admiralty. C. T. Russell, Jr., for libelants. Paul West, for claimants.

NELSON, J. The brig Water Witch arrived in Boston on the thirteenth of December, 1885, from Baltimore, having on board a cargo of clay retorts, tiles, etc., consigned to the libelants, Waldo Bros., commission merchants, doing business at Boston. In the course of the voyage a general average loss occurred. On her arrival here the master offered to deliver possession of the cargo to the consignees, they paying the freight, upon their executing to him an average bond prepared by the adjuster employed by him to settle the loss, in which it was recited that in the due prosecution of the voyage certain losses and expenses had been incurred, and other expenses thereafter might be incurred, which, according to the usage of this port, constituted a general average to be apportioned on the vessel, her earnings as freight, and the cargo on board. The consignees declined to execute the bond, with the recital expressed in that form, upon the ground that by its terms they would be precluded from disputing the liability of the cargo for contribution; but, desiring to obtain possession of the cargo, they offered to give a bond in which the recital was that the owners claimed that certain losses and expenses had been incurred on the voyage, which might constitute a general average, etc., and they had prepared and tendered to the master a bond in that form, and demanded the cargo, offering to pay the freight. But the master refused to accept the bond, or to deliver the cargo, insisting on his adjuster's form of the instrument.

The principal question discussed was whether the master was bound to accept the bond tendered by the consignee, and upon the payment of the freight deliver the cargo; but, on the facts as they were developed at the hearing, this question does not fairly arise for the decision of the court. The brig arrived here on December 13th. negotiations between the parties as to the form of the bond extended until December 28th, and on that day the consignees tendered their bond. But at that time the average adjustment had been completed,

and was known to the consignees. It is denied in the libel that a loss had occurred which subjected the cargo to contribution. But it turns out that no dispute ever really existed on this point. The brig. in the course of the voyage, encountered a severe gale, in which her sails were blown away, and other damage suffered, from which she was obliged to put into Vineyard Haven, where she incurred expense, and she was afterwards towed to Boston. That these expenses constituted a case of general average has never been a subject of contention between the parties. Therefore, on January 2d, when the libel was filed, all occasion for an instrument of this nature had ceased to exist, and nothing remained for the consignees to do but to pay the freight, and the amount apportioned on the cargo, (upon which payment the master was ready to deliver the cargo,) and take away their There is no doubt that the master, as agent of the shipowner and all others concerned, has a possessory lien on cargo for all general average sacrifices and expenses. The obligation of an average bond is an engagment by the consignee, on the condition of his immediately receiving the goods, to pay his proportion of the general average as soon as it shall be ascertained by an adjuster in the usual way. There is no law or usage that requires the master to accept such an instrument, in place of the cargo, after the adjustment has been completed. There is no proof or pretense that the consignees suffered damage from the detention, even if it was improper. Therefore the question which this suit was brought to settle does not arise on the conceded facts, and I am obliged to dismiss the libel. The freight has been paid since this suit was begun.

The claimant is entitled to a decree against the stipulators for the libelants for the amount apportioned upon the cargo by the adjuster. As the suit seems to have been contested on both sides with a view to settle a point about which the opinions of accomplished adjusters differ, and in this respect it has failed in its object, no costs are to be

allowed. Ordered accordingly.

COOPER v. LEATHER MANUF'RS' NAT. BANK.

(Circuit Court, S. D. New York. 1886.)

REMOVAL OF CAUSES—NATIONAL BANKS—22 U. S. St. AT LARGE, 162.

Under section 4 of the act of congress of July 12, 1882, a national bank cannot remove a suit against it from the state court upon the sole ground that it is a corporation organized under a law of the United States, and that therefore the suit is one arising under the laws of the United States.

Motion to Remand Cause to State Court.

Wallace, J. Section 4 of the act of congress of July 12, 1882, (22 St. at Large, 162,) declares that the jurisdiction for suits thereafter brought by or against any national banking association, except suits between them and the United States or its officers and agents, "shall be the same as, and not other than, the jurisdiction for suits by or against banks, not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun," and repeals all laws, and parts of laws, of the United States inconsistent with that enactment. This language is so explicit as to seem to leave no room for reasonable doubt that congress intended to prohibit national banks from invoking any jurisdiction, in suits in which they are either plaintiff or defendant, not open to banks not organized under any law of the United States.

The defendant has sought to remove this suit from the state court upon the sole ground that it is a corporation organized under the laws of the United States, and that, therefore, the suit is one arising under the laws of the United States. If its position is correct, the section referred to is practically nugatory legislation by congress, because in all cases a national bank can resort to the jurisdiction of the circuit court by removal,—where it is plaintiff, by bringing its action in the state court, and then removing it to the circuit court, and where it is defendant by removal merely.

The motion to remand is granted.

ATKINS and others v. Wabash, St. L. & P. Ry. Co. and others.

BEERS v. SAME.

(Circuit Court, N. D. Illinois. December 7, 1886.)

 COURTS—JURISDICTION—CONFLICT—UNITED STATES CIRCUIT COURTS—RAIL-ROAD COMPANIES—RECEIVERS—MORTGAGE—FORECLOSURE.
 A suit to foreclose a mortgage is a local action; and the fact that the United States circuit court, sitting in Missouri, has entertained a bill by a railroad

¹See Wabash, St. L. & P. Ry. Co. v. Central Trust Co., 22 Fed. Rep. 138, 269, 272; S. C. 23 Fed. Rep. 863, and 25 Fed. Rep. 69, 693. v.29 F. no. 4—11

company owning and operating lines in that state, and in Illinois, and other states, filed by the corporation, for the appointment of receivers, and has, without notice to the Illinois mortgagees, named such receivers, and, in the course of the proceedings, ordered a foreclosure of the entire line, does not operate to oust the United States circuit court sitting in Illinois of jurisdiction of a suit by such mortgagees to remove the receivers appointed in Missouri, so far as the lines in Illinois are concerned, and to foreclose the mortgages thereon. At the time the receivers were appointed in Missouri ancillary proceedings were had in Illinois, and the circuit court there entered an order appointing the same receivers for the property in that state, but in that order the court reserved the power to make such further orders in the premises as might be necessary.

2. RAILROAD COMPANIES—RECEIVERS—ABUSE OF TRUST—REMOVAL.

Courts of equity will protect the interests of the minority holders of mortgages of a railroad company as against the majority, and will remove receivers appointed at the instigation of the majority, where it appears that the receivers are incompetent, and that part of them have interests in other corporations adverse to the interests of the minority mortgagees, and are using their influence and powers as receivers in advancing such corporations, at the expense of the railroad.

8. RECEIVERS—DUTIES—INSOLVENT RAILROAD COMPANIES—WHO SHOULD BE APPOINTED.

Receivers should be impartial between the parties in interest; and stock-holders and directors of an insolvent railroad company should not be appointed receivers, unless the case is exceptional and urgent, and then only on the consent of parties whose interests are to be intrusted to their charge.

In Equity. Bill to foreclose mortgage, and remove receivers.

Henry Crawford, for complainants.

Isham & Lincoln, Julian T. Davies, and D. H. Chamberlain, for intervening first and second bondholders.

Wager Swayne and T. H. Hubbard, for purchasing committee.

W. H. Blodgett, for receivers.

Williams & Thompson, for trustees.

C. M. Osborn, for Chicago & W. I. R. R.

Gresham, J. The Wabash, St. Louis & Pacific Railroad Compuny is a consolidated corporation, owning lines of railway in several states on both sides of the Mississippi river. In the latter part of May, 1884, in form, it filed its bill in the circuit court of the United States for the Eastern district of Missouri against the trustees in the general mortgage covering the corporate property, and against certain railway corporations whose lines it was operating under leases. Upon the filing of this bill the court at once assumed jurisdiction of the entire property of the corporation, and, without notice, appointed as receivers Solon Humphreys and Thomas E. Tutt, who were, or up to that time had been, stockholders and directors; and ordered them to hold and operate the entire railway systems under that court's orders, and the orders of other courts exercising ancillary jurisdiction. The bill appears to have been first presented to the district judge at St. Louis, who declined to appoint receivers; when counsel applied to the circuit judge, who made the appointment at Topeka, Kansas, on the twenty-eighth of May, and the receivers qualified at St. Louis on the twenty-ninth.

A bill similar to the one filed at St. Louis was filed in this court on the 28th, the same day the appointment was made in Kansas, and the day before the receivers qualified at St. Louis. Upon the filing of the bill here, an order was entered, in form, adopting and approving the orders of the court at St. Louis, and appointing the same receivers, and directing them to take possession of all the property in Illinois. This order, and the so-called ancillary proceeding here, concluded thus: "And this court further reserves to itself power to make such further orders in the premises as may seem to be necessary."

After the receivers had been appointed by the court at St. Louis, the trustees in the general mortgage filed a cross-bill to foreclose that mortgage, and later they filed an original bill in one of the state courts at St. Louis to foreclose the same mortgage, which latter suit was removed to the federal court, and consolidated with the Wabash suit. The court at St. Louis, on application, refused to extend the receivership to the cross-bill, or to the consolidated suit. A decree was entered in the consolidated suit foreclosing the general and collateral trust mortgages, and at the sale the property was bid in by a purchasing committee.

With the exception that there was no sale, the same course was pursued at Springfield, in the Southern district of Illinois, as at St. Louis; the proceedings there, however, being ancillary to the proceedings at St. Louis. There was no appearance by any of the trustees at St. Louis until after the receivers had been appointed, and certain orders had been entered authorizing the issue of receivers' certificates.

Atkins and others, in behalf of themselves and other bondholders, filed a bill in this court to foreclose a mortgage executed February 1, 1867, by one of the consolidating corporations, to secure an issue of bonds amounting to \$2,601,000, and also to foreclose a mortgage executed May 17, 1879, to secure an issue of bonds amounting to \$2,000,000, of which it is alleged \$1,600,000 only were ever issued. The mortgage of 1867 covers the main lines in Illinois, Indianá, and Ohio, except the Chicago Division, the line from Decatur, Illinois, to East St. Louis, and the line from Naples to East Hannibal. The mortgage of 1879 was executed a short time before the consolidation of the companies and their lines east and west of the Mississippi river. This mortgage covers the main system, except the Chicago Division, extending from Toledo to Burlington, Keokuk, Quincy, Hannibal, and East St. Louis, and its operation, prior to consolidation into the Wabash system, was remunerative.

Beers, in behalf of himself and other bondholders of the same class, filed a bill to foreclose the mortgage on the Chicago Division, to secure an issue of bonds amounting to \$4,500,000. This mortgage covers 257 miles of railway.

¹ Wabash, St. L. & P. Ry. Co. v. Central Trust Co., 23 Fed. Rep. 513.

These bills were filed upon the theory that all the railway property in this state was taken into the custody of this court under the order entered here on May 28, 1884. It is claimed that they are dependent upon and ancillary to the suit of the Wabash Company, and are not, therefore, subject to the test applied to independent original It is urged that they should be treated as petitions pro interesse suo, filed in the case in this court. The trustees in the three mortgages which the bond creditors are seeking to foreclose here, the purchasing committee, and the Wabash Company, entered their full appearance to the two new suits. The mortgages of 1867 and 1879. and the Chicago Division mortgage, and 10 others which were executed from time to time by corporations which have become extinct by consolidation, secure outstanding bonds amounting to over \$27,-000,000, upon which nearly two and a half years' interest is due. The interest in arrear on the first of August last, according to the auditor's report, was about \$4,400,000. The bonds secured by the Chicago Division mortgage draw 5 per cent. interest, and the bonds secured by the other 12 draw 7 per cent. It is not denied that the 13 mortgages are valid, subsisting obligations; that the interest is in arrears for more than two years; and that the mortgaged property is an inadequate security. The income arising from the operation of the lines east of the Mississippi river was pledged by the mort-The main line east of the Mississippi river, not including the Chicago Division, made, in 1885, over and above operating expenses, \$873,925.85, which left, after making a fair deduction for taxes, over \$600,000. This money was used in paying losses on non-remunerative lines in the system. On this subject the purchasing committee. in their circular of June 1, 1886, say:

"It is fair to state that many lines of road have been worked which have not paid their expenses, and the amount required above the amount of earnings has been taken from the earnings of these two divisions."

In the two suits which have been brought here, the court is asked to remove Humphreys and Tutt on the ground that they are not fit persons to act as receivers, and appoint some capable, trustworthy person in this case. The decision of this motion renders it necessary to refer somewhat further to the proceedings commenced by the Wabash Company at St. Louis and elsewhere; to the relation of the receivers to that and other corporations; and to the parties interested in, and affected by, the litigation, and by the action of the receivers.

The Wabash Company, in 1883, 13 months before the receivers were appointed, leased its lines east and west of the Mississippi river to the Iron Mountain & Southern Railway Company. It appears that at this time the latter company was owned and operated by the Missouri Pacific Company. The annual report of that company for 1883, which is in evidence, shows that it was operating the Wabash property as its own. In December, 1883, the Wabash Company ex-

ecuted a mortgage upon its lines to the Iron Mountain Company to indemnify it for advances made under the lease. In this mortgage it is stated that the Iron Mountain Company is in possession of the mortgaged property, and that it shall remain in possession while the lease continues in force. It sufficiently appears from this and other facts that at the date of the lease the Missouri Pacific took charge of the Wabash system, including its accounting department. It was claimed that the Missouri Pacific was not able to operate the Wabash lines at a profit, and on May 19, 1884, under a clause in the lease, notice was given to the Wabash Company that the lessee had sustained a loss, in the operation of the leased lines, of \$4,000,000.

The Wabash Company had at this time outstanding paper, representing floating indebtedness, amounting to \$3,000,000 or more, some of which would soon mature. This, however, was no part of the indebtedness last referred to. Humphreys, Gould, Dillon, and Sage were liable as indorsers on all this paper. A meeting of the executive committee of the Wabash Company was accordingly called, and held at New York on May 21, only two days after the notice above referred to had been served upon the last-named company by the Iron Mountain Company. Gould, Humphreys, Dillon, Sage, and Hopkins were present at this meeting, and, with the exception, perhaps, of Humphreys, all were stockholders and directors in the Missouri Pacific or the Iron Mountain Company; and all, including Humphreys, were interested as stockholders and directors in the two last-named corporations, or as indorsers on the outstanding notes. At this meeting, on motion of Humphreys, it was resolved that steps be at once taken to secure the appointment of a receiver; and no delay occurred in the preparation of the bill, which was filed a few days thereafter in the court at St. Louis.

On May 30th, the Wabash Company filed its petition, representing that its promissory notes, amounting to about \$2,300,000, were outstanding, some of which would soon mature; that these notes were indorsed by "sundry individuals of high credit and financial standing." "For the sake of entire frankness," the name of Solon Humphreys was disclosed as one of the indorsers, but the names of Gould, Dillon, and Sage, the other three indorsers, were withheld, "because of the personal inconvenience and injury which might result to them from the publicity thereby given to their business affairs."

This petition prayed that receiver's certificates be issued to enable the receivers to meet the outstanding notes as they matured; and on the same day an order was entered, directing the receivers to use their obligations, as such, to protect these notes. This order also contained other directions, which need not be here mentioned.

The Central Trust Company and James Cheney, trustees in the general mortgage, appeared before the court in St. Louis, on the twentieth day of June, for the purpose of having this order rescinded or modified; and on that day the court entered the following order:

"This order shall not be construed as establishing any priority of lien in favor of such receivers' obligations, or of the obligations of said railway company now outstanding; but such priority shall be subject to the further direction of the court."

On the day the last-named order was entered, the receivers were authorized, on motion of the Wabash Company, to maintain the executive and transfer offices of the company in New York; and, for that purpose, to continue upon salaries the vice-president and subordinate officers and clerks. This has been done at a heavy expense to the trust. On the sixth of June, on motion of the receivers, a further order was entered, directing that receivers' certificates be issued amounting to \$2,000,000, which should be a first lien on the entire property of the Wabash Company, to enable the receivers to pay off specified classes of claims, among which were labor and supply claims accruing within six months before the receivers were appointed. These debts for labor and supplies the receivers knew had been contracted while the Wabash system was operated by the Missouri Pacific under the lease.

On June 30th the receivers asked the court for an order to enable them to pay rebates on traffic before they were appointed, and such an order was entered by the court at St. Louis on July 10th. Under this order \$360,000 of rebate claims have been paid on traffic actually handled by the Missouri Pacific during the time the Wabash lines were operated under the lease, and that the receivers asked for the order knowing how the indebtedness had been contracted. The proof shows that the receivers have used \$3,200,000 or more of the receipts which came into their hands from the operation of the property in paying labor and supply claims incurred by the Missouri Pacific during its possession under the lease, and that a large additional amount of claims of the same character has been audited for payment.

The decree of foreclosure which was entered at St. Louis on July 6, 1886, provided that nothing in it, or the sale to occur under it, should in any way prejudice or affect the rights of parties secured by any of the underlying mortgages. The decree also contained the following paragraph:

"Nor shall such conveyance, transfer, or assignment withdraw any of said railroad property or interests to be sold under this decree, as hereinbefore directed, from the jurisdiction of this or any of the other courts aforesaid; but the same shall remain in the custody of the receivers until such time as the courts shall, on motion, direct said property in whole, or, from time to time, in part, to be released to said purchaser or purchasers, or any of them; and shall afterwards be subject to be retaken, and, if necessary, resold, if the sum so charged or to be charged against said property, or any part thereof, or said receivers, as aforesaid, shall not be paid within a reasonable time after being required by order of this court or said other court. The conveyance and transfer of said property shall be subject to the power and jurisdiction of the said courts, and the purchasers of any part of said property shall thereby become and remain subject to said jurisdiction so far as necessary, to the en-

forcement of this decree; and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property, or any part thereof, or said receivers, by order of said courts, shall be fully paid and discharged."

The master appointed for that purpose sold the property, with certain exceptions, which need not be mentioned, to the purchasing committee on the twenty-eighth of April, 1886, for \$625,000. This sale was confirmed by the court on the fifteenth day of June, 1886, and the order of confirmation contained the following:

"And any deficit or loss incurred by the receivers herein, from the operation of any of said railroads, as also of the Eel River Railway, from the first day of June, 1886, shall, as a further condition of the confirmation of the said sale, be charged upon the interest of said purchasers in the property acquired by them at said sale. * * * And it is further ordered, adjudged, and decreed that this decree of confirmation of the sale of the premises and property, rights and franchise, as aforesaid, and the deeds hereinbefore ordered to be made, shall be subject to the terms and conditions of the decree of sale heretofore entered in this cause; whereby it is provided, in addition to the sums required by said decree of sale, and by this order, to be paid into court in cash, that there should be paid such further sums as may be needed, and as this court may direct, in order to meet claims which this court may adjudge in this case to be prior, in equity, to the mortgages foreclosed by said decree, and whereby the court directed that the railroads, property, or interest sold thereunder should remain in the custody of the receivers until such time as the court should, on motion, direct said property, in whole, or, from time to time, in part, to be released to said purchasers, and should afterwards be subject to be retaken, and, if necessary, resold, if the sums so charged, or to be charged, against said property, or any part thereof, or said receivers, as therein provided, should not be paid within a reasonable time after being required. By order of the court."

On motion of the counsel for the purchasing committee, the court, at St. Louis, on the twenty-first of September, 1886, entered the following order:

"Ordered that from any surplus in their hands arising from the operation of the property in their charge, over and above the necessary operating expenses, the receivers herein are authorized, as to them may seem meet, to pay, in whole or in part, such interest coupons or bonds, secured by mortgages superior in right to the mortgages foreclosed herein, as they may be requested to pay by the purchasers at the sale made under the decree herein, their successors or assigns."

And on the same day, on the motion of the same counsel, the following further order was entered:

"Ordered that in case the purchasers at the sale under the decree herein, or their successors or assigns, shall become possessed, by purchase or otherwise, of any claims or demands against the property in charge of the receivers in this cause, they shall be subrogated to the rights of the original holders of said claims or demands."

The address of the purchasing committee, issued on the first of June, 1886, to the holders of bonds secured by the senior sectional mortgages, appears to have been the first appeal or demand which

was made upon them to scale down their interest, or waive any of their legal rights. That address dwelt on the importance to the bondholders of keeping together the long line of road from Omaha and Kansas City to Toledo, by way of St. Louis and Hannibal, including all its main lines and branches connecting with Chicago, and possibly the branch to Detroit. It was urged that the lines east of the Mississippi river would be greatly benefited by such a course, as the funded debt on the lines running from the Mississippi river to Kansas City was comparatively light, and that the latter lines could be and were operated at a profit, after paying interest; and that, by maintaining the connection, the volume of business done by the lines east of the river would be greatly augmented. The bondholders were told that the total debt, including receiver's certificates, was upward of \$4,000,000, to which was to be added the car trust debt of \$3,196,-000, all of which was resting upon the property as preferred indebtedness. One of the reasons given in this address why the receivers had been unable to pay interest was that a number of lines in the system had been operated at a loss, and that the earnings had been taken from other lines, including the main lines east of the Mississippi river, to make good this loss. The creditors whose bonds were secured by senior mortgages on the property east of the river were asked to reduce their interest to 5 per cent. per annum, to fund the interest on their bonds for 18 months at the same rate of interest. and to waive their right to foreclose certain mortgages until after three successive years of default. The bondholders were warned in this address that if they did not accept these propositions, and attempted to foreclose their mortgages, the litigation would be long and expensive; that many intricate questions would arise as to the apportionment of the receivers' debts, the ownership of the rolling stock, and terminal facilities; and that the payment of coupons would be deferred indefinitely.

At a conference between a committee of the bondholders, appointed at a meeting on July 8th, and the purchasing committee, the above terms were agreed to, with this modification:

First. A reduction of interest to 5 per centum per annum upon the several classes of securities. Second. The funding of 18 months' interest—three coupons—on the same into bonds to be designated "coupon bonds," in three series,—coupons of the first mortgages and funded debt 7's to be funded in the first series; coupons of second mortgages and funded debt 6's, into the second series; and coupons of the consolidated bonds and 7's of 1879, in the third series. Interest on the 7 per cent. script to be funded to February 1, 1886, and on the 6 per cent. script to May 1, 1886,—these coupon bonds to bear interest at the rate of 5 per centum per annum, payable semi-annually, from August 1, 1886, for first series; from November 1, 1886, for second series; and from January 1, 1887, for third series; and to take rank in payment, after the mortgages, according to the priority of those from which coupons so funded may be detached, viz.: Coupon bonds of the first series to be entitled to payment of interest next after payment of interest on the first mortgages; coupon bonds of the second series, next after payment of interest on the sec

ond mortgages; and coupon bonds of the third series, next after payment of interest on the consolidated bonds and 7's of 1879.

Holders of over \$4,000,000 of bonds declined the terms offered by the purchasing committee. They insisted upon their rights as senior creditors, notwithstanding the discouraging prospect held out to them

by the purchasing committee.

On September 27th, O. D. Ashley, as secretary of the purchasing committee, informed the bondholders, in a circular address, that it was still claimed that the floating debt of over \$4,000,000 would have priority over all the mortgages; and that those who selfishly stood out against the committee's scheme "would enter into the most complicated litigation ever known in the railroading of this country, with its exasperating delays and endless expense," the prospect of which would be pleasing only to lawyers. Mr. Ashley, it is proper to say, was then and still is an officer of the Wabash Company, and his salary as such, as well as his salary as one of the purchasing committee, has been regularly paid by the receivers out of the earnings of the road.

At a meeting of the bondholders, held at New York on August 12th, it was distinctly stated by persons who were active in advocating the purchasing committee's scheme that the floating indebtedness of more than \$4,000,000 had been adjudged by the court to have precedence of all the mortgages, and that no interest would be paid until that indebtedness has been discharged or provided for. In addressing that meeting, Mr. Joy, president of the Wabash Company, and one of the purchasing committee, said:

"We have got \$4,000,000; we can relieve you of that debt. Now, if we do not relieve you of it, if you get into litigation, we cannot use that \$4,000,000. Some of these underlying securities have got to pay it; there is no escape from that. Where will it come from? The fourth mortgage, 1 am sure, cannot pay it. The two last mortgages cannot afford to pay it. It is as much as they amount to, almost. They will sink down on you, and you will all feel the weight of it, even to the first security."

The decree of foreclosure, fairly interpreted, required the purchasers to pay all claims against the receivership. The purchasing committee bid off the property for the stockholders and junior bondholders, including Humphreys, whose interests are in opposition to the views and interests of the bondholders who have refused to accept the funding scheme. The orders of September 21st were obtained by the purchasing committee, or by persons whom that committee represented. Those orders so far changed the terms of the sale and the order of confirmation as to allow the earnings in the hands of the receivers, which were covered by the underlying mortgages, to be used in the payment of coupons belonging to bondholders who assented to the funding scheme, while the same right was denied to non-assenting bondholders; and they also permitted the purchasing committee

to keep alive receivers' certificates amounting to \$4,000,000 against the non-assenting bondholders.

It was stated at the argument of this motion, by one of the counsel for the purchasing committee, that under these orders the receivers would pay such coupons as might be selected for payment by the purchasing committee, while no interest would be paid to non-assenting bondholders. The boldness of this scheme to aid the purchasers, by denying equal rights to all bondholders secured by the same mortgages, is equaled only by its injustice. The right is asserted by the purchasers of the property, in a court of equity, to take the earnings of a road covered by a mortgage, and pay part of the coupons secured by that mortgage, to the exclusion of coupons secured by the same mortgage, and falling due at the same time. Doubtless the counsel who obtained the orders of September 21st was not as frank in avowing to the court at St. Louis the purpose of the purchasers as he was here, and still is, in defending his interpretation of them. is not to be presumed that that court entered these orders intending or expecting that they would be used as a means of coercing non-assenting bondholders into the funding scheme. I prefer to infer, and do infer, that that court supposed the purchasing committee was progressing amicably with the bondholders, and was ignorant of the fact that part of them were, and for some time had been, stubbornly resisting the funding scheme.

It is said by one of the counsel for the purchasers, by way of excuse for their failure to comply with the terms of their bid, and for obtaining the orders of September 21st, that the purchasers bought the property without being fully informed as to its value; and that they had subsequently learned that they could not afford to take it incumbered with the various senior underlying mortgages, and pay the debt contracted by the receivers, and the floating debt existing before the receivers were appointed. In answer to this, it is safe to say that no one knew better at and before the sale the value of the Wabash property than the four indorsers and others represented by the purchasing committee.

It was also urged in defense of the orders of September 21st, and the action of the purchasers thereunder, that the provisions of the decree of foreclosure, and the order of confirmation, whereby the court retained authority to retake the property and resell it for failure on the part of the purchasers to comply with the terms of the sale, authorized the purchasers to abandon their bid; and that, not being obliged to complete it, they were at liberty to prescribe terms upon which they would consummate it. Argument is unnecessary to demonstrate that these provisions were inserted, not to secure to the purchaser the right to complete his purchase, or abandon it, as he pleased, but as a reservation of jurisdiction over the property, to be exercised if the purchaser failed to comply with his contract.

The Chicago Division bondholders claim that the Chicago terminals are covered by their mortgage, and that the holders of the collateral trust bonds, including Mr. Humphreys, resist this claim, and insist that they are entitled to a first lien on these terminals; which raises another conflict of interest between the receivers and the non-assenting bondholders.

The mines and property of the Ellsworth Coal Company are adjacent to the Wabash Railway. The original stock of this company was \$24,000, which was increased in June, 1885, to \$67,500. Humphreys, Gould, Dillon, Sage, Hopkins, and Charles Ridgeley, all directors of the Wabash Company, were stockholders in the coal company. It does not appear from the evidence that any one else held stock in this company. During the year 1885 the receivers purchased of the coal company 166,842 tons of coal, paying therefor \$190,769.91; and up to September 1, 1886, they purchased 145,191 tons, paying therefor \$163,724.42, which was at the rate of \$250,000 for that year. The receivers have paid out of the earnings \$15,401.48 as rebate on coal shipped by this company prior to their appointment, and while the Wabash lines were operated by the Missouri Pacific under the lease to the Iron Mountain Company. This they claim to have done under orders of the court at St. Louis. They have also paid rebates of \$63,309.85 on coal shipped since their appointment, and up to September 1, 1886. The total rebates paid by the receivers to the coal company amounted to \$80,711.33, which is more than the entire capital stock of the coal company. While it is true witnesses have testified that the receivers paid no more than the market rate for coal purchased by them for fuel, and that they charged the coal company a reasonable rate upon the coal which they carried for it, there is also evidence tending to show that the price paid for the coal purchased for use was too high, and that the freight upon the coal shipped was too low. The relation which these two corporations sustained to each other of itself exposed the owners of the stock and the directors of the coal company to the suspicion of intending to benefit that company at the expense of the Wabash Company. It is not strange if, as officers of the Wabash Company, dealing with themselves as officers of the coal company, whose entire stock, or the greater portion of it, we may assume, these men owned, care was taken that the Wabash Company should pay a liberal price for fuel obtained from the coal company, and that the latter company should pay a low rate upon its shipments of coal. Men with a proper appreciation of their rights and the rights of others-trustworthy men-are not apt to be found in such inconsistent relations. Gould, Humphreys, Dillon, Sage, Hopkins, and Ridgeley are men of stern integrity. if their interests in the coal company did not improperly influence their action as directors of the Wabash Company. It is going very far-further than this court is willing to go-to enforce a secret contract for the rebate of freight paid to a railroad company, and to the

extent of his interest in the coal company Humphreys allowed a rebate to himself.

It is proper to say that Mr. Tutt testified that when he heard of serious charges in connection with the Ellsworth Coal Company matter he instituted an investigation, but it does not appear that he developed anything worthy of being brought to the attention of the court. His own evidence shows that he was ignorant of the location of the mine; that he thought the rate for St. Louis was one dollar a ton, when, in fact, it was much less. He had never seen any of the numerous rebate vouchers in favor of the coal company, and did not know that any such existed. According to the auditor's testimony, the regular tariff was two dollars a ton on coal to Chicago, and a special rate was given to the coal company of \$1.30 per ton, after which 30 cents per ton was paid back to the coal company as a rebate. After the Wabash Company had built a road into the coal fields near Chicago, it was abandoned, and the track taken up, and thereafter the only coal shipped over the Chicago Division was, and still is, by the Ellsworth Coal Company, from its mines, the most of which are 240 miles distant. The evidence strongly tends to show that part of the abandoned track was not removed until after the receivers were appointed.

The receivers say that the debt which accumulated against the Wabash Company before they were appointed, and the large debt which has accumulated against them since their appointment, was caused mainly by the low and non-remunerative rates which were received for carrying freight. In the pamphlet which was issued on June 1, 1886, by the purchasing committee, it was claimed that the average rate of nine and a half mills per ton per mile brought about the present financial condition of the property; and yet it appears that the receivers had been carrying coal to Chicago from the mines of this company,

owned in part by one of them, at a much lower rate.

It is insisted for the purchasing committee and the receivers that when the Wabash bill was filed at St. Louis, and the court there appointed receivers, it acquired primary and paramount jurisdiction over the Wabash property and system throughout its length and breadth; and that all persons, including the creditors whose bonds are secured by senior sectional mortgages on property, no part of which is in the state of Missouri, must go to that court to enforce their rights and liens, and that no other court can remove the receivers. If, by the mere force of its own orders, the court at St. Louis acquired the legal custody of the res,—the entire Wabash property,—it would be alike the duty and the pleasure of this court to aid that court in the exercise of its primary jurisdiction; but this court feels obliged to take a different view of its duty and the law.

Cases may be found in which the English courts have appointed receivers over property or assets in other jurisdictions and foreign countries, but this has been done only when the parties interested in the property were personally before the court, and subject to its orders. High, Rec. § 44, and authorities cited. The rule in this country is that receivers appointed by one jurisdiction are not entitled, as of right, to recognition in other jurisdictions, and that courts of equity cannot acquire extraterritorial jurisdiction over property by appointing receivers. Booth v. Clark, 17 How. 322.

Muller v. Dows, 94 U.S. 444, which is relied upon in support of the position taken by the counsel for the purchasers and the receivers, was a suit brought in the circuit court of the United States at Des Moines against the corporation to foreclose a mortgage on a line of road running from a point in the state of Iowa to a point in the state of Missouri. The mortgage was foreclosed, and the entire line, including the portion in Missouri, was sold, no ancillary or other proceedings having been taken in Missouri. The decree required the trustees in the mortgage and the railway corporation to execute conveyances to the purchaser, which was done, and the title thus made perfect. The supreme court of the United States sustained the decree and sale. If the supreme court intended to sustain the sale and title regardless of these conveyances, it is to be observed the mortgage in that case covered a continuous, unbroken line of railroad, extending from one state into the other. There is a wide difference between the facts in that case and the facts in the Wabash Case, which was a suit by the corporation for the mere appointment of receivers, and not to foreclose a mortgage or other lien.

It may be said in this connection that Gould, Humphreys, Dillon, and Sage, the four indorsers, constituted a majority of the meeting of the executive committee of the Wabash Companies at New York; and that they, and perhaps others who controlled the Missouri Pacific. caused the Wabash bill to be filed, intending, it would seem, if possible, in that suit, to have the large indebtedness for which the four indorsers and the Missouri Pacific were liable made a charge upon the Wabash proper prior to the mortgages, or to have it provided for in some other way, to the injury of the holders of senior securities. Want of effort on the part of the four indorsers, the Missouri Pacific. and the receivers cannot be said to have caused whatever failure has occurred in accomplishing this scheme. The evidence shows that the receivers have paid, out of the income belonging to the bondholders, over \$3,200,000 on labor and supply debts incurred by the Missouri Pacific while it was operating the road under the lease, and that they have audited for payment over \$500,000 more of such claims.

It has frequently been deemed necessary, in suits against insolvent railway corporations to foreclose mortgages, to appoint receivers to operate and protect the property, pending the litigation; but it is unusual and novel, to say the least, to entertain a bill filed by such a corporation against its creditors, and at once, without notice, place the property in the hands of one or more of the directors whose man-

agement has been unsuccessful. Receivers should be impartial between the parties in interest; and stockholders and directors of insolvent corporations should not be appointed, unless the case is exceptional and urgent, and then only on the consent of parties whose

interests are to be intrusted to their charge.

While this court claims no authority to review the action of the court at St. Louis, and regrets that it is forced to meet the questions presented by the record, it cannot concede to that court paramount jurisdiction over the property in Illinois. Interest on the bonds secured by the mortgages of 1867 and 1879 has long been in default. and the right to foreclose these mortgages cannot be denied. No part of the property covered by them is within the jurisdiction of the court at St. Louis, and yet the creditors who have filed their bills in this court to foreclose mortgages are told this court has no jurisdiction, and that they must apply to the Missouri court, as a court whose jurisdiction is paramount.

It is earnestly contended that the court should not remove Messrs. Humphreys and Tutt, and appoint some one else to take charge of the property in this jurisdiction, at the instance of creditors representing a minority of the bonds, when a large majority are opposed to such action. As already stated, none of the lines covered by these mortgages run into Missouri, and a suit to foreclose a mortgage is a local action. The majority should not be permitted to force the funding scheme upon the minority. Courts of equity should not refuse to protect the rights of minorities, upon a proper showing, and such

a showing has been made in these cases.

The non-assenting bondholders, on the facts already stated, are clearly entitled to a foreclosure of the mortgages of 1867 and 1879. and the Chicago Division mortgage, and to have the property in this state taken out of the custody of the present receivers, and intrusted to some one who is capable and trustworthy. Other reasons might be given for removing the receivers without going outside of the

The suit to foreclose the Chicago Division mortgage will proceed here, and leave is given to withdraw the bill to foreclose the mortgages of 1867 and 1879, and file it in the Southern district, at Springfield; none of the property covered by these mortgages being within this district.

Francisco Company (1994)

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LIPSMEIER v. VEHSLAGE.

(Circuit Court, E. D. Missouri. October 6, 1886.)

1. Promissory Notes—Consideration—Indorsement after Maturity. A negotiable note, without consideration, cannot be enforced by a party to whom it is indorsed after maturity by the payee.2

2. SAME—EVIDENCE—BURDEN OF PROOF.

A negotiable note imports consideration, and, in a suit on such an instrument, the burden of proving lack of consideration is upon the defendant.2

8. Same—Allowance of Time.

The allowance of time in which to pay a debt is a valuable consideration.

4. SAME-GOODS FURNISHED ANOTHER.

Goods furnished a third party at the maker's request are a good consideration for a note given in payment therefor.2

5. Same—Compromise.

Where a note is given by way of compromise of a disputed claim, the consideration will not be inquired into.2

6. COURTS—JURISDICTION—U. S. CIRCUIT COURT—COLLATERAL SECURITY—REV

ST. U. S. § 629.

Where a note for over \$500, made by a resident of Missou.i, and payable to another resident of that state, was indorsed by the payee to a resident of Illinois, to secure a debt for less than \$500, and the indorsee agreed to account for and pay over to the indorser the entire amount collected on the note over and above the amount due him, held, in a suit on the note by the indorsee, that the circuit court had jurisdiction.

At Law.

Suit on a promissory note for over \$500 by a resident of Illinois, to whom it was transferred by the payee, a resident of Missouri, after maturity, as collateral security for a debt of \$400. At the time the transfer was made the indorsee gave the indorser a written agreement to account for and pay over to him the entire amount realized from the suit over and above the amount of his debt. When this suit was instituted, and up to the time of trial, the debt and interest thereon amounted to less than \$500. It was therefore contended by the defendant that the court had no jurisdiction, because the plaintiff's interest in the suit was less than \$500. The other material facts are sufficiently stated in the charge to the jury.

Kehr & Tittman, for plaintiff. Pattison & Crane, for defendant.

TREAT, J., (charging jury orally.) This suit is based on a promissory note negotiable in form. The plaintiff sues as indorsee of said note. The ordinary rule of law governing paper of this kind is that it imports on its face a consideration; in other words, that the party who gave the note entered into an obligation to pay the same, for pecuniary reasons, whereby the payee would be entitled to recover on the face of the paper. This note was transferred, as admitted,

¹Edited by Benj. F. Rex. Esq., of the St. Louis bar.

² See note at end of case.

after maturity. If it had been transferred for value, to an innocent party, before maturity, the defenses that are submitted to you would not be considered. But it so happens, admittedly, that this note was transferred long after maturity; consequently you are to determine the respective rights of the parties as if Mr. Beckerman, the payee in the note, himself was suing here. In other words, the equities of the original transaction are open for inquiry.

This note was given, it seems, February 1, 1878, negotiable by its terms,—a note payable in one year,—and transferred long thereafter to this plaintiff. Some very nice questions have been presented to the court, under the statute of the United States as to the jurisdiction of this tribunal, concerning which, in the present aspect of the case, it is unnecessary to trouble you. The court decides that the party is rightfully in court, and consequently the matter is submitted

to you, and the questions of fact are-

First, was there any consideration for this note? If not, you must find for the defendant. But the duty of showing that there was no consideration rests on the defendant. Notes of this character import consideration. In other words, the plaintiff is not bound to prove that the note was given for consideration, because, when a party signs paper of this kind, he admits, impliedly, that there was a good reason for so doing,—a valid reason. Consequently the burden is cast upon the defendant to show that there was no consideration. Notes sometimes may be given for the accommodation of the payee, or for any other than valid reasons. If so, it being the nature of a gift,—the mere voluntary act from one to another,—there is no obligation in law, if he chooses not to pay the note, for him so to do, by judicial process. Hence this case assumes an aspect between the plaintiff and defendant as if the suit had been brought by the pavee, Mr. Beckerman, against the defendant, and the question of consideration is open for full inquiry.

You have heard the testimony, which is somewhat peculiar in its aspects, and you alone must pass upon the sufficiency thereof, so far as the one or the other side is concerned. Starting, then, with the proposition that the note itself imports consideration, and that it is the duty of the defendant to show that there was no consideration, you should proceed to investigate the testimony. You have heard the statements of the immediate parties in interest. When I say "immediate," I mean the original parties. Mr. Vehslage, the defendant, has given you his version of the matter. Mr. Beckerman has given his version. Which is the true version? Did Mr. Vehslage sign this note merely to accommodate Mr. Beckerman, Mr. Vehslage not owing Mr. Beckerman anything, or did Mr. Vehslage, considering what you have heard as to the relationship of the family in all these transactions, having induced credit to be given, make his noto so that the whole of the controversy might be closed by one transaction? Suppose some one or other of his sons, or his wife, had, at his

instance, been furnished with property, to-wit, the flour in question, by Mr. Beckerman, and, to adjust that controversy, Mr. Vehslage gave a note whereby the immediate payment of the debt was to be deferred for a year: under this condition of affairs the note is valid in the hands of the holder, and the party having, under such circumstances, assumed the obligation, must respond. On the one side, Mr. Vehslage informs you that he had nothing to do with these original sales, etc., with Mr. Beckerman; consequently he gave a note without any Mr. Beckerman informs you that this dealing origiconsideration. nally began at the instance of the defendant, and that he asked Mr. Vehslage to account to him for all these amounts. If that be so. Mr. Beckerman had a right to look to this defendant, Vehslage, for the payment of that demand; and if it be true, as Mr. Beckerman says, that, after the lapse of years,—after some intermediate adjustments of accounts at the instance of Mr. Vehslage, the defendant,the accounting was finally adjusted between them, and this note given for the balance, then this defendant was responsible for that note.

... It is your duty, gentlemen, exclusively, to determine what weight you will give to the one or the other side in this conflicting testimony. You have heard both sides. They differ in very important matters as to the subject under investigation. Testimony has been offered whereby you may test the accuracy of the recollection of these respective parties in order to ascertain whether, first, this party defendant did cause this account to be entered into, the giving orders therefor, and making himself personally liable for the balance, or whether the dealings were between other parties. If the dealings were entirely with other parties, and this defendant voluntarily executed a note with respect thereto, he having no interest in the controversy, then the note is not obligatory upon him, and the verdict will be, if such be the fact, for the defendant. If, on the other hand, he asked, as Mr. Beckerman testifies, that this flour should be furnished on his account, and it was so furnished, no matter what he might wish with regard to the matter, Mr. Beckerman is entitled to pay from him, and if he gave his note, under that condition of affairs, for the balance of the account, he must pay the note.

Then, again, there is another proposition involved in this case to which the counsel, I believe, did not advert. The condition of these transactions has been explained to some extent to you. Here was a family occupying certain premises, devoted to different uses,—some using a portion thereof for a particular purpose; others for entirely different purposes. It seems to have been a family arrangement, all very proper among themselves. In order to carry forward their respective enterprises, they had a right to do what they chose among themselves, all being sui juris. Each one of the parties could make whatever contract he individually chose as to third parties, and be alone responsible therefor. It may be—and that is for the jury to

determine—that, under this peculiar arrangement among the various members of this family, doubts arose as to who should meet these varied obligations that had gone on in the management of these so-called family affairs of a business character. If there was a doubt or dispute among the parties, (there being an existing obligation on the part of some of them as to these matters undetermined,) and Mr. Vehslage chose to assume the obligation in order to compromise and settle the whole matter, then there was a consideration for so doing, because thereby he caused delay in the collection of the notes or the collection of the demand as to some one or the other of these

respective parties.

To summarize, gentlemen, the defendant admits he executed the note in controversy. The law determines, in the absence of any proof, that that note was executed for a valuable and legal consider-Therefore, in the absence of any proof, your verdict necessarily would be for the amount of the note, with the interest which it carries. Now, to overcome that presumption of law, which always arises when a man executes a negotiable note under the circumstances of this case, the defendant must show that the note was given without consideration. If it was given without consideration, your verdict must be for the defendant: the burden of proof being on the defendant to show that there was no consideration. As to the question of consideration, it is for you to determine, first, did this defendant owe this plaintiff? If he did, then the verdict must be for the plain-If he did not owe the plaintiff, or if he did not assume the debt to settle the controversies existing with respect to the various members of his family, Mr. Beckerman giving him a year for payment in consequence of such assumption, defendant is not liable. If that is true, then there is no consideration based upon such a supposed transaction.

It often happens that, where controversies arise, parties agree to adjust them by compromise. When they so do agree, courts do not go back to inquire into whether it was a good or bad controversy. The parties are supposed to know what they were doing, and, to avoid strife or litigation, agree upon certain terms whereby the matter may be adjusted or settled between themselves. When that is done, there is a valuable consideration. Consequently, if the defendant has shown that this is not his debt: that if, as averred, he merely signed this paper for the accommodation of Mr. Beckerman, not for consideration existing,—you will have to find for the defendant. If, on the other hand, you find that it was his debt, and the flour furnished by Beckerman was furnished at his instance, then there was adequate consideration. If you find that there was difficulty or doubt as to who the respective parties were who would have been primarily liable, and he came forward, and, on consideration that the debt should be delayed for a year, assumed the same, then there is a consideration.

Now, if I have made myself understood, gentlemen, it is for you to decide, first, was there an entire absence of consideration? If so, find for the defendant. If the testimony does not convince you, under the rules laid down, that there was an absence of consideration, you will have to find for the plaintiff.

NOTE.

Promissory Notes. The recital, in a promissory note, "for value received," is prima Promissory Notes. The recital, in a promissory note, "for value received," is prima facie evidence of consideration, Noyes v. Smith. (Me.) 5 Atl. Rep. 529; Parsons v. Frost, (Mich.) 21 N. W. Rep. 303; Frunk v. Irgens, (Minn.) 6 N. W. Rep. 380; Search v. Miller, (Neb.) 1 N. W. Rep. 975; which may, however, be rebutted between the parties, Lancaster Co. Nat. Bank v. Huver, (Pa.) 6 Atl. Rep. 141; Security Bank v. Bell, (Minn.) 21 N. W. Rep. 470; Maltz v. Fletcher, (Mich.) 18 N. W. Rep. 228; Kennedy v. Goodman, (Neb.) 16 N. W. Rep. 834; Brooks v. Hiatt, (Neb.) 14 N. W. Rep. 480; Torinus v. Buckham, (Minn.) 12 N. W. Rep. 348; Kansas Manufg Co. v. Gandy, (Neb.) 9 N. W. Rep. 569; Dicken v. Morgan, (Iowa,) 7 N. W. Rep. 145; Search v. Miller, (Mich.) 1 N. W. Rep. 975; but pot as against a homa fide indersee for value before maturity. Wilson W. Rep. 975; but not as against a bona fide indorsee for value before maturity, Wilson v. Second Nat. Bank, (Pa.) 7 Atl. Rep. —; Lerch Hardware Co. v. First Nat. Bank, (Pa.) 5 Atl. Rep. 778, and note; Arpin v. Owens, (Mass.) 3 N. E. Rep. 25; Western Cottage Organ Co. v. Boyle, (Neb.) 6 N. W. Rep. 473; and the burden of proof is on him who denies consideration, Bisbee v. Torinus, (Minn.) 2 N. W. Rep. 168; Conley v. Winsor, (Mich.) 2 N. W. Rep. 31.

An extension of time in which to pay a debt is a valueble consideration, and will support the consideration and will support

who denies consideration, Bisbee v. Torinus, (Minn.) 2 N. W. Rep. 168; Conley v. Winsor, (Mich.) 2 N. W. Rep. 31.

An extension of time in which to pay a debt is a valuable consideration, and will support a promise. In re Burchell, 4 Fed. Rep. 406; Bowen v. Tipton, (Md.) 1 Atl. Rep. 861; Maclaren v. Percival, (N. Y.) 6 N. E. Rep. 582; Fraser v. Backus, (Mich.) 29 N. W. Rep. 92; Parsons v. Frost, (Mich.) 21 N. W. Rep. 303; Johnston Harvester Works v. McLean, (Wis.) 15 N. W. Rep. 177; Atherton v. Marcy, (Iowa,) 13 N. W. Rep. 759. So will a debt owing by a third person, Bowen v. Tipton, (Md.) 1 Atl. Rep. 861; Holm v. Sandberg, (Minn.) 21 N. W. Rep. 416; Atherton v. Marcy, (Iowa,) 13 N. W. Rep. 759; Chicago & N. E. R. Co. v. Edson, (Mich.) 3 N. W. Rep. 176; and the compromise of a disputed or doubtful claim, Northern Liberty Market Co. v. Kelly, 5 Sup. Ct. Rep. 422; Zimmer v. Becker, (Wis.) 29 N. W. Rep. 228, and note; Hanley v. Noyes, (Minn.) 28 N. W. Rep. 189; Griswold v. Wright, (Wis.) 21 N. W. Rep. 44; Swem v. Green, (Colo.) 12 Pac. Rep. 202; Finley v. Funk, (Kan.) 12 Pac. Rep. 15; the release of another obligation by which the promisor is already bound, In re Dixon, 13 Fed. Rep. 109; Buechel v. Buec 1el, (Wis.) 27 N. W. Rep. 318; Snell v. Bray, (Wis.) 14 N. W. Rep. 14; but not the release of an utterly foundless claim, Harris v. Cassaday, (Ind.) 8 N. E. Rep. 29; nor the payment of part of an undisputed debt, Hooker v. Hyde, (Wis.) 21 N. W. Rep. 52; Bryant v. Brazil, (Iowa,) 3 N. W. Rep. 117; St. Louis, Ft. S. & W. Ry. Co. v. Davis, (Kan.) 11 Pac. Rep. 421; nor a promise to do what the promisor is already bound to perform, Harris v. Cassaday, (Ind.) 8 N. E. Rep. 29; Early v. Burt, (Iowa,) 28 N. W. Rep. 35. But the contrary was held in Condon v. Barr, (N. J.) 6 Atl. Rep. 614; Kent v. Rand, (N. H.) 5 Atl. Rep. 504; Allen v. Bryson, (Iowa,) 25 N. W. Rep. 820; Van Sandt v. Gramer, (Iowa,) 15 N. W. Rep. 259.

A moral obligation will support a promise. In re Ekings, 6 Fed. Rep. 170; Edwards v. Brassted, (Mich.) 16 N.

For other considerations held sufficient to sustain a promise, see Schutt v. Missionary Society, (N. J.) 3 Atl. Rep. 398; Hunt v. Dederich, (Ind.) 5 N. E. Rep. 710; Proctor v. Cole, (Ind.) 4 N. E. Rep. 303; Crombie v. McGrath, (Mass.) 2 N. E. Rep. 100; Clayton v. Whitaker, (Iowa,) 27 N. W. Rep. 296; Bedford v. Small, (Minn.) 16 N. W. Rep. 452; Robertson v. First Nat. Bank, (Mich.) 1 N. W. Rep. 1033; Barley v. Buell, (Cal.) 11 Pac.

Rep. 632; S. C. 9 Pac. Rep. 549.

For promises held to be without consideration, see Boyce v. Berger, (Neb.) 9 N. W. Rep. 545; Minneapolis Harvester Works v. Hally, (Minn.) 8 N. W. Rep. 597; Jones v. Matthieson, (Dak.) 11 N. W. Rep. 109; McCarthy v. Hampton Building Ass'n, (Iowa.) 16 N. W. Rep. 114; Fuller v. Lumbert, (Me.) 5 Atl. Rep. 183.

Baptist, Adm'r, etc., v. Farwell Transp. Co.

(Circuit Court, N. D. Ohio, E. D. October Term, 1886.)

COURTS—UNITED STATES CIRCUIT COURT—JUDGMENT—POWER TO SET ASIDE AT SUBSEQUENT TERM.

The United States circuit court has no power, at a subsequent term, to set

The United States circuit court has no power, at a subsequent term, to set aside a judgment, in due form, unconditionally entered at a former term, and which has become a final judgment.

At Law. Motion for a rehearing refused and dismissed.

Judge Cadwell, Hoyt & Munsell, and A. M. Cox, for plaintiff.

H. D. Goulder and Estep, Dickey & Squire, for defendants.

Welker, J. The action was one for a personal injury, and the case was tried to a jury at the April term, 1886, and a verdict for the plaintiff for \$3,250. A motion was filed at said term for a new trial, and was heard by the court, and overruled, and judgment entered upon the verdict, and execution issued upon the judgment. During said term, on the seventh day of September, 1886, a motion was filed by the defendant asking for a rehearing and reargument of the motion for a new trial, and stating that motion for a new trial should have been granted, which motion was not heard or disposed of at said term, and at its close a general order was entered "that all the cases on the docket of this court not otherwise disposed of be continued until the next term of this court."

The defendant at this (October) term asks that said motion be reheard, and that the motion for new trial so overruled at the April term be now heard, and said judgment be set aside, and a new trial This raises the question whether the court, after the term at which a judgment is rendered, has power to set it aside at such subsequent term in this summary way. The motion filed at last term for a rehearing, and which, by the general order, may be continued to this term, was one not known in proceedings at law. amounted to the same as an oral motion for a rehearing at the term. and nothing more. If such rehearing was not had at the term, and judgment set aside, it could not in any way affect the judgment so entered, or in any manner suspend it. It has been clearly settled that the court has no power, at a subsequent term, to set aside a judgment, in due form, unconditionally entered at a former term, and which had become a final judgment. Although the court may, at this term, rehear the motion for new trial, still on such rehearing, without power to set aside the judgment, such rehearing would avail nothing to the defendant. The motion for a rehearing is therefore refused and dismissed.

JACKSON, J., concurs.

In re AH Jow.

(Circuit Court, D. California. August 23, 1886.)

1. Constitutional Law—Fourteenth Amendment—"Due Process of Law"
— Ordinance of City of Modesto Forbidding Visiting Place Where
Opium is Sold.

Section 2 of ordinance No. 4 of the city of Modesto, California, providing that "every person who, in the city of Modesto, keeps or maintains any room or other place where opium, or any of its preparations. is sold or given away, and every person who resorts to, frequents, or visits such room or place, is guilty of a misdemeanor: provided, that this section shall not apply to the sale or gift of any of the preparations of opium by any druggist for any ailment not caused by the use of opium or any of its preparations," makes it criminal for one to visit such a place, no matter how innocently or how lawful his purpose. It is inconsistent with the law of the land, and is void. Committing one to prison for the offense created, therefore violates the fourteenth amendment of the United States constitution by restraining one of his liberty without due process of law.

2. COURTS—JURISDICTION—FEDERAL COURTS—CASE UNDER CONSTITUTION OF THE UNITED STATES—HABEAS CORPUS.

Since the ordinance violates an amendment of the United States constitution, a person imprisoned under it will be released by a United States court on habeas corpus.

On Habeas Corpus.

W. E. Turner, for petitioner.

B. C. Minor, for respondents.

Before SAWYER, J.

Sawyer, J. The return to the writ shows that petitioner is in custody in pursuance of a judgment upon a conviction upon a complaint charging him with a public offense, to-wit: "Visiting a room kept, in the city of Modesto, by another, where opium was sold." The offense for which the petitioner was convicted, and committed as a punishment, is created by section 2 of ordinance No. 4 of the city of Modesto, which reads as follows:

"Sec. 2. Every person who, in the city of Modesto, opens, keeps, or maintains any room or other place where opium, or any of its preparations, is sold or given away, and every person who resorts to, frequents, or visits such room or place, is guilty of a misdemeanor: provided, that this section shall not apply to the sale or gift of any of the preparations of opium by any druggist, for any ailment not caused by the use of opium, or any of its preparations."

This language is extremely comprehensive, and embraces every possible case of visiting "such room or place;" no matter whether for a proper and lawful or improper and unlawful purpose; whether the party has knowledge or is ignorant of the character of the "room or place;" whether he visits it innocently or otherwise. Neither knowledge, nor purpose of the visit, is made an element of the offense. The mere fact of going there, without any other element, is made an offense. That the provision was deliberately intended to be thus sweeping and comprehensive is evident from the fact that the provis-

ion in the preceding section, "who visits * * any such room or place, for any such purpose, is guilty of a misdemeanor," embraces the purpose, and, necessarily, knowledge of the character of the place, as elements of the offense, and there would be no occasion for section 2, if its provisions are not intended to embrace those cases which do not include knowledge and purpose as elements of the offense.

These places, in view of the ordinance making the keeping of "such room or place" an offense, would be likely to be kept for the purpose secretly, and the general public know nothing about it; especially if "the room or place" be an ordinary drug-store, constantly resorted to for the purchase of other drugs. Under this section it would not be lawful for any person, whether Caucasian citizen, or other inhabitant, to enter such a place or drug-store for many of the ordinary and proper purposes of life; as to purchase other goods, to collect bills, or transact any legitimate business. To lawfully prohibit, under penalties, the citizens or inhabitants from entering such a place, innocently, not knowing its character, or for any lawful purpose, and without reference to its object, is, in my judgment, entirely beyond the power of the city of Modesto. It is to prohibit an act which is innocent in itself, and lawful under the general laws of the land, and therefore inconsistent with the laws of the land. It is to put an unlawful inhibition upon the inalienable rights and liberties of the citizen; and to commit him to prison for doing so is to restrain him of his liberty without due process of law, in violation of the fourteenth amendment to the national constitution. Yick Wo v. Hopkins, 6 Sup. Ct. Rep. 1070, 1071.

As purpose and knowledge of the character of the place are not made elements of the offense, they cannot be considered, and it cannot be presumed that the petitioner had an unlawful purpose or knowledge. But we must take the ordinance as we find it, and the offense as stated in the commitment; and under the ordinance we could not discriminate if the facts showing knowledge or purpose did appear; but they do not. It does not in fact appear but that the petitioner was innocently visiting the room for some proper purpose. But section 2 of the ordinance, I think, is wholly void, as being beyond the power of the city to enact, and the petitioner is restrained of his liberty in violation of the constitution and laws of the United States. He must therefore be discharged.

The ordinance applies to all citizens, as well as aliens, and deprives them of rights and privileges secured by the constitution and laws of the United States. If directed only against Chinese, then it would be void under the fourteenth amendment, as discriminating against them.

This section would seem to make it an offense for a wholesale druggist in Modesto to sell opium, or any of its preparations, to a retail druggist of Modesto, or of other parts of the world, for the proper pur-

poses of their business. And it is claimed to be unconstitutional in other particulars, wherein it is too comprehensive, as limiting the use of the drug, as a medicine, for ailments not arising from the use of opium. It is claimed that opium, like spirits, in cases of delirium tremens, is often the only medicine that will save the life of a party suffering from excessive prior use. But the point already determined is sufficient for the purposes of this case.

The party being in custody in violation of the constitution of the United States, this court has jurisdiction to discharge him on habeas corpus, notwithstanding the fact that he is held by authority of a judgment of a state court, (Rev. St. § 753; Ex parte Royall, 117 U. S. 241; S. C. 6 Sup. Ct. Rep. 734;) and the case is one in which this court, in the exercise of a sound discretion, should discharge the pe-

titioner, within the principles announced in that case.

There are no reasons peculiar to the case that would justify putting the party to the expensive and tedious process of pursuing his remedy through all the state courts; and, if necessary, by appeal to the supreme court at Washington, 3,000 miles away. To require this in a case that seems clear would be equivalent to a total denial of justice. It would be far better for the petitioner to suffer the punishment imposed, and serve out his sentence, than to undertake so onerous a task for the vindication of his rights.

Let the petitioner be discharged.

THE HURON.

(District Court, D. Massachusetts, November 20, 1886.)

MARITIME LIEN-SUPPLIES-DEPARTURE FROM PORT-FOREIGN PORT-PUB. St. Mass. Ch. 192, 8, 15.

Mass. Ch. 192, § 15.

To sustain a lien for supplies furnished a vessel while in her home port, it is incumbent on the material man, by Pub. St. Mass. c. 192, § 15, to file his claim within four days after the departure of the vessel from the port at which she was when the debt was contracted. A cruise from Boston to Newport, though made in order to attend a regatta, is "a departure," within the meaning of the act. As Newport was a foreign port, the libelant is entitled, under the general admiralty law, to a lien for such of the supplies as were furnished after her arrival at that port, notwithstanding the fact that the goods were ordered from Newport at Boston, and were sent to the yacht at Newport by express.

In Admiralty. Libel in rem for supplies furnished partly in home and partly in a foreign port.

C. F. Loring, for libelants.

R. Stone, for claimant.

¹Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

Nelson, J. This was a libel against the yacht-sloop Huron, owned by the late William Gray, for supplies furnished in the month of August last. Some of these supplies were furnished by the yacht in Boston, which was her home port, and a part were furnished after the yacht went to Newport on a pleasure excursion, to attend a regatta on August 6th. The statement of the claim required by the Massachusetts Public Statutes, c. 192, § 15, was not filed in the city clerk's office in Boston until more than four days after the yacht left for Newport. It was contended by the claimant that there was no lien upon the yacht for the supplies furnished. The court disallowed that part of the claim, which was for supplies furnished while the yacht was in Boston. It was decided, as to this part, that going to Newport on a pleasure excursion was a departure from the port, within the meaning of the statute; which provides that the lien is dissolved unless a statement of the claim is filed at the clerk's office within four days after the departure of the vessel from the port at which she was when the debt was contracted. The Helen Brown, 28 Fed. Rep. 111. As to the part of the supplies which were furnished by the libelants while the yacht was at Newport, the court held that while at Newport she was in a foreign port, and, under the general admiralty law, the libelants could claim a lien, although the goods were ordered from Newport at Boston, and were sent to the yacht at Newport by express. There was accordingly a decree for the libelants for that part of the supplies furnished in the sum of \$93.94, and costs.

Arnold and others v. National S. S. Co.¹

(District Court, S. D. New York. November 24, 1886.)

1. Carrier — Discharge of Cargo — Customary Wharf — Discharge Elsewhere—Liability.

The customary discharge of goods by a carrier at its own wharf, so long as no good reason for a discharge elsewhere exists, though not without occasional discharges for cause at a different wharf, imports no such strict considerable. tract obligation to discharge at its own wharf as is violated by a discharge elsewhere, for good reasons,—such as that the usual dock was full.

2. Same—Statement.

On the thirty-first of January, 1883. the dock of the National Steam-ship Company being occupied by other vessels, the steam-ship Egypt, of that line, discharged her cargo at the Inman dock, three blocks distant, where it was destroyed by fire. Libelant alleged that the loss occurred through the violation on the part of the steam-ship company of its custom to discharge at its own wharf. The proof showed that while it was the practice of the National line to discharge at their own dock, it was no invariable custom. The bills of lading provided simply for a delivery at the port of New York. The Inman lading provided simply for a delivery at the port of New York. The Inman Company's pier was as good and safe from fire as that of the National line, and nothing was shown in regard to the cause of the fire that especially connected it with the unloading at the Inman pier. Held, that the National Company was not liable for the loss on the ground of violation of custom.

Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty.

Evarts, Southmayd & Choate, for libelants.

John Chetwood and R. O. Benedict, for respondent.

Brown, J. The libelants, composing the firm of Arnold, Constable & Co., filed this libel in personam to recover the sum of \$15,000 for the loss of 36 cases of goods which had been consigned to them from England, and were brought in the steamer Egypt, landed upon the Inman Company's pier, No. 36, North river, and there destroyed by fire on the thirty-first of January, 1883. The main features of the case, including the terms of the bills of lading, bonds, permits, etc., are the same that existed in the cases of Acker v. The Egypt, in which the several libels were dismissed. 25 Fed. Rep. 320. That decision is followed here, so far as relates to the points then considered.

By the amended libel in this case it is further charged that, for many years prior to 1883, the libelants had been in the habit of shipping goods by the respondents' line, and had invariably received them at the dock owned by the respondents, and not otherwise; and that it had become an established custom and usage of the port, between the libelants and the respondents, that all the libelants' goods should be landed at the dock known as the "National Dock," which was at this time pier No. 39; that the libelants had no knowledge or notice of the landing, or intended landing, of these goods at any other dock; that the change to Pier 36 was made without necessity, and in violation of the said custom; and that it was by reason of such violation that the goods were destroyed.

Had the bills of lading provided, in express terms, that delivery should be made at Pier 39, no doubt unloading at Pier 36, without notice, would have been such a departure from the contract as to deprive the carrier of the benefit of its stipulation for the privilege of discharging "without notice, and at the consignee's risk." tom alleged in the amended libel, in order to have a similar legal effect, must be so clearly proved, and also so certain in its character. as to have the legal effect of one of the express terms of the contract. In my judgment, the proof is entirely insufficient in either respect. I do not find more than six shipments by this line to the libelants during the five years previous; namely, one in 1878, one in 1879, none in 1880 or 1881, three in 1882, one in 1883, although this line was running from four to eight steam-ships per month. No special contract or arrangement was proved between the defendants' line and the libelants, and nothing to distinguish their relations to the defendants from their relations to any other occasional consignees. Defendants owned a dock, at which it was their habit to discharge their goods, because it was their own dock, and because it was more convenient for them to discharge there than to hire other accommodations. In agreeing with the Inman Company for freight on the Egypt for this voyage, the defendants had contracted for the right to discharge her at their own dock, or at the Inman pier, as they might elect. Shortly before her arrival they arranged for her to go to the Inman pier, because other steamers, previously due, would so occupy their own dock that the Egypt could not be accommodated there upon arrival, nor without such delays as would be injurious both to the consignees and to the defendants' line. During the five years preceding the arrival of the Egypt, out of 192 voyages from Liverpool made by steamers of the defendants' line, in 8 instances only had the vessels been sent to docks other than those leased or controlled by the defendants.

While these facts show, undoubtedly, the habit of the defendants to discharge at their own dock, this practice was in no way legally incompatible with a lawful discharge at any other fit and appropriate wharf, whenever there was reasonable occasion for so doing. instances of discharge elsewhere, though few, show that there was no such invariable custom. The practice of discharging at their own wharf, when there was room, does not show, or tend to show, any usage to keep vessels and consignees' goods waiting in the stream, when their wharf was full, until a place should be vacant. rather than send the vessel at once to some other proper place of discharge; nor does a mere practice of discharging at one's own wharf, of itself, raise any obligation, as a strict legal custom, to discharge at that wharf, and not elsewhere, equivalent to an express provision of the contract. If it did, consignees might refuse to accept goods at any other place, whatever the causes for a change, such as fire, destruction, or pending repairs,—of all which the ship would take the risk. Such a construction would be manifestly unreasonable, and opposed to the interest and presumed intention of both carrier and consignee.

The bill of lading in this case stipulated only for a delivery at the port of New York. Under this provision, the defendants had a right to deliver the goods in any part of the port in which, by the usage of trade, such goods were accustomed to be delivered. Devato v. Plumbago, 20 Fed. Rep. 511, 516. Pier 36, where these goods were actually landed, was within a few hundred feet of Pier 39. It was equally convenient to the libelants, and, as appears by the evidence, it was as good and as safe from fire, as Pier 36; and it was a pier at which the libelants had been in the habit of receiving goods from the Inman Company more frequently even than from the defendants' line at Pier 39.

Doubtless, where one of the clauses of the bill of lading requires the consignee to be in readiness to receive as soon as the ship is ready to deliver, there is reason for relying upon a discharge at the particular place accustomed; and if it had appeared that there was not in this case the usual notice of the place of unloading, and that the libelants had been actually ready to receive the goods at the usual place of landing before the fire, and that the libelants' failure to re-

ceive and remove the goods arose in consequence of the change in the place of landing and the lack of the usual notice, a very different case would have been presented. The facts here are all quite the contrary. Not only was the usual notice of the place of discharge bulletined in the usual manner at the custom-house immediately upon the entry of the vessel, but the libelants were not at any time before the fire in readiness to receive the goods at either pier, because they had not time, on the thirty-first of January, to make the necessary preliminary entry in the custom-house. There is nothing shown in regard to the cause of the fire that especially connects it with the discharge at Pier 36 except the mere fact that the fire occurred The cause of the fire is unknown. Railroad Co. v. Reeves. 10 Wall. 176; Hoadley v. Northern Transp. Co., 115 Mass. 304. The question presented is whether the customary discharge of goods by a carrier at its own wharf, so long as no good reason for a discharge elsewhere exists, though not without occasional discharges for cause at a different wharf, imports any strict contract obligation to discharge at its own wharf, and not elsewhere, though good reason for a discharge elsewhere does arise, for the reasonable convenience of all parties, so that the contract must be held violated by a discharge made at another place near by, equally fit and appropriate. In my judgment, there is no such obligation. As the facts, therefore, do not show any violation by the ship of the express or implied contract of the bill of lading, the libel must be dismissed, with costs.

THE IDAHO. (PACIFIC COAST S. S. Co., Claimant.)

(District Court, D. Oregon. November 30, 1886.)

1. Admiralty—Information on Seizure—Form—Contra Formam Statuti.

It is not necessary, in an information on a seizure on land or water, and particularly the latter, to allege therein that the act or omission on account of which the seizure is made, was done or omitted contrary to the form of the statute in such case made and provided, but it is sufficient that such act r omission is described in the words of the statute under which the proceeding takes place.

2. Ships and Shipping—Navigation—Penalty—Rev. St. U. S. §§ 4465, 4499.

The penalty prescribed by section 4499, Rev. St. U. S., for a failure to comply with any of the provisions of title 52 of the Revised Statutes in navigating a steam-vessel, is incurred by any such failure, although some other penalty may be prescribed by the section or provision thus violated; and therefore this section is to be read in this case as if the penalty therein was specifically prescribed for the violation of the first clause of section 4465 of the Revised Statutes, limiting the number of passengers to be carried on such vessel.

8. Same—Steam-Vessel—Rev. St. U. S. § 4499.

The navigation of a steam-vessel, within the purview of section 4499 of the Revised Statutes, includes everything required and provided therefor and thereabout in title 52 of the Revised Statutes,—such as equipment, management, character, and stowage of cargo, and the number and treatment of the passengers thereon.

4. Admiralty—Jurisdiction in Case of Seizure—Rev. St. U. S. § 4499.

In a case of seizure, the place of seizure, and not that of the commission of the act on account of which the seizure is made, determines the jurisdiction: and the clause in section 4499 of the Revised Statutes—"may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense"—does not change this rule; the court in whose district a seizure is made acquiring thereby jurisdiction of the subjectmatter or cause of suit.

(Syllabus by the Court.)

In Admiralty.

Cyrus Dolph, for claimant.

Lewis L. McArthur, for the United States.

Deady, J. On July 23, 1886, Mr. Lewis L. McArthur, district attorney for the district of Oregon, filed a libel of information in this court against the steam-ship Idaho, in a cause of seizure under section 4499 of the Revised Statutes, for the recovery of the penalty provided therein, in which it is alleged (1) that on July 22, 1886, the collector for the district of Portland (Wallamet) did seize said vessel at Portland, in this district; (2) that on April 16, 1886, at the port of San Francisco, in California, the Idaho did take on board and carry and convey therefrom to the ports of Victoria, in British Columbia, and Townsend, Washington Territory, a greater number of passengers than she was permitted by law to carry; (3) that the number of passengers stated in the vessel's certificate of inspection, and which she was entitled by law to carry, was 200, whereas she took on board and carried on said voyage 215 passengers; (4) that by reason of the premises, and the force and effect of the statute in such cases made and provided, said vessel is subject to a penalty of \$500.

On the same day the vessel was arrested on a warrant issued on the libel of information, and delivered by the marshal to the agent of the owners, the Pacific Coast Steam-ship Company, on a stipulation, in the sum of \$1,000, to abide by and perform the decree in the case.

On August 5th the claimant filed exceptions to the libel for "informality and insufficiency," as follows: (1) The court has no jurisdiction to enforce the penalty or grant the relief; (2) the libel does not allege any case of seizure provided for in said section 4499; (3) the libel does not state facts sufficient to justify the seizure of the vessel, nor any proceeding in this court against her.

Section 4499 of the Revised Statutes reads as follows:

"If any vessel, propelled in whole or in part by steam, be navigated without complying with the terms of this title, (52,) the owner shall be liable to the United States in a penalty of \$500 for each offense, one-half to the use of the informer; for which sum the vessel so navigated shall be liable, and may be seized and proceeded against, by way of libel, in any district court of the United States having jurisdiction of the offense."

Title 52 of the Revised Statutes includes the sections thereof from 4399 to 4500, both inclusive.

Section 4465 provides: "It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the

certificate of inspection;" and makes the master or owner liable for a penalty of \$10 for each passenger in excess of the lawful number, and the amount of the passage money, to any person who will sue for the same.

The judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction," (Const. U. S. art. 3, § 2;) and cases of seizure on the high seas, or the navigable waters of the United States, for the violation of any law thereof, are cases of admiralty and maritime jurisdiction, (The La Vengeance, 3 Dall. 297: The Samuel. 1 Wheat. 13.) By virtue of subdivisions 3 and 8 of section 563 of the Revised Statutes the district courts of the United States are given jurisdiction "of all suits for penalties or forfeitures incurred under any law of the United States," and "of all civil cases of admiralty and maritime jurisdiction." This is a civil cause of such jurisdiction. The act or offense by which the penalty was incurred. and the lien given therefor on the vessel, was performed on the water. The La Vengeance, 3 Dall. 301. Of course, it is understood that the jurisdiction of the court cannot be invoked or exercised in a particular case unless the defendant, if the proceeding is in personam, is found within the territorial limits of its authority, or unless the res, if the proceeding be in rem, is found within the same.

On the argument counsel for the exceptions contended that the libel was insufficient because the illegal act charged therein is not alleged to have been done "contrary to the form of the statute in such cases made and provided;" citing Briscoe v. Hinman, 1 Deady, 589. But that was an action at law, brought by an informer against the collector, to recover a penalty incurred under a statute, and given to any one who might sue therefor. The technical rule, that in an action at law,—an action of debt,—for a penalty given by statute, the act or omission on account of which the penalty is given must be charged to have been committed or omitted contra formam statuti, has always obtained in the United States courts. But in a libel of information in admiralty for a forfeiture or penalty, or even in a proceeding in rem, by information, on a seizure on land, the same strictness has never been required. Cross v. U.S., 1 Gall. 29; Sears v. U.S., Id. 259: The Samuel, 1 Wheat. 14: The Merino, 9 Wheat, 401.

In The Samuel, supra, 15, Chief Justice Marshall said:

"The court is not of the opinion that all those technical niceties which the astuteness of ancient judges and lawyers has introduced into criminal proceedings at common law, and which time and long usage have sanctioned, are to be ingrafted into proceedings in the courts of admiralty. These niceties are not already established, and the principles of justice do not require their establishment. It is deemed sufficient that the offense be described in the words of the law, and be so described that, if the allegation be true, the case must be within the statute."

In the case under consideration the section of the Revised Statutes (section 4499) under which the seizure was made is named, and the act for the commission of which the penalty in question is given is described, so that, if the allegation is true, there was a violation of that part of title 2 denominated section 4465, which declares: "It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection."

It is also contended that the libel does not bring the case within the provisions of section 4499. The argument in support of this proposition is that while the section declares that the owner of the vessel shall be liable for a penalty for any failure to comply with title 52 in the navigation thereof, yet each section of said title provides a special penalty for its violation, "and this section is not intended and does not add to the penalties elsewhere provided for;" and "this is apparent from the fact that section 4500 provides a penalty for the violation of any provision not specially provided for." But it will not do to assume—as this argument does—that section 4499 has no operation whatever as a part of title 52, and is a mere superfluity. In the first place, the penalty provided in section 4465 for its violation is given against the master or owner, who is made personally liable to any one who will sue therefor. It is true that section 4469 makes this penalty also a lien on the vessel. This, however, does not authorize her seizure by the government, but the person suing for the penalty may proceed in rem and arrest the vessel, as a seaman or material-man might do for wages or materials furnished.

The penalty given by section 4499 for a violation of any provision of the title differs from any other penalty therein, except that given by section 4454, in that it is given exclusively to the government. and the vessel is made liable to seizure on account of the same. It was competent for congress, however, to provide for alternative or cumulative penalties for the violation of any provision of this title, and therefore it is no objection to a claim for the penalty given by section 4499, for carrying too many passengers, that the section making the carrying unlawful also provides a penalty therefor. This section 4499 is compiled from section 1 of the "steam-boat act" of February 28, 1871, (16 St. 440.) The first clause of the section prohibits the issue of any license, register, or enrollment, to any steam-vessel, until all the provisions of the act have been complied Then follows the clause—now section 4499 of the Revised Statutes—giving the penalty for navigating any such vessel without complying with the terms of the act. This indicates that the penalty thus prescribed in the first section of the act was not merely intended to meet cases of violation otherwise unprovided for, but the contrary. And although this provision has been transferred by the compilers to the end of the title on the subject of steam-boats, nothing is to be inferred from that fact, as is declared in section 5600 of the Revision. There is really no reason to conclude that the various sections of this title, giving special penalties for particular violations thereof, were intended to exclude the operation of section 4499, imposing a particular penalty for any violation of the same; and so,

for the purposes of this case, section 4499 must be read as if the first clause of section 4465 was a part of it.

It is also contended in this connection that the term "navigated," as used in section 4499, is confined to the equipment, furnishing, and managing of the vessel, and does not include the matter of carrying a greater or less number of passengers thereon. This may be a plausible proposition, but, in my judgment, it is not supported by the statute, or the reason of it. This title 52 of the Revised Statutes is devoted to the regulation of steam-vessels, principally with a view to the safety and comfort of the passengers thereon. Concerning both these particulars, the number of passengers a vessel carries, compared with her capacity to take care of them, is a material circumstance; and it would be strange if section 4499 should apply to a failure to keep a watchman (section 4477, Rev. St.) in the cabin at night to give the alarm to the passengers in case of an accident, and not apply to the overloading of the same vessel with passengers, contrary to section 4465. The navigation of a vessel, within the purview of this section, includes, in my judgment, everything required and provided therefor and thereabout in this title, -such as equipment, management, the character and stowage of cargo, and the number and treatment of passengers thereon.

And, lastly, it is contended that the court has no jurisdiction of the proceeding, because, as it is claimed, it has no "jurisdiction of the offense." This is not a criminal proceeding, and the word "offense" is simply used here to signify, in a loose way, the act of taking on board a greater number of passengers than that mentioned in the vessel's certificate. This itself is not a crime, nor does the statute make it such. To secure obedience to the statute limiting the number of passengers that may be taken on board, a penalty is imposed on the owner for its violation, although he may in fact have been ignorant thereof. Such penalty is recoverable by a civil action, transitory in its nature, that may be maintained in any district court within whose jurisdiction the owner may be found. In addition, the statute in this case gives a lien on the offending vessel for the penalty, and so far it becomes a case of admiralty jurisdiction, that may be maintained in any district court where said vessel may be found and arrested. Not only this, but the statute authorizes the seizure of the vessel, in the first instance, by the proper officer of the government; and that, wherever it may be found,—for, of course. she cannot be seized elsewhere,

It is not to be lightly supposed that the general rule and test of jurisdiction of the district courts in cases of penalties and seizures, as prescribed by section 563 of the Revised Statutes, was intended to be changed, and a peculiar and impracticable test of jurisdiction substituted by section 4499 for the recovery of the penalty thereby imposed. The words, "and may be seized and proceeded against by way of libel in any district court of the United States having juris-

diction of the offense." must be construed so as to harmonize with the general rule on the subject of jurisdiction in such cases. thing mentioned is the "seizure" of the vessel. This is a substantive, separate act, on which the jurisdiction of the court depends. Thenceforth the district court, for the district within which the seizure is made, has exclusive cognizance of the cause. As was said in The Octavia, 1 Gall. 488, the place of seizure, and not the place of committing the offense, gives the jurisdiction. Therefore the court of the district where the seizure is made has, for that very reason, jurisdiction of the offense, so to speak, and no other court has, (The Ann, 9 Cranch, 290;) and if the vessel is taken into any other district by the seizing officer, the court will remit it to the proper district, (The Abby, 1 Mason, 360.) It matters not whether the act on account of which the penalty is given constitutes a crime or not. This is not a criminal proceeding against the party committing it, that must be prosecuted in the district where it was committed. Sixth Amend. On the contrary, it is a civil suit to enforce a penalty against the offending vessel, and the court of the judicial district in which the vessel was seized, for this purpose, has jurisdiction of the offense or matter out of which the penalty arose. Indeed, the word "offense," as used in this connection, has no precise or technical signification, and is used, generally and loosely, in the sense of the matter or transaction which constitutes the subject or cause of the suit. The jurisdiction to enforce the penalty against the vessel arises from the seizure, and does not exist without it; and it attaches or belongs to the court within whose district it was made, without reference to the place where the act for which the penalty is given was done or committed.

But it appears there is another answer to this exception to the jurisdiction. It comes too late. The claimant has filed a claim of ownership in this court, and obtained the delivery of the vessel thereon. By this act it admitted the jurisdiction of this court. If it intended to contest the jurisdiction, it should have done so before it obtained the delivery of the property. The Abby, 1 Mason, 363.

The exceptions are disallowed.

COLORADO MIDLAND Ry. Co. v. Jones and others.

(Circuit Court, D. Colorado. November 30, 1886.)

REMOVAL OF CAUSE—RAILROADS—COMPUTATION OF DAMAGES IN CONDEMNATION PROCEEDINGS.

When, in condemnation proceedings under state statutes, the only question remaining for determination is the computation of the value of the land, the parties being citizens of different states, the cause may be removed to the United States courts, notwithstanding the fact that the right of eminent domain is an attribute of sovereignty, and that the statutes provide a special mode of trial for the assessment of damages, since the amount of compensation for the land is entirely independent of the right of eminent domain.

Motion to Remand.

Henry T. Rogers, for complainant.

Hug's Butler, for respondents.

BREWER, J. This was a proceeding by the petitioner, the railway company, under the statute of this state, for the condemnation of a right of way through the lands belonging to the respondents. After the petition had been filed, and the summons issued and served, the respondents filed their petition and bond for removal to this court; and the question presented is whether that is a case of which this court has jurisdiction.

The right of eminent domain, as conceded, is one of the attributes of sovereignty. It is something which inures in the state by virtue of its sovereignty, and, except as limited by provisions in the state constitution, there is no question of the power of the state to take any land belonging to an individual which it may deem necessary for any public purpose. Being an attribute of sovereignty, it is one of those rights, the exercise of which cannot be questioned or challenged in the courts of any other jurisdiction. So far the authorities are all in accord. But the constitution of this as well as of other states provides that private property shall not be taken or damaged for public use without just compensation; and, when the right to take is asserted and adjudged, the question of compensation, a matter entirely independent of the right, still remains for determination. The legislature may provide under what circumstances and in what manner this compensation shall be determined, and, when it has provided that which is equivalent to a suit at law in which the only controversy remaining to be considered is the amount of compensation, there exists a suit,—a controversy,—which, under the removal act, may be removed to the federal courts, provided the citizenship of the parties justifies it. That right of removal has been affirmed in two cases in the supreme court, (Boom Co. v. Patterson, 98 U.S. 403, and Union Pac. R. Co. v. City of Kansas, 115 U. S. 1, S. C. 5 Sup. Ct. Rep. 1113;) so that the question in this case is narrowed to this: whether there was, at the time that this petition

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and bond for removal were filed, such a proceeding pending as could be considered fairly a suit at law, and in which the whole matter of inquiry was the amount of compensation. If there was, then there was a suit which is removable; otherwise not.

Now, turning to the statutes, I find, in section 238, "that in all cases where the right to take private property for public or private use, without the owner's consent, * * has been heretofore or shall hereafter be conferred by general law or special charter, and the compensation to be paid for or in respect of the property sought to be appropriated or damaged, for the purpose above mentioned, cannot be agreed upon by the parties interested, it shall be lawful for the party authorized to take or damage the property so required * * * to apply to the judge of the district or county court, either in term-time or vacation, by filing with the clerk a petition setting forth by references his or their authority in the premises," (and certain other matters,) "and praying such judge to cause the compensation to be paid to the owner to be assessed." That is, the question which is presented by that petition is simply as to the compensation to be paid to the owner. The right is already settled. It is a right which the legislature has granted either by special charter or general act; and the only question which upon that petition comes up for inquiry-perhaps the only question which can ever thereafter be considered—is that of compensation. that petition is filed, a summons is issued and served upon the party as in other cases. At the day fixed for the hearing, which may be either in term-time or vacation, either before the court or before the judge, a commission of three persons is appointed, who assess and report the damages. There may be a jury at the demand of the owner of the property, -only on his demand.

Section 237 says: "Compensation shall be ascertained by a board of commissioners of not less than 3 freeholders, or by a jury when required by the owner of the property;" and section 243 provides that a person or company "whose estate or interest is to be affected by the proceeding may demand, at the time of any hearing of such petition, and before the appointment of the commissioners herein provided, a jury of six freeholders." That jury, when selected, take oath faithfully and impartially to discharge their duties. "At the request of either party they shall go upon the land sought to be taken or damaged, in person, and examine same, and shall then return into court, if the proceedings be in term-time, and, if in vacation, then before the judge; and the said court or judge shall proceed in the same manner and with like power as in other cases." Evidence shall be admitted or rejected by the court or judge according to the rules of law, and, "at the conclusion of the evidence, the matter in controversy may be argued by counsel to the jury, and at the conclusion of the arguments the court or judge shall instruct the jury in writing, in the same manner as in cases at law." The jury retire for deliberation. They agree upon a verdict. If they do not agree, another jury may be called, and the same proceedings repeated. "Any person, party, or corporation feeling aggrieved by any such verdict may move, before such court or judge, for a new trial in the same manner and for the same causes as in action at law, and the refusal of such court or judge to grant a new trial may be excepted to and assigned for error."

Other features of like nature are specially provided for; so that it seems to me the sum and substance is this: That the legislature has provided for a trial by which the amount of damages to be given shall be ascertained. It may be by a commission of three freeholders, or it must be, on the application of the party whose property is sought to be taken or damaged, by a jury of six persons. It may be in vacation; it may be in term-time; but all the elements of a judicial inquiry are provided for,—a tribunal, the right of either party to appear, to present its testimony, to have the questions passed upon by the court or judge, error taken and reviewed by the supreme court. Now, while it is true that, in some respects, this proceeding is not in accord with the ordinary proceedings for the trial of a cause,—as, for instance, there is no common-law jury,—yet that fact does not in any manner abridge or limit the proposition that here is a trial provided for, and a trial for the determination of the simple question of compensation. The proceedings assimilate very closely with the ordinary proceedings of a court at law; and it seems to me the case comes within the opinion of the supreme court in the two cases referred to.

Counsel for the railway company presented a case from West Virginia (Baltimore & O. R. Co. v. Pittsburg, W. & Ky. R. Co., 17 W. Va. 812) that plainly recognizes the distinction I have noticed. There the question was whether the Baltimore & Ohio Railroad Company, alleged in the petition to be a foreign corporation, had a right to condemn property; and in a very elaborate opinion the court say, on page 866, after referring to the case of Boom Co. v. Patterson, supra:

"In this case [the Boom Case] the only question was as to the compensation to be paid to the owner of the land, and we can very well see how a controversy between citizens of different states upon this question might be removable to the federal court. As we have already seen, before the question of compensation can properly arise, the court must of necessity declare that the private property sought to be appropriated must be condemned. the question of the appropriation of the land sought to be taken, the government of the United States, a separate sovereignty, unless it is the party seeking the condemnation, has nothing to do; and no foreign corporation can, in the courts of the United States, condemn the land of a citizen of a state for the use of such corporation; and, if the federal courts have not original jurisdiction for such purposes, a proceeding of that kind instituted in the state court cannot be removed to the federal courts, because the federal courts can under no circumstances have jurisdiction in such cases. The contrary doctrine would destroy every vestige of control which a state has over its internal affairs."

And referring to the case before them: "There the whole controversy was as to the right of the petitioner to appropriate the land in question."

I do not suppose that a state can, by making special provisions for the trial of any particular controversy, prevent the exercise of the right of removal. If there was no statutory limitation, the legislature could provide for the trial of many cases by less than a commonlaw jury, or in some other special way. But the fact that it had made such different and special provisions would not make the proceeding any the less a trial, or such a suit as, if between citizens of two states, could not be removed to the federal courts. If this were possible, then the only thing the legislature of a state would have to do to destroy the right of removal entirely, would be to simply change and modify the details of procedure. Courts have always looked beyond the mere form,—tried to go down to the substance; and if it is apparent that there is a controversy between citizens of two states, involving a mere question of money, they will hold that there is a removable suit; and no mere matter of detail in procedure established by the legislature can abridge that right to remove.

The motion to remand will be overruled.

TANNER, Sr., v. VILLAGE OF ALLIANCE and others.

(Circuit Court, N. D. Ohio, E. D. October Term, 1886.)

COURTS—UNITED STATES CIRCUIT COURT — JURISDICTION — INTOXICATING LIQ-

NORS—INJUNCTION—CONSTITUTIONAL LAW—CONST. U. S. AMEND. 14.

A citizen of Ohio, engaged in the business of selling liquors, applied for an injunction against a village in the same state, to restrain it from enforcing an ordinance "to prohibit ale, beer, and porter houses, and other places where intoxicating liquors are sold at retail," which was passed under the provisions of an act of the legislature called the "Dow Law," on the ground that it was in violation of the constitution of the state and of the United States. that it was in violation of the constitution of the state, and of the United States, Held, (1) that the court had no jurisdiction to afford the relief asked, the bill and the affidavits not making a federal question, and all the parties being citizens of the state of Ohio; (2) that the ordinance does not conflict with the fourteenth amendment of the constitution of the United States; (3) that the ordinance does not deprive complainant of his property; (4) that the ordinance does not deprive complainant of his property; (4) that the ordinance is only a police regulation, in the interest of the public morals, and for the common good.1

In Equity. Application for an injunction to restrain the enforcement of an ordinance of the village of Alliance, Ohio, prohibiting the sale of intoxicating liquors.

The complainant alleged that for the last 20 years he had been engaged in the business of selling distilled, malt, and vinous liquors, lawfully, in the village of Alliance, in Ohio, and in pursuance of said business he had acquired property, a part of which was real estate, in said village, upon which he had made extensive improvements,

¹See Kessinger v. Hinkhouse, 27 Fed. Rep. 883; State v. Walruff, 26 Fed. Rep. 178; Weil v. Calhoun, 25 Fed. Rep. 865.

in the way of fitting it for the purpose of carrying on said business; that he had placed there, at great expense, fixtures and furniture, and had placed therein a stock of liquor; in so doing, he had acquired an extensive business in the lawful sales of liquor, as stated; that the good-will of the business was of large pecuniary value to him; that said property so acquired would be worth \$15,000 if he was permitted to carry on the business as it had always been provided by the laws of Ohio, and under which laws his money was invested, and his business built up; and that, if he is deprived of carrying on said business, his property will not be worth more than \$7,500; that the said village of Alliance, on the twentieth of August, 1886, enacted an ordinance, taking effect on the seventh of September, 1886, "to prohibit ale, beer, and porter houses, and other places where intoxicating liquors are sold at retail," and sets out the ordinance: this ordinance was passed under the provision of an act of the legislature called the "Dow Law;" that under this law he had paid the tax required to be paid to carry on his said business in said village. He states, in substance, that this ordinance prevents him, with severe penalties, from carrying on his business, and disposing of his stock; that thereby his property is taken for public use, and no provision is made for compensation therefor, and in that way his property is taken without due process of law. He asks an injunction to restrain the village from enforcing the law, and also to have it declared to be in violation of the constitutions of the state and of the United States.

Miller & Pomerine and Estep, Dickey & Squire, for complainant. Fording & Hoover, for respondents.

Welker, J., refused the injunction, and held: (1) That the court had no jurisdiction to afford the relief asked, the bill and the affidavits not making a federal question, and the parties being citizens of the state of Ohio. (2) That the ordinance does not conflict with the fourteenth amendment of the constitution of the United States. which provides that "no state shall deprive any person of life, liberty. or property without due process of law." (3) That the ordinance does not deprive complainant of his property. It only undertakes to prevent him from "keeping," within the limits of the village, an ale, beer, or porter house, or a place where intoxicating liquors are sold at retail. He may, under it, sell his stock in trade in any way he can, except in such a way as will make him such "keeper." (4) That the ordinance is only a police regulation, in the interest of the public morals, and for the common good; and, although it may in some measure affect the value of his property, or interfere with its use in the purposes for which it was obtained, it does not thereby "deprive" him of his property to any greater extent than a large class of legislation, both state and national, that has not been questioned in our (5) That, there being no federal question involved, public laws. the other grounds of relief claimed by the complainant are not considered by the court, leaving the same to the state courts for adjudication.

Jackson, J., concurs.

KEELS v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, D. South Carolina. December 3, 1886.)

1. LIFE INSURANCE—SUICIDE—EVIDENCE—STATEMENT IN PROOFS.

In an action on a life insurance policy, if there be a doubt whether the death of the insured was the result of accident or of suicide, the doubt should be solved in favor of the theory of accident; but if the plaintiff has, in her proof of death, stated that the death was by suicide, it is incumbent on her to satisfy the jury that she was mistaken in this statement, and that the death was caused by accident.

2. Same—Accidental Killing.

A condition in a life-insurance policy that it shall be void if the insured shall die by suicide, whether the act be voluntary or involuntary, does not apply where the death is the result of accident, or unintentional self-killing.

Motion for New Trial.

Action on a life insurance policy. Judgment for plaintiff. Defendant appealed. The facts are stated in the opinion.

J. T. Sloan and Pope & Shand, for plaintiff.

J. T. Seibels, for defendant.

Simonton, J. The action was on a policy upon the life of Isaac Keels in the sum of \$10,000. The complaint set out the policy in general terms, stating the death, averring that it did not occur within any of the exceptions of the policy, and that all the conditions thereof had been complied with. The answer admitted the policy; set out its requirements that proof of death should be made fully and under oath; that such proof of death had been made, stating that suicide was the proximate cause of death, and that the remote cause was softening of the brain, inducing dementia, during which the suicide was committed. The answer relied upon the ninth condition of the policy, which is in these words. "Death of a member by his own hand, whether voluntary or involuntary; sane or insane, at the time, is not a risk assumed by the association in this contract." The answer had, as exhibits, the proofs of death, signed and sworn to by plaintiff; and the proceedings of the coroner's jury, with their verdict that Isaac Keels came to his end by suicide, which proceedings had been attached to the proof of death by the plaintiff. reply of the plaintiff admitted that she had given suicide as the cause of death, but averred that this was on information, and not from personal knowledge; and also that she did not mean technical "suicide" by the use of this word.

The defendant moved the court to instruct the jury on the pleadings to find for defendant, as the proofs of death showed that the deceased had committed suicide,—one of the exceptions in the policy. This was overruled, and testimony was taken.

It appeared that Isaac Keels, whose life was insured, had, for over a year, been suffering from softening of the brain; that he showed great mental aberration, increasing in its character. On seventeenth January, 1886, being very much wrecked mentally and physically, and suffering from partial paralysis, he left his house about 2:30 p. m., walked to the back of his lot, returned through his pasture, and was found dead, with a bullet wound in his head, on the inner side of his pasture fence. This fence was 10 rails high, and it was evident that he had climbed over it before his death. His body was lying by the side of the fence, face downwards, a little on the right side, the head embedded in a hole in the ground, made apparently by the top of his head, a pistol being held in his open hand, under his body. The ball passed below the temple, ranged obliquely downwards, and was found lodged just at the juncture of the spine and the skull.

Each side presented requests to charge. The presiding judge adopted neither of them, but charged as follows:

(1) If the jury believe from the testimony that Isaac Keels came to his death by his own act,—shooting himself with the pistol,—and if, when he shot himself, he was either sane or insane, and so did the act intentionally or unintentionally, the plaintiff being bound by the condition expressed in the ninth article of the policy, cannot recover the full amount of it, and the verdict must be for the sum tendered by defendant. Bigelow v. Insurance Co., 93 U. S. 284.

(2) If the jury believe from the testimony that Isaac Keels, in climbing his pasture fence, fell, and in the fall, or caused by the fall, the pistol exploded, and killed him, then the ninth condition of the policy cannot protect the de-

fendant, and the jury may find the full sum secured by the policy.

(3) That, under ordinary circumstances, it is true that, if there be a doubt whether the death was the result of accident or of suicide, this doubt must be solved in favor of the theory of accident. *Mallory* v. *Insurance Co.*, 47 N. Y. 52. But in this particular case, plaintiff having in her proof of death stated to the company that the death was by suicide, it is incumbent on her to satisfy the jury that in this statement she was mistaken, and that the death was the result of accident. *Insurance Co.* v. *Newton*, 22 Wall. 38.

The jury found for the plaintiff the full amount claimed. The defendant now makes his motion for a new trial. The grounds upon which this motion is based may be stated thus:

(1) That the plaintiff in the proofs of death required by and submitted under the terms of the policy, having stated that the deceased came to his death by suicide, cannot now—certainly, in this action—give evidence of any other cause of death, or set up any other theory for the death; (2) because, if the deceased came to his death by a pistol in his own hand, this came within the ninth condition of the policy, and plaintiff cannot recover; (3) because the verdict is unsupported by the evidence.

The first ground gives to the proofs of death submitted when the claim is made an importance which they do not deserve. It is true

that the counsel for the defendant does not insist that the statements in the proof amount to an estoppel; but it is difficult to understand the proposition that the plaintiff cannot introduce evidence contradicting or explaining the statements in her proofs, unless she be estopped having made such statements. "Proofs of loss are not a part of the contract of insurance, nor a part of any contract. The contract of insurance requires that they shall be rendered, but it does not make them, when rendered, a part of itself, as sometimes an application for insurance is made. They are the act or declaration of one of the parties to a pre-existing contract, in attempted compliance with its conditions. The other party to the contract is not a party to this act or declaration, takes no part in making it, does not assent that it is a true statement, and is not bound thereby." McMaster v. Insurance Co., 55 N. Y. 228.

The proofs of death give notice to the company that the life insured has terminated, and that a claim is made. They put the insurer upon the investigation. In such investigation he may be directed, but surely is not controlled, by the proofs. He can question them, contradict them, disprove them. Were we to hold that a claimant under a policy is irrevocably bound by statements of fact in the proof; that there is no room for the correction of mistakes,—corrections made upon after-discovered testimony, and more careful inquiry,—we would give to such proofs a character higher than is given to evidence offered upon a trial, and verdict thereon. All trial courts entertain motions to set aside findings of fact upon newly-discovered evidence.

It is a more difficult question, however, when we inquire if such evdence can be offered in the present action. Ought not this change of theory to have been submitted to defendant before action brought? Should not the proofs of death have been amended? quoted by defendant, (Campbell v. Charter Oak Co., 10 Allen, 218; Irving v. Excelsior Ins. Co., 1 Bosw. 507; Worsley v. Wood, 6 T. R. 710,) certainly sustain this position. This rule, however, seems to be very strict, and should not be applied except to prevent the insurer from surprise or injury flowing from the acts of the plaintiff. The fact of death is communicated to the insurer. The question is made, did that death occur within the risks assumed? by the claimant are submitted early after the death, and on such information as can then be obtained. The insurer takes his own time. He examines the proofs, and makes his own investigation elsewhere, gathers all the testimony he can. Is it just to deprive the claimant of any results favorable to him which such investigation may disclose? Suppose that the facts changing altogether the character of the death be discovered after action, or on the trial, in the unexpected disclosure by a witness under cross-examination, shall the claimant be deprived of this, and shall the jury be told to disregard it, and find against the truth?

The supreme court of the United States in Insurance Co. v. Newton, 22 Wall. 36, speaking of proofs of death in a policy, says:

"They were intended for the action of the company, and upon their truth the company had a right to rely. Unless corrected for mistake, the insured was bound by them. Good faith and fair dealing required that she should be held to representations deliberately made, until it was shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained."

Referring to the cases quoted by defendant in the case at bar, and to their doctrine that, when a mistake has occurred in the preliminary proofs presented, and no corrected statement is furnished to the insurers before trial, the insured will not be allowed on the trial to show that the facts were different from those stated, the learned justice who delivers the opinion of the courts says:

"Possibly the rule there laid down is properly applicable only when the insurers have been prejudiced in their defense by relying on the statement contained in the proofs."

In the case at bar the presiding judge asked the attorney for the defendant if this change of theory in the cause of the death operated as a surprise to him, in which event a continuance would be granted. With a frankness to be commended he admitted that he was prepared for this defense.

In the case of Insurance Co. v. Newton the plaintiff was held bound by her proofs of loss "because no suggestion is made that these proofs do not truly state the manner of the death of the insured." The inference is a fair one that if some mistake could have been shown in the proofs, evidence of such mistake would have been admitted, although offered for the first time at the trial. See the cases of Mc-Master v. Insurance Co., above quoted, and Parmelee v. Insurance Co., 54 N. Y. 193, in which such evidence was admitted; Bliss, Ins. § 265, showing that the doctrine of the case in 10 Allen, supra, is not now followed.

I am of the opinion that the plaintiff in this action can show that the death was from some cause other than that stated in the proofs of death. At the most, the statement made in the proofs of death is an admission made by plaintiff, and, with all the other evidence, must be submitted to and be weighed by the jury. It meets the presumption that the death was accidental, and puts on her the burden of showing her mistake. And so the judge charged the jury.

2. We come now to the second ground, that, if the deceased came to his death by the pistol in his own hand, this is within the ninth exception in the policy. The words are, "death of a member by his own hand, sane or insane, voluntary or involuntary." The words "die by his own hand," in a provision for forfeiture in a life insurance policy, are synonymous with "commit suicide," "die by suicide." Bliss, Life Ins. § 228, and cases cited in note to Breasted v. Farmers' L. & T. Co., 59 Amer. Dec. 488. Accidental or unintentional self-

killing is not within a condition forfeiting a policy for suicide, or taking one's own life, whether such death results from taking poison by mistake, supposing it a wholesome medicine, or from an act done in frenzy or delirium, as by leaping from a window, tearing off a bandage from an artery, or from an act done under the stress of overpowering force. In this all the authorities agree, whatever may be the opinion of particular courts as to whether or not a voluntary selfdestruction resulting from insanity is within the condition. Id. 489; Edwards v. Travelers' Life Ins. Co., 20 Fed. Rep. 661; Pierce v. Insurance Co., 34 Wis. 389. If it were intended by this policy to include death by accident, it was easy enough to say so. surers frame their own contracts, and to suit themselves. They may, if they choose, insert express stipulations against accident. "If they prefer, for the purpose of getting custom, to omit such a stipulation, and to leave the matter in doubt, the doubt ought to be resolved against them."

3. With regard to the verdict. The facts were within the province of the jury. There was evidence to support the verdict. I see no

reason for setting it aside on this ground.

The motion for a new trial is dismissed. Let the plaintiff enter his judgment in conformity with the verdict.

United States v. Nelson.

(District Court, D. Alaska. 1886.)

 Constitutional Law—Powers of Congress—Prohibitory Liquor Law in Alaska.

Congress has power to enact that intoxicating liquors shall not be manufactured or sold as a beverage in Alaska, and to authorize the president of the United States to make such regulations as may be necessary to carry out the provisions of the law.

2. CRIMINAL LAW—INDICTMENT—EXCEPTIONS IN STATUTE.

When the enacting clause of a statute describes the offense, with certain exceptions, it is necessary to state in the indictment all the circumstances, and to negative the exceptions; but, if the exceptions are contained in separate clauses of the statute, they may be omitted in the indictment, and the accused must show that his case comes within them to avail himself of their benefit.

8. Intoxicating Liquors, Sale of—Indictment—Defense—License.

When the non-existence of a license is not averred in an indictment for an unlawful sale of liquor, and the license is particularly within the knowledge of the accused, the burden is on him to produce such license, and rely on it as a defense.

Demurrer to Indictment for Selling Distilled Liquors in Sitka, Alaska.

DAWSON, J. Defendant was indicted at the May term, 1886, of the district court for selling distilled liquors in the town of Sitka, in the district of Alaska, contrary to the statutes of the United States made and provided against, etc. To this indictment defendant has demurred upon two grounds: (1) That the statute of the United States which it is alleged was violated, is unconstitutional and void; (2) that the indictment does not state facts sufficient to constitute an offense against the statute.

The question presented is, has congress the constitutional power to prohibit the importation, manufacture, and sale of distilled spirits

in the district of Alaska?

It is earnestly and ably argued by defendant's counsel that the act of congress of July, 1868, (Gen. St. § 1955,) is violative of the fundamental principles of free government, and therefore void; for the reason alleged in the argument that congress, in its peculiar relation to Alaska, and with the restricted power it possesses in regard thereto, has no constitutional right to enact a prohibitory liquor law for this territory.

It has been judicially held (see Kie v. U. S., 27 Fed. Rep. 351) that Alaska has been since 1867, and now is, a district of our country under the exclusive jurisdiction of the United States, but I know of no case in which it has been decided that Alaska is in no sense "Indian country." It was held by this court in the Slave Case, in April last, that only as to the prohibited commerce mentioned in the sections referred to, being section 1955 of the act of July, 1868, and sections 20 and 21 of the intercourse act of 1834, and section 14 of the act of May, 1884, could Alaska be regarded as Indian country. That conclusion was based upon the Opinions of Attorneys General, vol. 14, p. 290, and vol. 16, p. 141, and I am unable to find anything in the opinion of Justice Deady in the Kie Case in conflict with the conclusion there reached; for the learned judge says:

"As it rests with congress to say whether a district of country shall be considered 'Indian country,' so far as the intercourse between the aborigines thereof and other persons is concerned, this legislation, in my judgment, by at least a reasonable, if not a necessary, implication, is equivalent to a declaration that Alaska is not to be considered 'Indian country' only so far as concerns the introduction and disposition of spirituous liquors therein."

It may well be said that Alaska is not "Indian country," in the conventional sense of the word; but it does not follow that it is not "Indian country," so far as congress may choose to make it such. True, the government has never treated with the Indians of Alaska; but in the third article of the treaty of March 3, 1867, there is express and specific reservation of power to the United States to make laws and regulations in relation to the aboriginal tribes. Congress being the only law-making power of the government under the constitution, that instrument has sharply defined the subjects upon which congress may legislate, and specifically prescribed the duties of the legislative branch of the government. Section 3 of article 4 of the constitution, one of the sections classifying the subjects upon which

congress may legislate, says: "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States."

It will be observed from this section that the territory or unpatented lands then within the territorial boundaries of the United States, and which did not belong to the original individual states, was intended to be, and upon the ratification and adoption of the constitution did become, the absolute property of the United States, subject only to the right of occupancy by the Indians. But the United States possessed the right to extinguish the Indian title of occupancy either by conquest or purchase. See 1 Kent, Comm. lect. 12. The treaty-making power of the government is vested by section 2 of article 2 of the constitution in the president, by and with the advice and consent of the senate. This power necessarily implies the right to purchase new territory; and when the power has been exercised, and territory purchased, the title, immediately upon an exchange of ratification, vested in the United States. American Ins. Co. v. Canter, 1 Pet. 511.

Such was the recognized doctrine in the treaty of peace with Great Britain, and by subsequent cessions from France and Spain, and by cessions from the individual states. But an effort was made to restrict and limit the powers of the government over the territories of Louisiana and Florida. The reason for the strenuous efforts to limit and restrict the powers of the government in relation to those territories is a matter of history, but the institution about which that controversy arose has passed away, and is no longer a question of contention, either in the political or juridical affairs of the government.

Counsel refers to and quotes the following from the opinion of the court in the case of American Ins. Co. v. Canter, 1 Pet. 511:

"In the mean time Florida continues to be a territory of the United States government by that clause of the constitution which empowers congress to make all needful rules and regulations respecting the territory or other property of the United States. Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source from which the power is derived, the possession of it is unquestionable."

It is then argued that because the source of the power to make all needful rules and regulations respecting the territory or other property of the United States was not decided in that case, that the power exists only as the inevitable consequence of the right to acquire territory; and the celebrated *Dred Scott Case*, 19 How. 393, is cited and relied upon by counsel. But the conclusion reached by the majority of the court in that case, holding that the power to make all needful rules and regulations existed only as the inevitable consequence of the right to acquire territory, and that section 3 of article

4 of the constitution had reference only to the then territory of the United States, has never met with the united approval of the American bench and bar. Two reasons may be assigned for the lack of approval of the doctrine of that case: First, the decision was by a divided bench, some of the ablest jurists then on the bench, in exhaustive opinions, dissenting from the conclusions reached by the majority; secondly, the case involved a vital political question, upon which the American people were unmistakably and radically divided in sentiment.

Article 1 of the treaty by which Alaska was ceded to the United States is as follows:

"His majesty, the emperor of all the Russias, agrees to cede to the United States, by this convention, immediately upon the exchange of the ratifications thereof, all the territory and dominion now possessed by his said majesty on the continent of America, and in adjacent islands; the same being contained within the geographical limits herein set forth." See Pub. Treaties U. S. 671.

Upon the ratification by the president of the United States, by and with the advice and consent of the senate, on the one part, and on the other by his majesty, the emperor of all the Russias, and an exchange of those ratifications within three months from the date of the treaty, the title to the soil in Alaska vested in the United States, and remains in the United States by virtue of the treaty with Russia.

Judge Story, in his Commentaries on the Constitution, in examining the section now under consideration, has deduced the following conclusion from the very case referred to and quoted from by counsel, in 1 Pet.:

"As the general government possesses the right to acquire territory either by conquest or by treaty, it would seem to follow, as an inevitable consequence, that it possesses the power to govern what it has so acquired. The territory does not, when so acquired, become entitled to self-government, and it is not subject to the jurisdiction of any state. It must consequently be under the dominion and jurisdiction of the Union, or it would be without any government at all. * * In cases of confirmation or cession by treaty, the acquisition becomes firm and stable, and the ceded territory becomes a part of the nation to which it is annexed, either on terms stipulated in the treaty, or on such as its new masters may impose." Story, Const. par. 1324.

There can, I think, be no question as to the authority of congress to enact such forms of territorial government within the territories of the United States as they may choose or deem best, and not in conflict with the constitution and laws of the United States. Possessing the power to erect a territorial government for Alaska, they could confer upon it such powers, judicial and executive, as they deem most suitable to the necessities of the inhabitants. It was unquestionably within the constitutional power of congress to withhold from the inhabitants of Alaska the power to legislate and make laws. In the absence, then, of any law-making power in the territory, to what source must the people look for the laws by which they are to be

governed? This question can admit of but one answer. Congress is the only law-making power for Alaska.

The next question to be determined is, what laws are applicable to Alaska in relation to the importation and sale of ardent spirits? In March, 1873, sections 20 and 21 of the intercourse laws of 1834 were extended to and over all the main-land, islands, and waters of Alaska. In the act of congress of July 27, 1868, the president is authorized to restrict, regulate, or prohibit the importation and use of fire-arms, ammunition, and distilled liquors into and within the territory of Alaska. Section 1955, Rev. St.

Section 14 of the act of May, 1884, establishing a civil government for Alaska, (23 St. 28,) is as follows:

"Sec. 14. That the provisions of chapter 3, tit. 23, of the Revised Statutes of the United States, relating to the unorganized territory of Alaska, shall remain in full force, except as herein specially otherwise provided; and the importation, manufacture, and sale of intoxicating liquors in said district, except for medicinal, mechanical, and scientific purposes, is hereby prohibited, under the penalties which are provided in section 1955 of the Revised Statutes for the wrongful importation of distilled spirits. And the president of the United States shall make such regulations as are necessary to carry out the provisions of this section."

It will be observed that fire-arms and ammunition, as prohibited commerce in section 1955 of the act of 1868, are omitted in section 14 of the act of May, 1884; thus, by clear implication, repealing section 1955 so far only as prohibiting the importation and use of fire-arms and ammunition. It is well settled that in the construction of statutes a subsequent statute which is repugnant to a prior one, or that if it can be reasonably inferred that the intention was that the subsequent statute should prescribe the only rule that should govern in the case, it is to be regarded as a substitute for, and as repealing, such prior act. Sedg. St. & Const. Law, 104; U. S. v. Seveloff, 2 Sawy. 311. A statute is repealed by the enactment of another repugnant to it, or one covering the whole subject of the former. U. S. v. Barr, 4 Sawy. 254.

Applying this rule, we may reasonably conclude that section 14 of the act of May, 1884, was intended to cover the whole of the subject embraced in sections 20 and 21 of the intercourse laws of 1834, as extended to and made applicable to Alaska; and that section 1955, with the omission of the words "fire-arms" and "ammunition," with the act of May 14, 1884, and the regulations made by the president on the twenty-sixth day of February, 1885, taken together, are the only laws now in force in relation to this question in Alaska.

To enforce this law the following rules have been prescribed:

"No intoxicating liquors shall be landed at any port or place in said territory without a permit from the chief officer of the customs at such port or place, to be issued upon evidence satisfactory to such officer that the liquors are imported, and are to be used, solely for medicinal, mechanical, and scientific purposes. No person shall manufacture or sell intoxicating liquors

within the territory of Alaska without first having obtained a license from the governor of said territory, to be issued upon evidence satisfactory to that officer that the making and sale of such liquor will be conducted strictly in accordance with the requirements of the statute. Any intoxicating liquors imported, manufactured, or sold within the limits of said territory in violation of these regulations, and the persons engaged in such violation, will be dealt with in the manner prescribed in section 1955 of the Revised Statutes; and the governor of Alaska, and the officers of the customs at any port or place in the United States from which intoxicating liquors may be shipped to that territory, as well as officers of the United States within that territory, are hereby authorized, respectively, to exact, in their discretion, a bond of the character mentioned in section 1955, Rev. St., from the master or mate of any vessel, and from such persons in such territory to whom liquors may be sent. The penalty prescribed by section 1955, Rev. St., for violation of the law, is a fine not exceeding \$500, or imprisonment not more than six months, and the forfeiture of the vessel bringing the merchandise and her cargo, together with her tackle, apparel, and furniture, where the value of the merchandise exceeds \$400. Where the value of the merchandise does not exceed \$400, the penalty is forfeiture of the merchandise. The proper officers within the territory are charged with the execution of the law and these regulations. Intoxicating liquors forfeited under the provisions of this act will be subject to sale under the same provisions of law as govern the sale of other goods that may have become liable to forfeiture, but will only be delivered for removal beyond the limits of the territory. H. McCulloch. Secretary.

"Approved: CHESTER A. ARTHUR."

These laws, as amended, then, are the only laws now applicable to Alaska in relation to the importation and sale of distilled liquor. Congress unquestionably had the constitutional power to authorize the president to regulate or prohibit the introduction of distilled spirits into the district of Alaska, and when the president, in pursuance of that power, made regulations, those regulations became a part of the law upon the subject. The Louisa Simpson, 2 Sawy. 57. It should be borne in mind that the various acts of congress in relation to the subject now under consideration are in pari materia, all relating to the same subject-matter, and are to be taken and examined together. in order to ascertain the legislative intent. Sedg. St. & Const. Law, 247. What was the object of the legislation? What was the evil sought to be remedied? By the treaty of March, 1867, more than 500,000 square miles had been added to the territory of the United States. This vast region was then populated principally by Indian creoles and Russians, with a few whites scattered here and there.

By the third article of that treaty the United States guarantied the Russians who chose to remain in the ceded territory the equal protection of the laws. The evils resulting from the use of intoxicating liquors are so appalling, prolific of so much mischief and disorder, that at an early period in the history of our government strenuous efforts were inaugurated to prevent their introduction among the Indians. This policy has been scrupulously adhered to by the government through all the years of its existence. The court cannot presume that in a matter of such vital importance to the material and moral well-being of the Indians, and to the protection, peace, and

safety of other residents in Alaska, that congress intended to depart from the long-established policy of the government in relation to this question.

The evident intention of congress was that distilled spirits shall not be imported, sold, and used in Alaska as a beverage; but that, under the regulations of the president, they may be imported and sold for the purposes only mentioned in section 14 of the act of May. But it is contended that the law is unwise, impolitic, and discriminative. With these questions the court has nothing to do. is not for the court to decide the wisdom or inconveniences of a law. Is it a law? Is it within the scope of legislative power to enact? If so, it belongs to the legislative branch of the government to correct its oppressive features, if they exist. Neither can policy have any influence in construing a law. The policy of one age may not suit the wishes of another: the law is not subject to such fluctuations. Story, Confl. Laws. It may be well to remark that distilled spirits are not lawful commerce per se, but the business can only become legitimate by those engaging in it complying with the internal revenue laws of the United States. Section 3232, c. 3, Rev. St., says: "No person shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax therefor, in a manner hereinafter provided." Then follows an enumeration of the articles. and the amount of license taxes, including distilled spirits. See section 3244.

It is also unlawful for any person to retail distilled spirits in Alaska without having complied with the regulations prescribed by the president, by procuring a license from the governor as therein prescribed. Upon this branch of the case I have no doubt about the constitutionality of the laws now in force in relation to Alaska, even though they amount to prohibition. Many instances might be pointed out in which congress has imposed like duties upon the president, and I know of no case in which the power to do so has been seriously questioned. Alaska being under the complete dominion of the United States government, and its inhabitants subject to the jurisdiction of its courts, it follows, as a necessary sequence, that the government, by virtue of its sovereignty, may restrict or prohibit the manufacture, importation, and sale of distilled spirits as a beverage in the territory as it may do in any other district under the exclusive jurisdiction and control of the United States.

This legislation by congress is analogous to prohibitory legislation by the states. Prohibitory laws have been sustained by state courts where the question of conflict with state constitutions, or with general fundamental principles, has been raised. Such laws are regarded by the court as police regulations, established by the law-making power for the abatement and prevention of intemperance, and the consequent and intolerable train of evils which invariably follow in its wake. See *People* v. *Hawley*, 3 Mich. 360; *Reynolds* v.

Geary, 26 Conn. 179; Com. v. Kendall, 12 Cush. 414; Com. v. Clapp, 5 Gray, 97; Com. v. Howe, 13 Gray, 26; State v. Robinson, 33 Me. 568.

The second point raised by defendant's counsel is that the indictment is defective in that it does not negative the exceptions in the Section 1955, Rev. St., contains no exceptions whatever, but confers upon the president power to restrict and regulate, or prohibit. etc. The first act of congress containing any exceptions is section 14 of the act of May 17, 1884, in which it is declared that the importation, manufacture, and sale of intoxicating liquors in said district, except for medicinal, mechanical, and scientific purposes, is hereby prohibited. Chapter 3 of title 23 of the Revised Statutes. which congress declares in the act of May 17, 1884, shall remain in full force, except as therein otherwise provided, was enacted and became a law nearly 16 years prior to the act of May, 1884, in which the words "fire-arms and ammunition" were omitted, and the words "except for mechanical, medicinal, and scientific purposes," were in-The omission of the words "fire-arms and ammunition," troduced. and specifications of the uses for which distilled spirits may be manufactured, imported, and sold, we must infer is what was embraced in the language, "except as herein specially otherwise provided" in section 14 of the act of May, 1884. Then follows the regulations by the president dated February 26, 1885. Can it now be said that the exceptions are contained in the enacting clause of the statute so as to invoke an application of the rule contended for by defendant?

When the enacting clause of a statute describes the offense with certain exceptions, it is necessary to state all the circumstances that constitute the offense, and to negative the exceptions; but, if the exceptions are contained in separate clauses of the statute, they may be omitted in the indictment, and the defendant must show that his case comes within them to avail himself of their benefit. Kline v. State, 44 Miss. 317. Where provisos or exceptions are contained in distinct and independent clauses of the statute upon which an indictment is founded, it is unnecessary to allege in the indictment that the party indicted is not within the exceptions. State v. Cassady, 52 N. H. 500.

The allegation in the indictment is that the defendant did sell certain distilled liquors, therein described, contrary to the statutes of the United States. Now, before there could be legal sale of liquors, the law requires that the party selling must have procured a license from the governor of the territory, issued upon evidence satisfactory to that officer that the sale of such liquor would be strictly in accordance with the requirement of the statute, as provided for and required in the president's regulations.

Prof. Wharton says, (Crim. Ev. § 342:)

[&]quot;When the non-existence of the license is not averred in the indictment, and when the license is particularly within the knowledge of the party hold-v.29f.no.5—14

ing it, the burden is on him to produce such license in all cases in which the existence of the license is in question."

If this defendant has complied with the law, and procured a license from the governor, surely he knows it; and I am clearly of opinion that this is one of that class of cases in which the burden is shifted on the defendant, and, upon the general allegation that he sold contrary to the statute, he must show that he is within the exceptions of the statute.

As to any other defect in the indictment, if any exists, it is cured by section 1025, Rev. St.; which is that "no indictment found and presented by a grand jury, in any district or circuit or other court of the United States, shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

Upon a careful consideration of the questions presented, I am of opinion that the law is constitutional; that the indictment, while probably inartificially drawn, is substantially good; and that the demurrer should be overruled; and it is so ordered.

LAMSON CASH Ry. Co. v. OSGOOD CASH CAR Co. and others.

(Circuit Court, D. Massachusetts. November 24, 1886.)

1. Patents for Inventions—Infringement—Prior Invention—Sufficiency of Evidence—Patent No. 295,172, for Improvement in Cash and Parcel Carrying System.

In a suit for infringement of a patent, the defense being that defendant was the first inventor, the fact that soon after the time of his alleged invention he applied for a patent relating to the same subject, which he based on an entirely different principle, overcomes his and his witness' testimony, that he was the first inventor.

2. Same—Hayden Patent of May 3, 1881, No. 241,008.

The Hayden patent of May-8, 1881, No. 241,008, describing, among other things, an extensible holder, attached to a frame supported on wheels, the specification of which is as follows: "One of the principal difficulties in constructing a carrier of this character has been to adapt it to retain both large and small articles as well as articles of irregular shape,—a difficulty which I have overcome by connecting the holder, C, flexibly to the frame. I have adopted various modes of securing a flexible connection. For instance, I have used a crate or frame or basket, in connection with elastic straps, suspending it from the frame, A, or I have used a holder made of elastic straps. In either case the article, whether large or small, is pressed up against the frame by the elasticity of the holder, "—includes a holder extensibly connected to the frame as well as a holder extensible in itself.

In Equity.

B. F. Thurston, M. B. Philipp, and E. C. Gilman, for complainant.

J. L. S. Roberts and Rodney Lund, for defendants.

- Colt, J. This suit is brought on letters patent No. 295,172, dated March 18, 1884, issued to Warren S. Hill, for improvement in cash and parcel carrying system; also on letters patent granted to Harris H. Hayden dated May 3, 1881, and numbered 241,008, for improvement in store service apparatus. Another Hayden patent, dated August 14, 1883, is included in the bill, but not pressed at the hearing. The defendants are charged with infringement of the first and third claims of the Hill patent, which are as follows:
- (1) In a cash and parcel carrying system, a car provided with a pivoted hooked arm, held against a stop by a spring, and a buffer disposed axially on the wireway, consisting of a fixed part secured to the wire, and a yielding part moving against a spring, and having a retaining flange to engage with the pivoted hooked arm, substantially as set forth.

(3) In a cash-carrying car, the combination of the handle, d^2 , made integral with the pivoted hooked arm, D, the stop, d, spring, g, and frame, a^1 , substantially as shown and described.

Hill's improvement has special reference to mechanism employed to stop and retain the car when it has reached the end of its run. Great difficulty had previously been experienced in the construction of suitable mechanism to accomplish this. Hill's devices seem to have overcome this difficulty, and thus to have made the cash-carrying system a commercial success. These devices consist in providing the car with a pivoted hooked arm, held against a stop by a spring, and a buffer, consisting of a fixed part secured to the wire, and a yielding part moved against a spring, and having a flange to engage with the pivoted hooked arm. The first claim is for the combination of the pivoted hooked arm and the buffer, while the third claim relates specifically to the pivoted hooked arm. The defense relied upon is that Hill was not the first inventor of what is set forth in his patent, but that he surreptitiously obtained the patent for that which was invented by Edwin P. Osgood and Byron A. Osgood, assignors of the defendant company.

It appears that for several years previous to the Hill invention the Osgoods had been engaged in perfecting a cash-carrying system for use in stores. They made many efforts to construct suitable mechanism to stop and retain the car at the end of its route, which was the great obstacle to overcome to insure complete success. They used for a stop a piece of rubber through which the wire passed, but found the rebound of the car on striking was too great. Then they tried rubber attached to a spiral spring, with the same result. These were followed by various other devices,—such as the forked stop, curtain roller stop, pivoted spring lever catch stop, and the McGann stops. All these attempts at stopping and retaining the car, extending down to the time of Hill's invention, were in a greater or less degree failures. Hill conceived of his improvements in November, 1883. August, 1883, B. A. Osgood writes to his agent in New York that they were doing all in their power to make their buffers or catches right. Under date of September 21, 1883, he again writes that the bunters have been a great source of trouble on the new cars, that he had abandoned the rubber, and that he thought he had at last overcome the difficulty by the use of wooden bunters set in an iron socket which is attached to the wire. On November 12, 1883, E. P. Osgood filed his application for a patent for improvement in cash cars, in which we find a modification of the McGann stop.

With these general facts before us, it is highly improbable that the Osgoods, as they say, conceived of the Hill buffer and pivoted spring lever catch in the summer, or not later than September, 1883. Their great object was to discover just what Hill discovered, and, had they found it, why should B. A. Osgood write what he did to Porter, or why is no description of the invention found in the Osgood application of November 12th? B. A. Osgood first met Hill early in November, 1883, and he says he then described to him the buffer and spring lever found in Hill's patent. This Hill denies. skilled mechanic and inventor, and Osgood went to him to construct some cash cars. Osgood showed him a pencil sketch of a cash car, and described the working of the apparatus. He also described a buffer for stopping the car, consisting of a rubber bulb, and a catch which was secured to the wire. He also showed him the McGann catch or stop. This is all consistent with the theory that Osgood was desirous of building cash cars after the patent for which he had just made application. Hill's investigations at this time led him to see the defects in the old forms of stops, and how they could be overcome, and these ideas he embodied in his patent. That Osgood suggested these improvements to Hill is almost as improbable as that he knew of them the previous September.

In addition to the testimony of the Osgoods, there is some evidence going to show that B. A. Osgood had previously conceived the idea of a buffer like that described in the Hill patent, and a catch fastened to the car provided with a handle to loosen it from the buffer. O. Leonard, a pattern maker and an acquaintance of B. A. Osgood, draws a rough sketch, which he says is like a drawing shown him by B. A. Osgood in September, 1883, wherein is found a buffer substantially like Hill's, and a catch attached to the car, and provided with a handle to loosen it from the buffer. The original sketch is not produced by Leonard or Osgood. Luray C. Powers, another pattern maker, and an acquaintance of B. A. Osgood, produces a drawing which he says was made by him October 17 and 18, 1883, from instructions and sketches furnished by B. A. Osgood. The ink tracings on this drawing do not show any devices for stopping the car, and the drawing evidently was not originally intended to show any, but we find added, somewhat indistinctly drawn, pencil sketches of a buffer and a catch secured to the car. Powers says these pencil sketches were added after the ink tracings, and that Osgood himself about that time made a sketch of a buffer to assist him in understanding what he wished made. I cannot but regard these pencil sketches with

some degree of suspicion. Powers after this made drawings to be used in the patent-office in connection with Osgood's patent No. 290,190. If Osgood at this time had knowledge of this improvement, it is strange we do not find it described in these drawings. To my mind, the evidence of Leonard and Powers is not satisfactory, or of sufficient weight to overthrow the evidence for complainant, and so destroy the Hill patent. But, further than this, neither the Leonard nor the Powers drawing shows the pivoted spring lever catch described in the first and third claims of the Hill patent, and therefore it is difficult to see how the defendants can escape the charge of infringement, even if the Osgoods were the first to invent the Hill buffer.

We come now to the Hayden patent of May 3, 1881, wherein, among other things, is found described an extensible holder attached to a frame supported upon wheels, for the purpose of holding articles of different shapes or sizes. Claim 1 is as follows:

The combination, in a carriage for transporting packages, of a frame supported upon wheels, adapted to a rail, and provided, with an extensible holder connected to the frame, substantially as set forth.

The specification says:

One of the principal difficulties in constructing a carrier of this character has been to adapt it to retain both large and small articles, as well as articles of irregular shape,—a difficulty which I have overcome by connecting the holder, C, flexibly, and in some instances jointedly, to the frame. I have adopted various modes of securing a flexible connection. For instance, I have used a crate or frame or basket, in connection with elastic straps, suspending it from the frame, A, or I have used a holder made of elastic straps. In either case the article, whether large or small, is pressed up against the frame by the elasticity of the holder. I prefer, in most instances, to use, in connection with the holder, an elastic cross-belt, I, Fig. 1, against which the articles are pressed upward, and between which and the bar, E, smaller articles may be inserted and retained.

In defendants' apparatus there is a frame supported by wheels upon a way, and there is connected to this frame a cup-shaped holder, which is made extensible by means of flexible bands passing over small drums having coiled springs within them. When the holder is drawn down, articles can be placed between it and the frame of the carrier, and the springs of the drum, through the flexible straps, press these articles against the frame. Spring drums and flexible connections were well known at the date of the Hayden patent, and they may be regarded as a mechanical equivalent of the elastic straps described by Hayden. But it is urged with much force by defendants that the extensible holder of the Hayden patent must be one capable of extension or expansion independent of the frame or carriage, so as to be capable of receiving larger or smaller articles. while the holder in defendants' car is non-extensible, and consequently has no capacity of adjusting itself to articles of various sizes. It is plain, however, that no such limitation can be properly imposed

upon the Hayden claim. The specification clearly describes a holder extensibly connected to the frame, as well as a holder extensible of itself. It may be that the main object of Hayden was to secure a holder extensible of itself, but, having also described a holder extensible relative to the frame, his claim should not be limited to the former.

The other defense urged is that the Osgoods were the first inventors of extensible holders. This defense is not made out. Whatever crude notions the Osgoods may have had as to a two-part cash-carrier about the time the apparatus was put up in E. P. Osgood's barn, in 1878, I think the subsequent statements of the Osgoods, in the interference proceedings at the patent office, show, beyond question, that it was not until September 1, 1881, that either of them conceived the idea of a two-part extensible carrier. Whatever may have been the decision of the commissioner of patents on this question of priority, I can come to no other conclusion on the present record. for complainant.

Bruff v. Waterbury Buckle Co.1

(Circuit Court, D. Connecticut. November 26, 1886.)

 PATENTS FOR INVENTIONS—SUSPENDER BUCKLES. Letters patent No. 295,085, of March 11, 1884, to John W. Bruff, for an improvement in suspender buckles, construed, and its claims sustained.

2. Same—Construction of Claims.

The claims of this patent are limited to a suspender buckle having a spring clamp, and the first claim is limited to a buckle having a spring clamp divided at its center.

8. Same—Infringement—What is.

Each of the claims of this patent being limited to a buckle having a spring clamp composed of two elastic wings or arms approaching each other, but not connected, they are not infringed by a buckle having its wings or arms firmly joined, and possessing no more resiliency than is due to the character of the material, although it performs all the functions of the patented buckle.

In Equity.

M. D. Connolly, for plaintiff.

George E. Terry and M. B. Phillipp, for defendant.

SHIPMAN, J. This is a bill in equity which is founded upon the alleged infringement of letters patent No. 295,035, granted to John W. Bruff, March 11, 1884, for an improvement in suspender buckles. The invention is clearly stated in the following extract from the specification of the patent:

"This invention has relation to suspender buckles, and has for its object the provision of a buckle of novel construction, wherein the suspender cloth

Edited by Charles C. Linthicum, Esq., of the Chicago bar.

or web will be held in place by the conjoint pressure of a spring-clamp and a flanged tongue, while remaining susceptible of ready adjustment, and the necessity of a toothed or serrated fastening, which has many disadvantages, entirely dispensed with. In suspender buckles, as commonly used, it is customary to employ an unyielding metallic frame, with a toothed or serrated tongue pivoted thereto, while various expedients serve as the means of attachment of the suspender straps, the buckle frame constituting the part to which the straps are attached. Where a toothed or serrated tongue is used, it is more or less objectionable, because it is not only troublesome to adjust and fasten, but is a source of injury and disfigurement to fine goods. In the employment of a plain-edged tongue, as the same has been applied, it has heretofore been found difficult to render the tongue effective as a fastening. This difficulty has been owing to the peculiar relation of the tongue to the other parts of the buckle, and the absence of any expedient to re-enforce the delicate pressure which the tongue obtains on the web. My improvement contemplates obviating these disadvantages, as well as many others, and hence it consists in the novel construction of the buckle frame and tongue, wherein the prominent features are—First, a buckle frame made of sheet metal, 'struck up' or bent into shape, and formed with a yielding spring-clamp to embrace, and with the tongue bind, the web or suspender cloth, and hold it firmly in place; second, a flanged plain-edged buckle tongue, constructed and adapted for the attachment of the suspender straps, and formed so as to rest in a slot in the back part of the buckle frame, and impinge upon and bind the suspender cloth or web between its flange and the spring-clamp of the frame."

The buckle frame is made by stamping or cutting the blank from a sheet of metal, and then by "striking up" or bending inwardly two wings, on opposite ends of the blank, until their edges are brought close together, and an elongated narrow space, in which the suspender cloth is inclosed, is left between the wings and the front part of the frame. These arms are elastic, and "produce a spring-clamp which will yield from inside pressure, but which exert a binding force or pressure against the web."

The claims are as follows:

"(1) A suspender buckle having a frame or bow formed with a springclamp, divided at its center, and integral therewith, and adapted to embrace and bind the web or suspender cloth, substantially as shown and described.

"(2) In a suspender buckle, the combination with a frame or bow having a spring-clamp to embrace the web or suspender cloth, and slotted to receive a tongue, of a buckle tongue, adapted for the attachment of the suspender-straps, and having a flanged edge or lip to impinge upon the web or cloth,

and hold it against the clamp, substantially as described.

"(3) The buckle frame or bow consisting of the metallic plate, A, struck up or bent into shape, and having the inwardly turned leaves or wings, a, a, forming a clamp-spring or springs, and forming the elongated space, b, substantially as described. The combination of the buckle frame, consisting of the plate, A, provided with inwardly bent elastic clamp-arms, a, a, and having the slot, e, and the movable tongue, H, fitting and working in said slot, and formed with flange or lip, h, substantially as described:"

Although a frame to receive the suspender cloth is old, the invention described in each claim is novel. The novelty consists in the impinging of the web by means of a smooth-edged buckle tongue, having its bearing in a slot in the front part of the buckle, against a spring-clamp, which is a part of, and not the main body of, the frame,

and which incloses the cloth. A spring-clamp is, perhaps, unnecessarily made a part of each claim. The patentee apparently thought that the resistance plate must necessarily be a yielding or "spring" plate. The defendant makes two forms of buckles which are com-

plained of.

The decision in regard to infringement turns upon the question whether these buckles have a spring-clamp. "Buckle A" has a long arm or wing, bent inward, and under a short bent wing on the other The two wings form the elongated space in which the web is inclosed. Not being secured or fastened to each other, they make a spring-clamp which is not divided at its center; and therefore the first claim is not infringed, but the other three claims are infringed. The charge of infringement cannot be avoided, because the clamp is unequally divided, and although the long arm is bent under the short one, and makes a comparatively firm plate, I think that it can properly be considered a yielding or spring plate. "Buckle B" has two short wings, turned back, and securely locked to each other by a separate strip of metal extending across the width of the front part of the frame, and forming the back of the elongated space. I cannot see in this buckle a "spring-clamp" or elastic clamp-arms. It possesses only the spring or elasticity which naturally arises from the resiliency of brass, the material of which it is composed. The back of the buckle seems to be as strong, firm, and unyielding as the nature of the material will permit. It is true that the buckle performs all the functions of buckle A, or of the patented buckle, but it has not the spring-clamp which is a part of each claim.

Let there be a decree against making, selling, or using buckles

like Exhibit A. and for an accounting.

Wells v. Armsrtong.1

(District Court, S. D. New York. November 24, 1886.)

Collision—Necessity for Allowing Sufficient Margin for Safety.
 A vessel must allow a sufficient margin for the contingencies of navigation, in undertaking to avoid another vessel, and must take decisive measures in time.

2. Same—Vessel at Anchor—Exceptional Circumstances—Necessity for

CARE BY ANCHORED VESSEL.

While a vessel at anchor in a proper place, in the day-time, and in fair weather, is not ordinarily required to be on the watch to avoid vessels under way, having control of their motions, yet, under exceptional circumstances, when the vessel under way is subject to special difficulties in her navigation, some care on the part of the vessel at anchor may become obviously prudent and necessary, that would not otherwise be obligatory.

Reported by Edward G. Benedict Esq., of the New York bar.

8. Same—Statement of Case—Apportionment.

The schooner C., while lying, during the day-time, in the middle of the outer entrance to Hampton roads, and heaving upon her anchor preparatory to going to sea, was run into by the schooner K., which, with a large fleet of vessels, had come down from above on her way to sea, and which, owing to the intervening vessels, did not observe the C. until within 200 or 250 yards of her. The evidence indicated that the collision might have been avoided had the C. starboarded her helm, or paid out chain, as she was hailed by the K. to do. No one was at the wheel of the C. and she did nothing to avoid collision. Held, that both vessels were in fault, the K. for not avoiding the C., which, on the evidence, she might have done by prompt and effective measures; and the C. for an entire lack of prudence, attention, and assistance in avoiding danger, while voluntarily suffering herself to remain as an obstruction in the midst of a large fleet of moving vessels.

4. Same—Damages—Putting back for Repairs.

A schooner having had her jib-boom carried away, and fore-chain plate broken, in a collision, is justified in putting back to repair them, before proceeding to sea.

In Admiralty.

Wilcox, Adams & Macklin, for libelant.

Thomas J. Ritch, Jr., for respondent.

Brown, J. At about 7 a. m., on the morning of March 4, 1885, as the three-masted steamer Cochico, then lying at anchor near the outer part of the entrance to Hampton roads, was heaving upon her anchor preparatory to getting under way, in a strong ebb-tide, she was run into by respondent's three-masted schooner Kelsey, which carried away the Cochico's bowsprit, and did some other damage, for which this suit is brought.

A large fleet of 150 vessels or upwards had previously put in at Hampton roads on account of the weather, and anchored from one to seven miles above the Cochico. On the morning of the 24th, the weather being fine, and the wind light from the W. or S. W., the whole fleet made sail together, and came down with the strong ebb-tide. The Cochico was nearly in the middle of the channel, which was there about two miles in extreme width, half a mile at least on each side of her being easily available for navigation. The fleet was so numerous that the Cochico was not perceived by those on board the Kelsey until, as the master of the latter states, he was from 600 to 750 feet only At that time, as the lookout says, another interdistant from her. vening vessel, nearly directly ahead of the Kelsey, went to the northward, i. e., on the starboard side, of the Cochico, disclosing the latter to his view. She then bore about a point on the Kelsey's starboard bow. The wind was four points abaft the Kelsey's beam, and, though light, gave her about one and one-half or two knots speed through the water. The tide is estimated by the master at from one to one and one-half knots.

Although the more customary place of anchorage was further up the roads than the place where the Cochico anchored, her position was not altogether unusual; it certainly was not unlawful. The J.

W. Everman, 2 Hughes, 17. There was a sufficiently broad passage on either side to have enabled all vessels to clear her, as all save the Kelsev easily did. Although the Cochico could not be seen till she was quite near, still, upon the statements of the master of the Kelsey, I cannot doubt that there was abundant time for him to have cleared the Cochico by an ample margin for safety, had he promptly starboarded his helm at the time when he first saw the Cochico nearly Not only did the Cochico bear a point on his starboard bow, but the wind, though light, was so far aft as to favor a rapid change of his vessel under a starboard helm. He made but little change. however, in his course,—not over half a point, or a point; because, as he says, he had no apprehension of collision. He charges the collision to a sudden, sharp sheer of the Cochico to the northward, while heaving upon her anchor, and when about 100 feet distant, after a previous sheer to the southward. But the master saw that the Cochico was hauling in her anchor against the tide. He knew her liability to sheer either way in consequence. He was bound, therefore, to allow for such contingencies. The slight wind, and his slow speed through the water, while drifting straight towards the Cochico. made a strong change of wheel, instead of a slight change, most evidently necessary. His principal motion was, in fact, drifting in the The master probably miscalculated the amount of line of the tide. this drifting, through the presence of so many other vessels going with him, which would naturally tend to mislead him, through the drift-His fault was that which I have had so frequent ocing of all alike. casion to comment upon, namely, not allowing a sufficient margin for safety, amid the contingencies of navigation, and not taking in time the decisive measures at his easy command. The Laura V. Rose, 28 Fed. Rep. 104; The Aurania, 29 Fed. Rep. 98. As I must find that the master had sufficient time and space to keep out of the way, had he acted with the promptness and decision that reasonable prudence demanded, and as there was no other vessel that prevented his doing so, the Kelsey must be found in fault.

The Cochico is alleged to be also in fault, on the ground that, though hailed by the master of the Kelsey to starboard her helm, and pay out chain, she did neither; though either of these measures would have averted the collision. The hail to starboard was apparently given when the vessels were about 200 feet apart; the hail to pay out chain, when they were within about 100 feet of each other. The respondent's account of the blow, its angle, and the positions of the two vessels, is the most consistent, and I adopt it. The Kelsey was going towards the starboard side of the Cochico. Their starboard bows at first just grazed each other. The Cochico's anchor caught the after-shroud of the Kelsey's fore-rigging. Her jib-boom ran aslant, across the Kelsey's deck, from just forward of her main-shrouds, and got locked fast in her mainsail; the Kelsey's crew being unable to fend her off as she approached. I have no doubt that either a

sheer by the Cochico of a few feet to the southward, or dropping astern a few feet by paying out chain, would have avoided the collision. The Cochico's master had not been on deck during the Kelsey's approach. When he first looked out of the companion way, he says, the collision was inevitable, though he estimated the distance at 300 yards, and he returned to the cabin to look after his wife. The crew and the mate were forward, heaving up the chain, and there was no one at the Cochico's wheel, or on her quarter-deck. That the Cochico would have swung somewhat to the southward under a starboard helm, had it been starboarded when she was hailed to do so, cannot be doubted. Not only the experts so testify, but the mate says she would have sheered instantly under such a helm, had she been under a sheer to the northward; and the evidence shows that there was such a northward sheer. The small angle at which they struck satisfies me that a starboard helm, even when they were within 100 or 200 feet of each other, would have been sufficient to counteract the Cochico's northward sheer, and to change her position, and the direction of her jib-boom, enough to have avoided the injury. So, also, had the chain been let go upon which the Cochico's crew were hauling, as it might have been, within a few seconds after the hail to do so, as it seems to me, and, as the experts testify, the vessel would have immediately dropped astern with the tide, quite enough to have cleared the Kelsey. The evidence shows that both these precautions against accident in a tide-way, where other vessels are more or less drifting, instead of being unusual, is very common. In other cases before me they have been proved to have been employed.

Doubtless less vigilance is required of a vessel at anchor. Ordinarily, a vessel anchored in a proper place, in the day-time, and in fair weather, is not expected, or legally required, to be on the watch, and to stand prepared to take measures to avoid vessels under way, and having control of their motions. The Lady Franklin, 2 Low. 220; The Rockaway, 19 Fed. Rep. 449. But under exceptional circumstances, where the vessel under way is subject to special difficulties or embarrassments in her navigation, some care and precautions on the part of the vessel at anchor may become obviously prudent and necessary that would not otherwise be obligatory. Such, I think, is plainly this case. Here the circumstances were altogether excep-The wind was light, and the tide strong. The Cochico was anchored in a narrow part of the roadstead; and the immense fleet from above, coming down with the tide, and under imperfect control, or slow control, in the tideway, were necessarily more and more crowded together as they approached the narrower part of the roadstead, where the Cochico lay. Common prudence required of the Cochico some care amid such a fleet of vessels. The testimony of the experts, I think, on the whole, clearly sustains such a recognized obligation among seamen. Under such circumstances, I must hold that

reasonable attention and reasonable measures on the Cochico's part,

to avoid accident, were incumbent upon her.

There was, in fact, no good reason for her long delay in getting She was nearly an hour behind most of the fleet, some of which had already come down from several miles above. There was nothing to detain the Cochico there. Reasonable prudence, and a reasonable regard for her own safety, and for the safety of the other vessels, should have indicated to the captain that it was his business to be up and off with the rest of the fleet, instead of remaining, without reason, as an obstruction, amid such a crowd of vessels. Scioto, 2 Ware, 360, 367, 368. If he chose to remain until the whole fleet were coming down thick on each side and in front of him, it was his duty, in my judgment, to be on deck; and, while the few other hands were at the windlass, to be himself at the wheel, in order to take at once those reasonable precautions which might aid in avoiding collisions that were likely to arise through the precise causes that operated here, viz., the obscuration of his own vessel from the view of another, through a third vessel intervening until they were very near each other; and specially to prevent any vawing of his own vessel. Had this reasonable care been taken, the collision would have been avoided, notwithstanding the tardiness in the maneuvers of the The Cochico must therefore be also held in fault, and a decree directed for half her damages only. Simpson v. Hand, 6 Whart. 311; The Petrel, 6 McLean, 491; O'Neil v. Sears, 2 Spr. 52.

I do not think the Cochico was bound to go to sea without a jibboom, and with one of her fore-chain plates broken, though she might possibly have repaired the latter on the voyage. She was justified in putting into Norfolk for repairs, and is entitled to recover for her necessary detention. Whether she delayed unjustifiably there, will be one of the questions upon the reference to compute the damages.

THE ST. JOHN.1

FERRIS v. THE ST. JOHN, etc.

(District Court, S. D. New York. November 18, 1886.)

1. Collision—Fog—Steamer Near Line of Piers—Speed—Ability to Stor.

A large steamer has no right to run in a dense fog, near piers where boats usually tie up, except under such slow speed as to be capable of being fully stopped within the distance at which they can be seen.

2. SAME—STATEMENT OF CASE.

Where the steamer St. John was going up the North river in a fog, within 100 or 200 feet of the line of the New York piers, and when about abreast of Piers 2 and 3 ran into libelant's barge, which was one of a tow hauled up in that place, where tows customarily make fast, held, that the St. John was solely liable for the damage.

In Admiralty.

E. D. McCarthy, for libelant.

De Forest & Weeks, for claimant.

Brown, J. At about 11 o'clock in the morning of October 28, 1885, the steamer St. John, bound from Sandy Hook to pier No. 8, North river, when above the Narrows, encountered a thick fog. In passing abreast of piers Nos. 2 and 3, North river, she ran into the libelant's barge, which was the outside boat in the head tier of a tow of some 12 or 15 boats, doing some damage, for which this suit is brought. The tow was upon a hawser about 40 feet long, and in charge of the steam-tug Skeer. They had put in at Pier 2 about two hours before, in consequence of the thick fog. The Skeer was made fast, heading down along the outer end of Pier 2, and the tow tailing up river with the strong flood-tide.

The pilot of the steamer estimates the distance at which they went outside of Pier 1 at about 100 feet; that they were going about five knots, by land, with the tide; and that the barge they struck was about 75 or 100 feet out in the river. He says they ran along parallel with the shore, going very slow; that at Pier 1 the engines were stopped, and worked by hand; and that they backed as soon as the barge was seen, about 100 feet off, which was as far as it could be seen through the fog. Whistles were heard from the tug indicating that it had a tow, before the tug or tow was seen.

A number of the witnesses testified that the tow was tailing at a large angle, some three or four points, out into the river, and that the flood-tide sets in that direction. One witness states that the tide was already slack along the shore, and setting a little down. But as both the libel and the answer state that the tide was strong flood, and all of the witnesses, save one, state the same, and as the almanac also gives

¹Reported by Edward G. Benedict, Esq., of the New York bar.

the time of high water at 11:40 in the forenoon, more than an hour and a half after this collision, I must hold that the witness last referred to is mistaken, and that the libelant's witnesses, who say that the tow tailed nearly straight up river, and was but a few feet outside of the line of Piers 2 and 3, are more probably correct. The tow was 60 feet wide. If, as the evidence indicates, the inner boat was some 20 or 30 feet distant from the pier, that would make the distance of the outer boat from 80 to 100 feet, which is the estimate of the pilot of the St. John of the distance of the barge he struck.

In that situation I cannot hold that there was any legal fault in the situation of the tow. It was a place where tows were accustomed to haul up. Under such circumstances, the tug had a right to go and remain there during the fog, and it was the duty of other vessels accordingly to take whatever precautions were necessary to keep As the tug is not a party defendant, no issue is presented whether or not she performed her whole duty in respect to signals, or in other respects, after putting in at this pier. The evidence shows. however, that she was sounding whistles, indicating that she had a tow there in her charge. The barge was without fault; and, as I must hold that she was rightfully where she was, it follows that the St. John must make good the damage, unless the accident can fairly be deemed inevitable, or without her fault. The circumstances do not warrant such a finding. The Rockaway, 25 Fed. Rep. 776. A steamer of the size of the St. John had no right to be going up river in a dense fog, within 100 or 200 feet of the ends of piers where it was not unusual for tows like this to tie up, except under such slow speed as to be capable of being fully stopped within the distance at which a tow could be seen. The Nacoochee, 28 Fed. Rep. 462. When she found that she had come within 100 feet of Pier 1, I think the steamer was bound to go further out into the stream, or take all the risk of proceeding so near to the shore. To reach her pier No. 8, she had vet a considerable distance to go. I am by no means insensible to the extreme difficulties that beset navigation in a dense fog; but as between a barge rightly moored at a customary place, and a steamer voluntarily proceeding close along the piers, the steamer, whose interest it is to continue her trips, must bear the loss that her enterprise, her speed, and the course that she selects, entail, rather than cast such loss upon an innocent third party, who is without fault.

O'ROURKE v. PECK and others.1

(District Court, S. D. New York. November 29, 1886.)

1. Wharves—Injury to Vessel—Liability of Lessee of Wharf.

Defendants occupied the wharf at the foot of One Hundred and Twentyeighth street, Harlem river, under a lease which reserved to grantor wharfage
rights. These rights defendants' grantor subsequently conveyed to the Consumers' Coal Company, on whose invitation libelant brought his boat to the
wharf. The boat being injured while at the wharf, held, that there was sufficient privity between libelant and defendants to entitle the former to relief
directly against the latter.

2. Same—Leasehold Premises—Covenant to Repair—Liability—Notice of

DANGER.

Defendants, in their lease, covenanted to "make such alterations and repairs to the dock and bulk-head as they required." Libelant's boat, the day after her arrival at the wharf, was sunk, owing to the dangerous character of the river bottom, of which libelant was not notified. Held, that the covenant meant such repairs as the dock and bulk-head required, and that the defendants were liable for the loss, for neither making the necessary repairs, nor giving notice of danger to the libelant's boat.

In Admiralty.

E. D. McCarthy, for libelant.

George S. Hamlin, for defendants.

Brown, J. The libelant's coal-boat was sunk during the night of June 19, 1884, while at the end of the bulk-head at One Hundred and Twenty-eighth street, Harlem river. The evidence leaves no doubt that she rolled over and outwards, as the tide went down, in consequence of settling upon the bottom along the end of the bulk-head, where the bottom was uneven and dangerous for boats to lie during the ebb-tide, unless fended off. The boat was sent there to the Consumers' Coal Company, had arrived the afternoon before, and had no notice of the dangerous character of the bottom. The defendants had occupied the wharf and premises for upwards of two years, under a lease dated February 28, 1882, which reserved to the grantors rights of wharfage, and to use the bulk-head for the purpose of loading and unloading coal and other boats, and to carry coal on the elevated rail or tram way situated on the property. The grantor, a few days afterwards, granted the rights reserved to the Consumers' Coal Company. The defendants in their lease covenanted, among other things, "to make such alterations and repairs to the dock and bulk-head as they required."

The wharf was not devoted to the uses of the public. It was used only for the business of the defendants and of the Consumers' Coal Company. Though strangers tying up at the dock without notice could probably not be treated as trespassers, (Heeney v. Heeney, 2 Denio, 625,) still I can hardly deem the defendants liable as occu-

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

pants merely; since neither the public, nor the libelant, came to the dock upon any implied invitation by the defendants. They are liable, I think, upon the terms of the lease only, if liable at all. Onderdonk v. Smith, 27 Fed. Rep. 874. The regulations of the dock department were neither pleaded, nor put in evidence.

My conclusions are as follows:

- 1. There is no such ambiguity in the terms of the lease as permits the natural import of its language, as to the obligation to repair, to be contradicted by parol evidence. The plain meaning of the clause, as regards repairs, is that the defendants would make "such alterations and repairs to the dock and bulk-head" as they, the dock and bulk-head, "required."
- 2. The above covenant, in connection with the reservation to the grantor of the rights of wharfage and of use for the coal business, clearly imports an agreement by the defendants to repair for the use and benefit of the grantor, as well as for their own use; and hence for the use of the grantor's privies, under the further lease by the grantor of the premises and rights reserved, and of those also who should make use of the wharf in the coal business, as expressly reserved and provided for in the defendants' lease. There is sufficient privity, therefore, with the libelant, who came there upon the invitation of the Consumers' Coal Company, in the ordinary course of this coal business, to entitle the libelant to relief directly against the defendants.
- 3. The unsafe character of the ridge on the bottom along the bulkhead, whether arising from gradual accumulations, or dejections from the dock, must, upon the evidence, be deemed sufficiently known to the defendants to require the dock, and the adjacent bottom, to be put in a safe condition. It was plainly a condition requiring "alteration or repair," and hence within the terms of the defendants' covenant. So long as the defendants neglected to "alter or repair" the bottom, so as to make it safe, they were bound to give notice of its condition to strangers having a right to come there in the business of the Consumers' Coal Company. I find, therefore, though not without hesitation, that the libelant is entitled to a decree. A reference may be taken to compute the damages, if not agreed upon.

ELGIN NAT. WATCH Co. v. MEYER and others.1

(Circuit Court, E. D. Missouri. November 3, 1886.)

ESTOPPEL—JUDGMENT—FRAUDULENT CONVEYANCES—GENERAL ASSIGNMENT.

A judgment creditor, who has been defeated in a suit to have conveyances made in payment of indebtedness by an insolvent debtor declared fraudulent and void, is not estopped from subsequently bringing another suit to have such conveyances declared part of a general assignment.³

In Equity. Plea in abatement. Dyer, Lee & Ellis, for complainant. Krum & Jonas, for defendants.

Brewer, J., (orally.) In the case of Elgin Nat. Watch Co. v. Meyer these facts appear: The Eisenstadts, being insolvent, executed conveyances in payment of certain indebtedness. In a few days thereafter they made a general assignment. This plaintiff, in connection with other creditors, brought suits in attachment. These attachments were sustained. This plaintiff then filed its bill to subject that property covered by those conveyances to the payment of its judgment, claiming that the debts were fraudulent, and the conveyances void. Upon hearing, the issues were found in favor of the defendants, and a decree entered dismissing the bills. Thereafter this plaintiff filed this bill, alleging that those conveyances, though made in payment and satisfaction of conceded indebtedness, should be treated as merely a part of the general assignment; and invoking in its aid that series of decisions of the federal courts of this state, by which all conveyances made at the same or nearly the same time by an insolvent, of all of his property, are adjudged as parts and parcels of one general assignment. To this bill a plea of abatement is filed, setting forth the former suit and adjudication in behalf of the defendants.

I think that the plea in abatement must be overruled. Generally speaking, a party who mistakes as to his right and remedy is not thereby estopped from thereafter asserting his real rights, and pursuing his true remedy. The only penalty that falls upon him is the payment of the costs and expenses of the suit in which he fails, and it would oftentimes be very harsh if the plaintiff's mistake—a mistake perhaps founded on ignorance of all the facts—should work a denial of all rights and every remedy.

I am aware that the supreme court of this state has held that, where there is a general assignment, the creditor who attacks its va-

¹Edited by Benj. F. Rex, Esq., of the St. Louis bar.

²As to when a judgment is not an estoppel, see Bigley v. Jones, (Pa.) 7 Atl. Rep. 54; Dicken v. Hays, Id. 58; Riverside Co. v. Townsend, (Ill.) 9 N. E. Rep. 65, and note; Weiss v. Guerinean, (Ind.) 9 N. E. Rep. 399; Richardson v. Richards, (Minn.) 30 N. W. Rep. 467.

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lidity, if he fails in his attack, forfeits his right to share in the property conveyed; thus placing before him the election whether to attack the assignment as wholly void, or to come in and share with the other creditors in its benefits. Whether that doctrine is binding upon this court or not, it seems to me it should not be carried beyond the very letter of its terms. And here these conveyances were not, in terms at least, part of the general assignment. They were executed before. They were separate conveyances, and the duties imposed by the general assignment, if I remember rightly the statements of counsel, have been fully performed by the assignee. Here is property which did not, in terms, pass under that assignment, which these creditors are claiming should be held subject to the claims of all creditors.

I appreciate the fact that under our system of laws a defendant who succeeds in obtaining judgment really gets little compensation. He recovers his costs, but he has nothing to compensate him for the attorney's fees and other expenses to which he has been put; and it is oftentimes a hardship upon him that he should be subjected to one and then another suit. But more often it would be a greater hardship to cut off the plaintiff from all remedy, because he has made a mistake in the one first pursued.

The plea in abatement, therefore, will be overruled, and leave given to the defendant to answer by the December rules.

THE HOLLADAY CASE.

HICKOX v. HOLLADAY and others.

(Circuit Court, D. Oregon. December 14, 1886.)

 RECEIVERS—ORDER FOR SALE BY FEDERAL COURT OF PROPERTY IN HANDS OF RECEIVER OF STATE COURT.

When a receiver is in possession of property pending a suit involving the right to its possession merely, as in a suit to redeem from a mortgage, the court is of opinion that a mere sale of such property on the process of another court is not an interference with such possession; but, in deference to the dicta of Mr. Justice Nelson in Wiswall v. Sampson, 14 How. 52, to the contrary, it declines to direct such sale.

2. Same—Conflict of Laws—Appeal—Mandate—Extension of Time—Powers of Federal Courts.

A decree of the supreme court of the state (Oregon) in Holladay v. Holladay, 11 Pac. Rep. 260, allowed the plaintiff to redeem the property therein mentioned from certain conveyances to the defendant, on the payment of a certain sum of money within 90 days therefrom. The circuit court to which the mandate was sent, on the application and consent of the parties, made an order enlarging the time for redemption to three years, and placing the property in the hands of two persons as receivers during that time. Held, that

¹See Connor v. Hannover Ins. Co., 28 Fed. Rep. 549, and note.

these persons were not receivers, but only agents of the parties, and that their appointment would not prevent this court from directing the sale of a certain portion of said property on which the plaintiff herein has a lien by virtue of the decree heretofore given in this case.¹

(Syllabus by the Court.)

Motion for Order of Sale to Satisfy Decree.

James K. Kelly and Wm. H. Effinger, for Hickox.

Thomas N. Strong, George H. Williams, and Charles B. Bellinger, for Holladay and Weidler.

DEADY, J. On June 14, 1886, this court adjudged and made a decree in this cause to the effect (1) that a certain judgment obtained by the defendant Elliott in the supreme court of this state, on August 15, 1879, for the sum of \$24,630.22, principal and costs, against Ben Holladay, and then amounting, with interest, to the sum of \$38,975.62, does, by virtue of a certain assignment of February 13, 1874, from Elliott to the plaintiff, Hickox, in consideration of the sum of \$14,979.85 advanced to the former by Martin White on the security thereof, belong to Hickox, in trust for White, subject to a claim of the defendant Effinger, for services as attorney in said suit, for \$7,871.85; (2) that sundry parcels of real property, in said decree mentioned and specified, had before then belonged in equity to Ben Holladay, who caused the same to be conveyed to his brother, the defendant, Joseph Holladay, with intent to hinder and delay the plaintiff and others, his creditors, in the collection of their lawful debts and demands, and that Joseph Holladay gave no consideration for said conveyances, and received the same with the intent to hinder and delay the plaintiff, and others, the creditors of Ben Holladay aforesaid; (3) that said conveyances are void as against the plaintiff, and the amount due him on said judgment is a charge on said real property, and Joseph Holladay holds the legal title thereto, subject to said charge and in trust for the payment thereof; and (4) that unless Joseph Holladay shall, within 60 days, pay into court for the plaintiff said sum of \$38,975.62, with interest therefrom, and \$219.32 costs, the master of this court shall, on the order thereof, to be made on the application of the plaintiff, as soon as the receiver of said property in the case of Holladay v. Holladay, now pending in the state court, shall be discharged, sell, as on execution, so much of said property as may be necessary to discharge the claim of the plaintiff, and costs of such proceeding.

On October 26, 1886, the plaintiff made application for the order of sale provided for in the decree, based on the affidavit of the defendant Effinger, to the effect (1) that Joseph Holladay had not paid any part of said decree; (2) that the receiver of the property appointed by the state court in Holladay v. Holladay, namely, David P. Thompson, "had

¹See Connor v. Hannover Ins. Co., 28 Fed. Rep. 549, and note.

^{*}Hickox v. Elliott, (The Holladay Case,) 27 Fed. Rep. 830.

been discharged as such receiver, and there is now no legally appointed receiver in the possession" thereof; and (3) the suit of *Holladay* v. *Holladay*, "in which said receiver was appointed, has been finally determined by the supreme court of Oregon, upon an appeal taken by said Joseph Holladay from the decision of the circuit court for Multnomah county."

On November 20th the application was heard by the court on the pleadings, proofs, and decree in this case, and copies, offered by the plaintiff, of a deed of trust from Ben Holladay and others to George W. Weidler, dated September 6, 1886; of articles of agreement between Ben Holladay and Esther, his wife, of the one part, and Joseph Holladay and George W. Weidler, of the other part, and their counsel, dated July 10, 1886; and of the order of the circuit court, dated November 17, 1883, appointing the receiver in Holladay v. Holladay: and the affidavit of George W. Weidler, dated November 6, 1886, offered by the defendant Joseph Holladay, with copies attached thereto of the final decree of the supreme court of the state in Holladay v. Holladay, of June 29, 1886; and the mandate transmitting the same to the circuit court: and the presentation of the same in said court by the attorney of Joseph Holladay, on July 12, 1886; of the order of the circuit court of the same date removing D. P. Thompson from the receivership aforesaid, and appointing Joseph Holladay and George W. Weidler thereto; and of the order of said court of September 27, 1886, approving and providing for the enforcement of the terms of the agreement aforesaid between Ben Holladay and Esther, his wife, and Joseph Holladay and George Weidler.

It appears that in January, 1873, Ben Holladay, being indebted to his brother, Joseph Holladay, in the sum of \$100,000, gave him his note therefor; and that on November 1, 1876, he gave him another note of \$163,345, in payment of this and other indebtedness. Thereafter, and until 1878, Ben Holladay, from time to time, caused the real and personal property in Oregon,—supposed to be worth not less than \$500,000,—of which he was the equitable owner, including that mentioned in the decree herein, to be conveyed to Joseph Holladay by deeds absolute on their face. Afterwards Joseph Holladay went into possession, and remained so until the appointment of the receiver, and took the rents and profits thereof to his own use, of which much the larger portion went to his brother's support.

In 1883 Ben Holladay commenced a suit against Joseph Holladay in the circuit court for Multnomah county, in which he stated the existence of the indebtedness to his brother, and the conveyance of his property to him as aforesaid; and alleged that the conveyances, although absolute in form, were really intended to operate as mortgages for the security of said debt, and asked to have them so declared, and to be allowed to redeem the property therefrom on the payment of what was due the mortgagee. In his answer Joseph Holladay affirmed that the conveyances were made to hinder and delay the grantor's creditors, and

¹Holladay v. Holladay, (Or.) 11 Pac. Rep. 260.

on the expectation that he would nevertheless hold the property in trust for him, so as to prevent said creditors from subjecting it to the payment of their debts.

On appeal by Joseph Holladay, the supreme court determined that the conveyances were executed with intent that they should operate as mortgages, and not with intent to hinder and delay creditors; and that the grantor might redeem on the payment of the debt, and costs of suit, which former the court found then to be \$315,492.46. The decree of the court also provides (1) "that the redemption hereinbefore provided for be made by the plaintiff or his assigns within 90 days from the entry of this decree;" (2) that during said 90 days, "unless otherwise ordered by the court below," the receiver or his "successors" shall keep the possession of the property; (3) if the plaintiff fails to redeem within the time limited, the receiver shall pay over to the defendant all money in his hands, and "turn over and deliver to the sheriffs of the respective counties where said property may be situated all of the property in their respective counties," who shall, under the direction of the defendant, sell all or so much thereof "as upon execution," as may be necessary to satisfy said debt and costs, which sale shall bar the parties of all right in and to the premises, except the right of redemption provided by statute; and (4) that the cause be remanded to the court below, "and that a decree be there entered and docketed in accordance therewith." It does not appear that this decree has been either entered or docketed in the court below, but only that it was presented and read therein.

The giving and enforcing of a decision of the appellate court is regulated by section 536 of the Code of Civil Procedure. Subdivision 2 of the section comprehends this case,—one where "a new trial is not ordered;" and it provides that, on the receipt of the mandate by the clerk, "a judgment or decree shall be entered in the journal, and docketed, in pursuance of the direction of the appellate court, in like manner, and with like effect, as if the same was given in the court below." The decision of the appellate court in Holladay v. Holladay cannot, it seems, have the force and effect of a decree or judicial determination of the controversy between the parties until it is entered in the journal of the circuit court as provided by statute, and directed by mandate of the appellate court.

So far, then, as appears, the proceedings and orders in the circuit court for the removal and appointment of receivers, and the sanction and enforcement of the private agreement of the parties concerning the disposition of the subject-matter of the suit, were coram non judice, and void. But the exhibits before me do not profess to contain a full copy of the record, and, while it does not appear affirmatively that the decision was entered in the journal of the circuit court, it may have been, and therefore it will be taken for granted that it was.

According to section 1029 of the Code of Civil Procedure, a receiver may be appointed in a civil suit (1) "provisionally, before decree, on the application of either party, when his right to the property, which is the subject of the suit, and which is in the possession of the adverse party,

is probable, and the property, or its rents or profits, are in danger of being lost, or materially injured or impaired; (2) after decree, to carry the same into effect; (3) to dispose of the property according to the decree, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the debtor refuses to apply his property in satisfaction of the decree;" and also in cases of insolvent

debtors, dissolved or insolvent corporations.

It may be admitted that the appointment of a receiver in Holladay v. Holladay was well calculated to coerce the defendant into a compliance with the demands of the plaintiff. But there does not appear to be any authority in this statute for so doing, at least so far as the real property is concerned; for, even on the theory and claim of the plaintiff in that suit, the defendant was the mortgagee of the property, with an unpaid debt equal in amount to the probable value of the property at a forced sale, who had gone into possession with the consent of the plaintiff, and was therefore entitled to remain in possession until his debt was paid, and in the mean time to receive and apply thereon the rents and profits of the property. Roberts v. Sutherlin, 4 Or. 219; Witherell v. Wiberg, 4 Sawy. 232.

The property, being real, could not be lost pending the litigation or otherwhile. Nor was it likely to be injured; but, if it was, the defendant's interest therein—the amount of his debt—was ample security there-And, as for the rents and profits, they could not be lost to the plaintiff; for, in effect, they belonged to the defendant, and were, in fact, as fast as received, a payment on his debt. If there was any danger of the defendant's disposing of the property, or incumbering it, pending the litigation, as the apparent owner thereof, he might have been enjoined

from so doing.

The only controversy involved in the case of Holladay v. Holladay was this: Were the conveyances from the plaintiff to the defendant, although absolute in form, mortgages in fact? and, if the latter, what sum was then due the defendant thereon? The court decided that the conveyances were mortgages, and that the plaintiff might redeem on the payment of \$315,492.46 in 90 days; and this was a determination of the whole controversy before the court. If the plaintiff did not redeem within the time limited, his right of redemption was gone, and the defendant, as between the parties to the conveyances, became the absolute owner of the The further provision in the decree that, in case of a failure to redeem, the receiver, instead of surrendering the property to Joseph Holladay, as he ought, should turn it over to the sheriffs of the respective counties in which it was situated, to be sold as upon execution, on the order of Joseph Holladay, appears to be an extrajudicial arrangement, devised by counsel for the purpose of keeping up what may be called an unbroken possession of this property in the hands of the officers of the state courts, in the hope of thus preventing the plaintiff, who has the first lien on it, from enforcing the same by the sale thereof on the process of this court, and thus collecting his demand against Ben Holladay.

The decree in Holladay v. Holladay is one allowing a mortgagor to redeem, and not a decree foreclosing these several mortgages, and directing the sale of the property included therein, to satisfy the debt secured thereby. The latter could only have been done by separate suits in, and the decrees of, the circuit courts of the various counties in which the property is situated. Code Civil Proc. § 383. But by this extrajudicial arrangement the receiver is to turn over this property to these various sheriffs, who are, without judgment or process of or from the courts of which they are officers, or otherwise, to hold the same for Joseph Holladay, and dispose of it, as upon execution, at his will and pleasure, which may be at once, and may be never.

The agreement between the Holladays and their counsel, of July 10, 1886, divides this property into two lots, described in two memorandums, the first of which contains eleven valued parcels, situate in six different counties, amounting in the aggregate to \$327,500, and includes the property mentioned in the decree herein. It provides as follows:

(1) The debt of Joseph Holladay is increased \$31,194, making it \$346,686.46, drawing interest at 6 per centum; and Ben Holladay has the right to redeem the property mentioned in Memorandum 1, or any parcel thereof, within three years from the date of the agreement, on the

payment of the affixed value.

(2) The property mentioned in Memorandum 2 is released from the lien of the Holladay mortgage and decree, and vested in George W. Weidler, as trustee, to sell and dispose of the same, and pay the debts due from Ben Holladay to August Belmont, the Mutual Life Insurance Company, S. L. M. Barlow, and others, the attorneys and counsel in this litigation; which provision is carried out by the deed of trust from Ben Holladay and Esther, his wife, to said Weidler, of September —, 1886, conveying said property to him in trust to pay said debts therewith, without naming the amounts, according to the terms of an agreement between said parties and Holladay, of August 31, 1886, which are not disclosed, and which was apparently made in fulfillment of the undertaking in this agreement that Ben Holladay would in 90 days procure said creditors to relinquish all claims to priority of security or payment over Joseph Holladay.

(3) But if sundry other named creditors of Ben Holladay's, including this plaintiff, or any of them, shall succeed in having said mortgages adjudged fraudulent as against them, or any of them, Joseph Holladay shall be so far indemnified out of the proceeds of the property in Memorandum 2, and no creditor shall be paid anything until he assents

to this agreement.

(4) The court may remove the present receiver, (D. P. Thompson,) and appoint Joseph Holladay and George W. Weidler receivers of the property in Memorandum 1, "to take charge of, manage, sell, and dispose of the same during said three years," or until the redemption provided for; and "the court may direct the receivers to apply the income and proceeds of such property, when sold," as follows: First. To the payment of taxes, assessments, repairs, and insurance thereon; taxes on the

debts therein secured; and the costs of that litigation. Second. The payment of interest to Joseph Holladay, and the other creditors whom Ben Holladay may compromise with. Third. To the payment of \$300 a month to Esther, the wife of Ben Holladay, and her heirs, "for her subsistence pending the settlement of said indebtedness, which sum is in consideration of the execution by her * * * of this agreement, and of such mortgages, transfers, and assignments requisite to the carrying out of the terms hereof, and to bar all her claims upon said property of dower or otherwise. Fourth. To the payment of \$346,686.46, with interest, to Joseph Holladay. Fifth. To the payment of the claims of the above-mentioned creditors of Ben Holladay.

(5) George W. Weidler, as trustee, shall manage and dispose of the property mentioned in Memorandum 2, and apply the proceeds as provided in the first, second, and third subdivisions aforesaid; and the residue of the proceeds of the property in Memorandum 1 shall be applied

to the creditors first mentioned herein.

(6) On the payment of Joseph Holladay, the property in Memorandum 1 not redeemed or disposed of shall be conveyed to George W. Weidler, in trust for the payment of Ben Holladay's creditors: provided, the debts due August Belmont, the Mutual Life Insurance Company, S. L. M. Barlow, and the attorneys and counsel aforesaid, shall be a lien thereon, second only to that of Joseph Holladay.

(7) When any property is sold by said receivers or trustee, the court may direct that the same be conveyed in payment of the purchase price, and such conveyance shall have the effect to pass the said property to

the purchaser in fee-simple, clear of all incumbrances.

On July 12, 1886, the court, in pursuance of the stipulation of the parties, removed D. P. Thompson from the receivership, and appointed Joseph Holladay and George W. Weidler receivers, with directions to Thompson to turn over the peroprty to them, who are to "take, manage,"

and retain" the same "until discharged by the court."

On September 27, 1886, the court, on the application of the parties and the filing of the agreement aforesaid, declared that the terms and conditions of said agreement should be enforced by the court, and ordered (1) that the time of redemption be enlarged to three years from July 10, 1886; (2) that the receivers convey to George W. Weidler, trustee, all the property in their hands mentioned in Memorandum 2, and discharge the same from the custody of the court, and the lien of the decree therein; (3) that the receivers "safely keep, hold, and manage" the rest of the property, as heretofore, until the further order of the court, and "apply the proceeds thereof in making the payments" provided for in said agreement, until the further order of this court.

I have thus, with some labor and pains, given a substantial outline of the facts and proceedings involved in this application, and without

which the question involved could not well be understood.

Counsel for Joseph Holladay and Weidler, representing all the parties to the agreement of July, contend that the property is in the possession of the receivers of the state court, and that this court cannot and will

not do anything to interfere with such possession, and that a mere sale by a master, on the decree of this court, would be such an interference.

On the other hand, counsel for the plaintiff insist that Holladay and Weidler are not receivers at all, but the mere agents of the Holladays and their attorneys, in a scheme devised by themselves for the purpose of appropriating this property to their own use, and that of three favored creditors, to the exclusion of the plaintiff and others having prior rights therein; and that, even if they are receivers, being in possession simply without title, a sale on the decree of this court would not interfere therewith.

On the latter question the case relied on by counsel for Holladay and Weidler is Wiswall v. Sampson, 14 How. 52. The language of the opinion by Mr. Justice Nelson is very strong and unqualified,—much more so than the case required,—to the effect that a sale of property made on the process of one court, while the same is in the possession of a receiver

appointed by another, is illegal and void.

A contrary view is maintained with great force and learning in Chautauqua Co. Bank v. Risley, 19 N. Y. 369. In each of these cases the receiver was appointed in a suit by a judgment creditor to set aside a fraudulent conveyance, and subject the property to the payment of the grantor's debts, and the ultimate purpose of the proceeding was to sell the property, and create a fund for distribution among creditors. In each case the sale in question was made at the instance of a judgment creditor, whose judgment antedated the appointment of the receiver, but was subsequent to the execution of the fraudulent conveyance. In the first case the conveyance based on the sale was held invalid, while in the second one it was held valid. But even then the court admits that the party making the sale while the property is in the possession of the receiver is guilty of a contempt. Indeed, it says (page 377) the question is merely one of contempt, and does not affect the legal right.

But as the title of the judgment debtor in each case had passed to the grantee in the fraudulent conveyance before the judgment was obtained on which the sale was made, the judgment creditor had no lien on the Therefore nothing passed by the sale, and on this ground, at least in this state, the sale would be held inoperative. In re Estes, 6 Sawy. 459; S. C. 3 Fed. Rep. 134. The debtor's conveyance having been set aside as fraudulent in the suit in equity, the property was in

the hands of the receiver for the purposes thereof.

It may be admitted that when a court takes possession of property by means of a receiver, at the suit of creditors, for the purpose of disposing of the same, and distributing the proceeds thereof according to the respective rights of said creditors, a sale or an attempt to sell such property on the process of another court is, in effect, an interference with such possession. And this is so because the possession of the receiver in such case is not a mere provisional custody, pending the litigation in which he is appointed, for the benefit of the party who shall be found entitled thereto, but it is a possession taken and held with a view to a final disposition of the property, by converting it into money, and distributing the same among the parties entitled thereto. But, in my judgment, where real property is in the possession of a receiver merely provisionally, for the purpose of preserving the same and the income thereof intact for the person to whom the judgment of the court may determine it belongs, the sale of the property pending such possession of the receiver on the process of another court, against one of the parties to the litigation, or the acquisition of a lien thereon by a judgment in another court against such party, is not an interference with the possession of the receiver. Ellicott v. United States Ins. Co., 7 Gill, 307.

And such is this case. The relief sought in *Holladay* v. *Holladay* in no way involved the sale or distribution of the property, but only the right of the plaintiff to redeem the same from what he alleged were mortgages given thereon to the defendant, and thus be restored to his original right and possession. By the order of November 17, 1883, appointing the receiver, he was simply directed to take the property included in the alleged mortgages into his possession, manage the same,—care for it,—until discharged by the court. And the order of July 12, 1886, does no more. By it, Holladay and Weidler are only directed to take and man-

age the property until discharged by the court.

The receiver has no title to the property, (High, Rec. § 5,) and that is all that is affected or changed by a sale. If it becomes necessary to resort to legal proceedings to obtain possession under such sale, the party must wait until the receiver is discharged, or obtain permission from the court appointing him; and this present right to sell may be a valuable By the exercise of it in this case, a creditor of Ben Holladay, the confessed owner of the property, -having an established claim against him, and the first lien on the property, is enabled to realize on his security at once, without awaiting the result of the contentions or contrivances for delay of the parties to a suit in which he has no interest, and whose interests in the property are altogether subordinate to his. But considering the unqualified language or dicta of Mr. Justice Nelson in Wiswall v. Sampson, supra, I do not feel at liberty, sitting in this subordinate tribunal, to follow my own judgment, and direct a sale of property in the hands of a receiver for any purpose; and particularly a court of another jurisdiction.

And this brings me to the consideration of the question, is this property now in the hands of a receiver at all? Or is there now any receiver in Holladay v. Holladay? After a careful examination of the subject, I am constrained to answer this question in the negative. The functions of a receiver usually terminate with the termination of the litigation in which he was appointed, (High, Rec. § 833;) and although he may not be beyond the power of the court until he accounts for his trust, and is formally discharged, yet his general functions and powers, including the custody and management of the property, terminate with the final decree, unless and only so far as it may provide some act or duty to be performed by him, concerning the disposition of the property, other than the mere surrender of it to the party thereby entitled to receive it.

When it was determined in this case by the decree of the supreme

court that Joseph Holladay was only the mortgagee of the property, and that Ben Holladay was entitled to redeem the same on the payment of what was due the former on a certain time, the litigation was practically It being also admitted that the mortgagee was rightfully in possession at the appointment of the receiver, the latter should have been directed or allowed to return the property to him to keep until the redemption was made. But for some reason, of which I do not stop to question the sufficiency or propriety, the receiver was directed to retain the possession during the 90 days allowed for redemption, and, if the redemption was not then made, to turn the same over to the sheriff for the purpose of being sold by them to satisfy Joseph Holladay's mortgage, when it would please him so to direct. No attempt was ever made to carry out this part of the decree, and the question of whether it was beyond the power of the court to make, need not be any further considered than already suggested. The court having decided that the property should remain in the hands of the receiver pending the redemption, it may also be admitted that the court below might change the receiver during that period, or fill a vacancy therein. It had no power to modify the decree of the supreme court, but under subdivision 2 of section 536 of the Code of Civil Procedure it had the same power to enforce it as if made by itself; and, so far as a receiver was a part of the means appointed in the decree for its enforcement, it might fill a vacancy, or make a change therein, when necessary. But at the end of the 90 days, whether the redemption was made or not, the receiver's functions were at an end, and the power of the court over the subject was confined to the enforcement of the decree by compelling Joseph Holladay to reconvey the property in case his debt was duly tendered him. The power to change the provision for the custody of the property pending the redemption is the only direct power over the decree given by the appellate court to the court below; and under that it does not appear that the court could do more than change the receiver, or restore the property to the possession of Joseph Holladay, from whence it was taken, and where it properly belonged. It is not admitted that the supreme court could, if it would, give the circuit court any direction contrary to the determination it made of the only question before it,—the right of Ben Holladay to redeem this property.

I make no account of the further direction concerning the custody of the property until the levies are made by the sheriffs of the various counties in which the property is situated, under Joseph Holladay's direction. The provision is ambiguous, and if it is intended, as suggested on the argument, to give the circuit court power to control the custody of this property, so as to prevent the plaintiff from enforcing his lien thereon by a sale thereof sufficient to satisfy his debt, not only during the term appointed for redemption, but as long thereafter as Joseph Holladay shall please to extend it, by delaying the levy, then I think the court has undertaken to provide a perpetuity in favor of a fraudulent debtor and his grantee that no one is bound to regard. Therefore I prefer to think that the reference to the levy, as a point of time to which the custody of the

court might extend, was only intended as cumulative, or to emphasize the termination of the 90 days with which it was coterminous, and that the whole provision, taken together, means that the custody of the court shall terminate at the end of the 90 days,—the time when the levy may Now, on the strength of this decree, the parties and their counsel drop their contention, and arrange a scheme for their mutual protection against the claim of the plaintiff. To this end a kind of family settlement of their claims is composed, by which this property is virtually put in their own hands, as receivers, for three years, with leave to Ben Holladay to redeem in that time all or any of the eleven parcels into which it has been arranged; the money paid therefor to go to Joseph Holladay in payment of his debt, and, if any of it is left after such payment, it is to be applied on the claims of counsel, and the three preferred creditors, whom one of them represents. The remainder of the property, if any, is to be conveyed to Ben Holladay, or his trustee, as he may In the mean time the rents and profits of the property, after think best. paying taxes, insurance, and repairs, are to be applied to the payment (1) of taxes on the debts thereby secured; (2) of interest on Joseph Holladay's debt; (3) of \$300 a month to the wife of the debtor, in consideration, it is said, of the release of her dower, though it does not appear that she would be entitled to dower in any of it, but the contrary, (Farnum v. Loomis, 2 Or. 29;) (4) of Joseph Holladay's debt; and (5) of the debts of counsel and the favored creditors. Then the scheme is presented to the circuit court, and, by consent of the parties, made, in form, a part of the decree of the court. If the court had the power to do this, it might have extended the time for redemption indefinitely, on the consent of the parties, and in the mean time, by means of these so-called "receivers," have permanently protected the property from the claims and liens of all the other creditors.

In my judgment the functions and authority of the receivers over this real property terminated at the end of the 90 days, and the jurisdiction of the court was gone, except to call the receiver to an account for his trust, and, it may be, to compel the mortgagee to reconvey, if the tender of his debt had been duly made. The consent of the parties, so far, at least, as third persons are concerned, does not give a court jurisdiction to appoint a receiver, (Whelpley v. Erie Ry. Co., 6 Blatchf. 274;) and in Louisiana it has been decided that a receiver of partnership funds, appointed by consent of both partners pending a suit for the dissolution of the firm, is not an officer of the court, but merely an agent of the parties. Kellar v. Williams, 3 Rob. 321; so cited in note to section 1, in High on Receivers.

The presumption is that the order for the enforcement of this scheme having been made on the joint application and consent of the parties, the court did not consider or consciously consent to its operation, so far as the rights of third persons are concerned; and I doubt not that, on the matter being brought to its attention, it will so declare. The respect which I am bound to entertain for this tribunal will not allow me to believe that it would give its deliberate sanction to a scheme which, so far

as this plaintiff is concerned, is nothing more or less than a fraudulent device to hinder and delay creditors.

My conclusion therefore is that Holladay and Weidler are not receivers of this property, and that there is nothing to prevent this court from directing a sale of so much of the same as will satisfy the decree herein.

The orders of the court will be that the master sell the property as on execution, and that, on the coming in of his report, the court will consider and determine whether, if possession is withheld, to direct the issue of a writ of possession in favor of the purchaser, or leave him to his action of ejectment.

BUFFALO INS. Co. v. PROVIDENCE & STONINGTON STEAM-SHIP Co.

(Circuit Court, S. D. New York. December 16, 1886.)

WITNESS—MILEAGE—How Taxed as Costs.

The traveling fees of a witness residing out of the district can only be taxed to the extent of 100 miles.

Appeal by the plaintiff from taxation of the clerk disallowing traveling fees for more than 100 miles of a witness residing in Buffalo, who attended the trial of this cause in the Southern district of New York.

Carpenter & Mosher, for plaintiff.
Miller, Peckham & Dixon, for defendant.

Coxe, J. The taxation by the clerk is correct. The law is well settled in this circuit that the traveling fees of a witness residing out of the district can only be taxed to the extent of 100 miles. Anon., 5 Blatchf. 134; The Leo, 5 Ben. 486; Beckwith v. Easton, 4 Ben. 357. It is true that this rule may work injustice in some instances, but still greater injustice might ensue from the establishment of a rule permitting the successful party to tax the fees of witnesses brought from the remote corners of the Union to testify upon a collateral or inconsequential issue, when their testimony could as well have been taken by commission. Taxation affirmed.

WILLIS and Wife v. MILLER, Treasurer, etc., and others.1

(Circuit Court. E. D. Virginia, October, 1886.)

1. Constitutional Law-Obligation of Contracts-Virginia Coupons-Vir-

GINIA ACT OF MARCH 30, 1871, AND OF MARCH 15, 1884—SCHOOL TAX.

The act of the Virginia legislature of March 30, 1871, commonly called the "Funding Act," providing that the coupons on bonds issued under that act should be receivable for all public taxes and dues, is not invalidated or rendered unconstitutional by the fact that the legislature subsequently, by the act of March 15, 1884, altered the method of collecting the school tax and the mode of its distribution, and segregated that tax from the gross tax collected.2

2. Same—Virginia Act of March 15, 1884.

So far as the act of the Virginia legislature of March 15, 1884, forbids the receipt of tax receivable coupons for any state tax, it is an act impairing the obligation of contracts, and is void under the constitution of the United States.

8. Taxation — Virginia Tax-Receivable Coupons—Right of Tax-Payer to Stand on Tender of Coupons—Virginia Acts of January 14, 1882, and March 15, 1884.

A tax-payer in Virginia is under no obligation to pay state taxes in money, and to surrender his tax-receivable coupons for identification and verification, as provided by the act of January 14, 1882. He has a right to stand upon the tender of the coupons.

4. TRESPASS — TAX COLLECTOR A TRESPASSER — TAX-RECEIVABLE COUPONS —

MEASURE OF DAMAGES.

Upon the tender of tax-receivable coupons by a tax-payer of Virginia for the payment of taxes due the state, whether the coupons are received or not, the taxes are paid, and any levy by a county treasurer upon the property of the tax payer after such tender is a trespass; and in an action for damages for such levy, where, at the time it was made, the officer knew that it was illegal, punitive damages may be recovered.

SAME — Joint Trespassers — State Officers Advising Illegal Tax Levy — Virginia Act February 24, 1886.
The members of the Virginia "indemnity board," created by the act of February 24.

ruary 24, 1886, are jointly liable with a county treasurer for a trespass committed by him in making a levy for non-payment of a state tax after tender by the tax payer of tax-receivable coupons, where they advised such levy, and promised legal assistance and indemnity in the case of the treasurer being mulcted in damages.

6. Damages-Illegal Levy of Tax-Malice.

Malice in law is not necessarily personal hate or ill will of the trespasser towards the person injured, but it is that state of mind which is reckless of law and of the legal rights of the citizen; and the object of exemplary damages or "smart money" is not only to indemnify the sufferer for any loss sustained, but to prevent similar actions on the part of the trespasser in the future.

At Law. Trespass.

Prior to the late civil war the state of Virginia borrowed large sums of money upon her bonds bearing 6 per cent. interest to construct works of internal improvement, such as railways, and so forth. Her bonds being in the main held outside of her own borders,—in the north and in England,—she paid no interest on them during the war and during the period of reconstruction. During the war, one-

¹See Strickler v. Yager, post, 244.

As to legislation impairing the obligation of contracts, see Saginaw Gas-light Co. v. City of Saginaw, 28 Fed. Rep. 529, and note; City of Louisville v. Weible, (Ky.) 1 S. W. Rep. 605, and note.

third of her territory and population were detached, and erected into the state of West Virginia. Virginia v. West Virginia, 11 Wall. 39. In 1871 public attention had come to be attracted to the condition of Virginia's debt, and a general demand arose that some provision should be made to meet it. The people of the state of Virginia took this view of the matter: They said that as West Virginia had taken part in borrowing this money, and received her share of the benefit of it, it was but fair that she should bear her share of the burden of it, and, as that part of the state which had been detached was about one-third in respect to territory and population, it was assumed that her share of the debt, therefore, was one-third.

Accordingly, the state of Virginia, on March 30, 1871, passed an act which offered to all holders of her old bonds that, if they would surrender them to her, she would give them her new bonds for two-thirds of the principal, and two-thirds of the interest overdue on the old bonds, and on this new bond she would pay them 6 per cent. interest, and also give them a certificate, with respect to the remaining third, that as to it she would turn over to them whatever she might thereafter obtain from West Virginia on account of it. She proposed, further, that the new bonds should run 34 years, with interest payable semi-annually, and that the interest promises should be represented by coupons, which should be receivable in payment of all

taxes, debts, and demands due the state.

This proposition proved acceptable to the creditors, and they at once began to fund freely. When new bonds to the amount of \$22,000,000 had been issued, bearing these tax-receivable coupons, the legislature reassembled, and repealed the funding act, March 7, 1872, so far as to forbid the further issue of bonds bearing tax-receivable coupons: allowing, however, the funding to continue in all other respects the same. It also passed an act forbidding the collectors of taxes to receive the coupons that had been issued, in payment of taxes. The creditors of the state, deeming this to be an act that impaired the obligation of the coupon contract, at once attacked it in the courts; and the supreme court of appeals of the state held it to be unconstitutional and void in the case of Antoni v. Wright, 22 Grat. 833. For a number of years after this decision the coupons were regularly received in payment of taxes, but in the mean time a political party was being formed which aimed at destroying the coupons by legislation based upon the decision of the supreme court of the United States in the case of Tennessee v. Sneed, 96 U.S. 69, by pretending to change the remedy for the enforcement of the contract. This political party came into control of the whole state first in the winter of 1881-82. It at once proceeded to enact its party policy in the form of statutes. It passed, January 14, 1882, an act which in substance provided that no coupons should be received in payment of taxes except under the conditions prescribed in that act. Reciting that there were many counterfeit, forged, and spurious coupons in existence, (as a matter of fact none had ever been

known to exist, and none have ever been found,) it provided that, when a tax-payer desired to pay his taxes in coupons, he should pay the amount of his tax-bill in money, and surrender his coupons to the collector at the same time, who should deliver them to the county or corporation court, where a jury should pass upon the question whether they were genuine or spurious. If the jury found them genuine his money was to be refunded to him.

The creditors at once attacked this act as one impairing the obligation of their contract. It went to the supreme court of the United States, where its validity was maintained. Antoni v. Greenhow, 107 U. S. 769; S. C. 2 Sup. Ct. Rep. 91. While maintaining the validity of the act as applied to the case where a tax-payer sought to force the state actually to receive his coupons, the court very distinctly intimated that there might be a wide difference between that case and the case in which a tax-payer tendered his coupons, and stood upon that tender, and refused to pay in any other medium. Cases built upon this idea were immediately brought before the supreme court. A tax-payer offered coupons, which were refused. The collector, carrying out the provisions of the state law, levied on the tax-payer's property, and sold it. The tax-payer sued him for a trespass. He justified his conduct by authority of the state law, which the tax-payer said was unconstitutional and void. The question coming before the supreme court of the United States, it held that a tender of the coupon pays the tax so far as to deprive the collector of all power to collect thereafter in another medium, and that any and all acts of the Virginia legislature were powerless to protect him from the consequences of his trespass in making that levy. Poindexter v. Greenhow, 114 U. S. 270; S. C. 5 Sup. Ct. Rep. 903; Barry v. Edmunds, 116 U. S. 550; S. C. 6 Sup. Ct. Rep. 501; Taylor v. Chaffin, 116 U. S. 567-572; S. C. 6 Sup. Ct. Rep. 518; Royall v. Virginia, 116 U. S. 572; S. C. 6 Sup. Ct. Rep. 510.

After the last decisions of the United States supreme court on this subject, it was very evident that the state would be forced to redeem her coupons, unless some new legal barrier could be interposed. The legislature of Virginia, being in session at the time, determined upon the policy of resistance to the law as defined by the supreme court. Accordingly, on the twenty-fourth February, 1886, it enacted the following statute:

"Be it enacted by the general assembly or Virginia, that upon the application of any officer charged with the duty of collecting or settling taxes due the commonwealth, a board, consisting of the attorney general, secretary of the commonwealth, auditor of public accounts, second auditor, and treasurer, shall be authorized to ascertain and allow to such officer such sum or sums of money as they may deem just and proper to cover any liability and expenses incurred by, and any loss or damage accrued to, such officer, as the result of his collecting, or attempting to collect, enforce, or settle taxes due the commonwealth; and, for the amount so ascertained and allowed, the auditor shall draw his warrant in favor of such officer upon the treasurer, and

the same shall be paid out of any money in the treasury not otherwise appropriated. * * * The said board may prescribe rules and regulations in reference to such applications and allowances, if they shall deem proper so to do; but no such allowance shall be made unless the said board shall be satisfied that such officer used due diligence in protecting and defending the interests of the commonwealth in the matter touching which such allowance is asked for."

On the twenty-third March, 1886, the auditor of the state, to whom all the collectors of taxes look for instructions, issued a circular to each collector, wherein he instructed them to levy on and seize the property of any tax-payer who should offer to pay his taxes in coupons, and sell it by public auction, and the other members of the indemnity board, created by the above-recited act, indorsed this circular, and promised that every collector making these unlawful levies would be indemnified out of the treasury of the state. one tax-payers, in various parts of the state, tendered coupons for their taxes due in the spring of 1886, and, refusing to pay with anything else, the collectors levied on their property, seized it, and sold it. Fifty-one suits were thereupon brought against these collectors, and this board of indemnity, in the circuit court of the United States for the Eastern district of Virginia, for damages for these trespasses. Two of them came on for trial before the Honorable H. L. Bond. the United States circuit judge, and the Honorable R. W. Hughes, United States district judge for the Eastern district of Virginia, and a jury at Richmond, in October, 1886.

The facts in the first case were as follows: Mr. and Mrs. A. M. Willis, of Rappahannock county, Virginia, tendered to W. G. Miller, the treasurer of that county, \$128 of the state's coupons in payment of the taxes due upon Mrs. Willis' farm. The treasurer refused to receive them, and levied on 3 horses and a colt, 10 head of cattle, 85 sheep, a wagon, and a buggy, all of which he advertised to sell at the door of the court-house. The levy was very excessive. The horse and colt alone would have brought more than enough to satisfy the tax. On the day of the sale he sold five head of the cattle, and returned all the other property to the plaintiffs. The plaintiffs therefore sued him for \$10,000 damages.

After the plaintiffs had proved the foregoing state of facts, the defendants, who offered no testimony, moved the court to exclude that part of the plaintiffs' evidence which went to prove that the plaintiffs had endeavored to pay with coupons the portion of their taxes dedicated by the state constitution to the public free schools. The ground for the motion was as follows: It was argued that the act of assembly authorizing the issue of tax-receivable coupons was repugnant to the constitution of the state, and was therefore void, for the reason that the constitution dedicates one-fourth of the revenue to the establishment and maintenance of the public free schools; that the act makes all taxes payable in coupons, and therefore makes that portion dedicated to the free schools payable in coupons; that it might result

from this that the entire revenue might come in in the form of coupons, and thus the public free schools be closed; and they recited, in support of this view, a decision of the supreme court of appeals of Virginia, rendered in the case of *Greenhow* v. Vashon, in the month of January, 1886, (Law J. Va., May, 1886, p. 299,) wherein that court held the act to be unconstitutional, for the reasons advanced.

The counsel for the plaintiffs replied that the identical question had been passed upon by the supreme court of appeals of Virginia in 1872, in the case before referred to, of Antoni v. Wright, and that court had then held that the act, in making the school money payable in coupons, was not repugnant to the constitution; that it had afterwards reaffirmed the same proposition in the case of Clarke v. Tyler, 30 Grat. 134, and Williamson v. Massey, 33 Grat. 237; and that the same question has been similarly passed upon by the supreme court of the United States in Hartman v. Greenhow, 102 U.S. 672, and in Antoni v. Greenhow, 107 U.S. 769, S. C. 2 Sup. Ct. Rep. 91, and that in such cases it was the rule of the federal judiciary to follow the first decision of the highest court of the state,—citing Gelpcke v. Dubuque, 1 Wall. 175, and the many cases since that case in which the supreme court had held to the doctrine of it. (A new set of judges for the court of appeals had been put in by the Readjuster party when it came into power in 1881-82, and it was this later court that made the decision relied on.) They also cited the cases of Jefferson Branch Bank v. Skelly, 1 Black, 436, Northwestern University v. People, 99 U. S. 309, and a number of other decisions of the supreme court of the United States for the proposition that where the question was whether an alleged contract of a state was repugnant to her own constitution, the federal judiciary would pass for themselves on the question, without regard to any decision which the courts of that state might have made; and they argued that as his honor was free to form his own opinion, unhampered by any decision which the supreme court of Virginia might have made, he could have no difficulty in coming to the conclusion, as the court of appeals of Virginia had done in the first instance, that the act was not repugnant to the constitution of the state, for that reason, or for any other reason.

The court overruled the defendants' motion to exclude this testimony, and, in doing so, the learned circuit judge delivered the following opinion.

William L. Royall and George Bryan, for plaintiffs.

R. A. Ayers, Atty. Gen., and J. Randolph Tucker, for defendants.

Bond, J. The court has listened with interest to the argument of the counsel upon the point now made that, since the act of 1884 which segregated the taxes levied by law and collected by its treasurers, the right to tender coupons in payment of the state school tax was no longer allowable. By the act of 1871 the coupons tendered in the case by the plaintiff in payment of his state taxes were made receivable for all public taxes and dues. The supreme court of the United States has decided that this was a contract between the state and the coupon holder which no subsequent legislation could impair, and we cannot now see why the fact that the legislature has altered the method of collecting the school tax, or the method of its distribution, or the fact that it has segregated it from the gross tax collected, can alter its contract to receive its own evidences of debt in payment of that tax. It is a public due. tender of a coupon is the tender of a receipt of so much money already in the state treasury. If the money represented by the coupon is not in the treasury, it is as much the duty of the state to have it there as it is to support the public schools. The one is as much a sacred trust as the other. So far as it may be maintained that the act of 1884 forbids the receipt of tax-receivable coupons for any state tax, to that extent it is in violation of the constitution of the United States, as has been decided again and again by the supreme court, and no device of division or segregation or distribution of any particular state tax will avoid this fatal defect.

The circuit judge then delivered the following instructions to the jury:

Bond, J. If the jury find from the evidence that the plaintiffs in this action, being citizens of Virginia, were indebted to the state in the sum of \$128.24 for taxes due upon the property owned by them in Rappahannock county, in that state, and that, in payment thereof, they tendered to Miller, treasurer of the said county, entitled to receive the same, coupons of the bonds of the state of Virginia receivable for public taxes, and that said treasurer refused to receive the same in payment thereof, and that notwithstanding such tender the defendant levied upon the property of the plaintiffs, advertised and sold the same, and so collected the tax, then the said Miller was a trespasser, and is liable to the said plaintiffs for his trespass.

And if the jury find from the evidence in the cause that the other defendants to this action, or either of them, advised and counseled the said Miller to commit the trespass above described, by advising him not to receive the said coupons, but to make the said levy, with a promise of indemnification if he was mulcted in damages for his conduct, promising the assistance of counsel to defend him, then the said defendants are jointly liable with the said Miller, the treasurer, for the trespass alleged; and the jury may find such of the defendants guilty or not guilty as they may find they did or did not so advise, counsel, and abet the above-mentioned trespass.

And the jury are instructed that it is the law of the land that upon the tender of the tax-receivable coupons for the payment of taxes, whether received or not, the taxes are paid, and any levy upon the property of the tax-payer, after such tender, is a trespass (any state law to the contrary notwithstanding) for which damages are recoverable; and if the said levy is made with a knowledge, at the time, that it is illegal, while the tax-payer remonstrates that it is illegal, and claims the protection of the law of the land, then the jury may find that said levy was malicious, and are not confined to giving actual damages, but may give punitive or exemplary damages, as they may find the facts to be.

And the jury are instructed that the meaning of the word "malice" in law is not personal hate or ill will of one person towards another, but it refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct towards that citizen; and the object of the law, in permitting the jury to give exemplary damages or smart money in cases like this, is not only to indemnify the plaintiffs for the loss sustained, but to prevent similar actions upon the part of these and other defendants in the future.

The court instructs the jury that the plaintiffs were under no obligation to pay their taxes in money, and surrender their coupons for identification and verification, but they had a right, under the law, to stand upon their tender of coupons, and to refuse to pay in money

and surrender their coupons for identification.

The jury found a verdict for \$150 damages. The counsel for the plaintiffs moved to set the verdict aside upon the ground of inadequacy, but the circuit judge overruled the motion, saying that he could not tell how far the jury might have been influenced by the argument respecting the decision of the Virginia court of appeals on the school-tax question, which it would have been legitimate for the jury to consider in mitigation of damages.

STRICKLER and Wife v. YAGER, Treasurer, etc., and others.

(Circuit Court, E. D. Virginia. October, 1886.)

Constitutional Law—Taxation—Virginia Coupons—Measure of Damages—Malice.
Following Willis v. Miller, ante, 288.

At Law. Trespass.

The facts in this case were the same as in the preceding one, with the exception that the tax due was nine dollars only, and there was no question relating to the school tax involved in the case; the plaintiffs having paid that part of the tax relating to the public schools in currency, and having tendered coupons for the other part of the revenue solely.

The court gave the same instructions in this case as in the preceding one, and the plaintiffs' counsel urgently appealed to the jury to find a verdict for punitive damages, and thus arrest these open, pro-

claimed, and intended defiances of the supreme law of the land as laid down by the supreme court of the United States.

The plaintiffs had bought in their own property at the sale for nine dollars. Consequently nine dollars was the extent of the damage suffered. The jury found a verdict for nine dollars, the plaintiffs' actual damages, against the members of the indemnity board; but they found a verdict of not guilty as to the treasurer of Page county, who made the seizure and sale. The plaintiffs' counsel moved the court to set this verdict aside as inadequate, but his honor, the circuit judge, overruled the motion, saying that the amount of damages was a matter entirely within the province of the jury; that it appeared from the two trials which had been had that a jury of Virginians proposed to let it be known that they would not protect their fellow-citizens from willful trespasses committed upon them, when those fellow-citizens relied upon the constitutional laws of the United States only for that protection; and, if the jury chose to take this position, the court was powerless to secure the citizen any redress.

During the trial of the latter case the plaintiffs' counsel called the Honorable R. A. Ayers, attorney general of the state of Virginia, as a witness to prove that, as a member of the indemnity board, he had signed the circular instructing the treasurer to levy and sell, notwithstanding the tender of coupons, and promising them indemnity for such unlawful acts. During his examination the following colloquy

took place between him and the court.

William L. Royall and George Bryan, for plaintiffs.

R. A. Ayers, Atty. Gen., and J. Randolph Tucker, for defendants.

Bond, J. Mr. Attorney General, when you signed that circular and that guaranty, did you know that the supreme court of the United States had decided that it was a trespass for a collector to levy on a tax-payer after a tender of coupons, and that any law of the state undertaking to protect him on that trespass was repugnant to the constitution of the United States and void?

AYERS, Atty. Gen. After the last decisions of the supreme court of the United States, made in the beginning of February last, I was before the legislative committee having charge of that subject. The meaning of those decisions was fully explained to and understood by that committee and the entire legislature. This act creating the indemnity board was the result of the resolution the legislature came to.

Bond, J. Do you think that indemnifying act a constitutional one, or that any act authorizing one citizen to commit a trespass upon another, and agreeing to indemnify him for all damages he might suffer, would be held to be constitutional by the courts of Virginia?

AYERS, Atty. Gen. Well, I think there might be a good deal of discussion concerning that.

Bond, J. Well, we won't discuss it.

McAndrew v. Robertson.

(Circuit Court, S. D. New York. December 6, 1886.)

Oustoms Duties — Importation of Emery Stone — Act of 1883 — When It Took Effect.

Emery stone, that arrived by vessel at the port of New York on June 30, 1883, too late to go into stores or bonded warehouse on that day, and that was not entered until July 2d, July 1st being Sunday, was not exempted from duties under the act of congress of 1883, (22 St. 488,) but was liable to the duty of six dollars per ton imposed by the act in existence prior to that act.

Action to Recover Duties Paid under Protest. George B. Adams, for plaintiff. Henry C. Platt, Asst. U. S. Atty., for defendant.

Wheeler, J. The plaintiff's goods,—200 tons of emery stone, on which by law, prior to the act of 1883, there was a specific duty of six dollars per ton, arrived by the bark Teresina Bruno at the port of New York on June 30, 1883, at about 3 o'clock P. M., and too late to go into public stores or bonded warehouse on that day. The first day of July was Sunday. On the second day of July the goods were entered for consumption as free. They were passed as free on bond to pay such duties as they might be found liable to, and unloaded by the plaintiff. Afterwards the duty, six dollars per ton, was assessed and paid by the plaintiff, under protest that they were free under the act of 1883, and this suit is brought to recover the amount. By the act of 1883 (22 St. 488) it was enacted that on and after the first day of July, 1883, the following sections should constitute and be a substitute for title 33 of the Revised Statutes. Then follows a tariff of duties, in which emery stone is classed as free. By section 10 it is provided that goods in the public stores or bonded warehouses on the day when the act should take effect should be subject to no other duty than if the same were imported after that day, and that if the duties had been paid there should be a refund of the difference; and, by section 13, that the repeal of existing laws or modifications thereof by that act should not affect any act done or right accruing or accrued. It is not, and could not well be, claimed but that the right to duties on goods imported accrues on their arrival at the port of importation, with intent to unlade. U.S. v. Lyman, 1 Mason, 482; Prince v. U. S., 2 Gall. 204; Perots v. U. S., Pet. C. C. 256; Meredith v. U. S., 13 Pet. 486; U. S. v. Cobb, 11 Fed. Rep. 76; U.S. v. Benzon, 2 Cliff. 512.

It is argued, however, that as goods imported prior to this time, and had gone to bonded warehouse, would come under the provisions of the new act, it must have been the intention of congress that these goods should, and that for this purpose the deck of the vessel should be considered the warehouse. This question must be deter-

mined by the apparent intention of congress, which must be gathered from the language of the act itself. Congress fixed upon the first day of July as the day when the new act should take effect. The right to these duties, therefore, accrued under the old act, and was saved by the thirteenth section, unless the provisions of the tenth section prevented. Those provisions do not include this merchandise in their description. Nothing is included but such goods as are in bonded warehouse or public stores at that time, and are entered for consumption afterwards. These goods were on board the ship at that time, and not in the public store or warehouse in the sense of this section.

Verdict for defendant directed.

United States v. McMillan.

(District Court, E. D. South Carolina. 1886.)

EVIDENCE—PROOF OF HANDWRITING—COMPARISON.

Handwriting cannot be proved by comparison with letters not admitted to be genuine, nor belonging to the witness testifying as to the party's handwriting, and produced in court in confirmation or explanation of his testimony.

Indictment for Using the Mail to Carry out a Fraudulent Device.

Asst. Dist. Atty. Furman, for the United States.

W. St. I. Jervey, for defendant.

SIMONTON, J. The defendant is on his trial for violation of section 5480, Rev. St., abusing the mail in carrying out a fraudulent device. The fraudulent device with which he is charged is the issuing of circulars, under several assumed names, offering for sale various articles, none of which were in his possession or control, with the intent of retaining the money sent for them, and of not furnishing the goods. The government have put in evidence three letters, said to have been written by the defendant, and signed in his proper name. One witness, to whom these letters were exhibited, has sworn to his belief that they are in the handwriting of the defendant. The letters were not the property of, nor in the custody of, the witness, and are not parts of the record. It is now proposed to examine an expert, to put in his hands the circulars alleged to have been sent out by defendant, and to prove that the defendant wrote these circulars, by the comparison of handwriting. The defendant objects. As the result of the trial depends upon the decision of this question, the ruling of the court is put into formal shape.

In South Carolina "it has been generally accepted that comparison of handwriting, as an original means of ascertaining the genuineness

of handwriting, will not be permitted, but, when introduced in aid of doubtful proof already offered, it may be allowed," (Benedict v. Flanigan, 18 S. C. 508,) and the question whether or not the evidence is so doubtful or conflicting, so as to admit this supplemental testimony, must be determined by the court, (Id. 509.)

Mr. Greenleaf, discussing this question, volume 1, § 580, says that there is conflict between the American authority upon it. The conclusion which he derives from comparison of the authorities seems to be more certain than the rule adopted in South Carolina. "Such papers can be offered in evidence to the jury only when no collateral issue can be raised concerning them; that is, only when the papers are either conceded to be genuine, or are such as the other party is estopped from denying, or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in explanation or confirmation of his testimony." Greenl. Ev. § 580.

In Moore v. U. S., 91 U. S. 274, this rule is recognized. Were the testimony to be admitted upon the comparison with writing not conceded to be genuine, or which cannot be denied to be genuine, collateral issues would arise which would tend to confuse the jury, and to lead them away from the main issue.

The objection is sustained.

No other testimony having been offered connecting the defendant with the circulars, the jury were directed to find a verdict in his favor.

Dudgeon v. Watson and another.

(Circuit Court, S. D. New York. December 18, 1886.)

1. PATENTS FOR INVENTIONS—LETTERS PATENT NO. 137,765, OF APRIL 15, 1873—HYDRAULIC JACK—IMPROVEMENT IN DIRECT-ACTION PUMPING ENGINES.

Letters patent No. 137,765, of April 15, 1873, to Richard Dudgeon, for n improvement in hydraulic jacks, the structure being this: A ram works in a water-tight cylinder, and by the injection of water or other liquid, by means of a force-pump, into a chamber at the bottom of a cylinder, the ram rises, lifting the load; the ram is lowered by permitting the liquid to escape: held, not anticipated, or defeated for lack of invention, by the patent granted to Worthington and Baker, April 3, 1849, for an improvement in direct-action pumping engines.

pumping engines.
2. Same—Letters Patent No. 297,975—Hydraulic Jack—Infringement.
Letters patent No. 297,975, granted to one Richard H. Dudgeon, May 6, 1884, and by him assigned to complainant, for an improvement in hydraulic jacks: 1873, No. 137,765. By the improved device a smooth bearing is given to the plunger or piston while taking its extended stroke when the ram is lowered. This is accomplished by boring the reverse passages in the walls of the independent internal cylinder in which the plunger operates. This cylinder is so constructed that it can be removed, and the apparatus which it contains renewed or repaired. In the defendant's structure a short section of the ram cylinder is cut off, and the internal cylinder is so cast as to fill up the space thus left; the result being that the latter is not supported by the screw-threads

of the valve-block as in the patent, but by being made to fit closely to the ram cylinder. The two methods are equivalent, and plaintiff's patent held to be infringed.

In Equity. Action for infringement of patents for improvements in hydraulic jacks.

Edmund Wetmore, (Phillips Abbott with him,) for complainant.

Charles N. Judson and James McKeen, for defendants.

Coxe, J. This is an equity action for the infringement of two patents owned by the complainant. Both are for improvements in hydraulic jacks. The first, No. 137,765, was granted to the complainant, April 15, 1873. The second, No. 297,975, was granted to Richard H. Dudgeon, May 6, 1884, and by him assigned to the complainant. The defenses are want of novelty and non-infringement.

The patent of April 15, 1873, will first be considered.

A hydraulic jack is a portable machine for lifting heavy bodies a short distance. A ram works in a water-tight cylinder, and by the injection of water or other liquid, by means of a force-pump, into a chamber at the bottom of the cylinder, the ram rises, lifting the load. The ram is lowered by permitting the liquid to escape. Prior to the invention the lowering process was accomplished by means of a long, stiff wire connecting with the ingress valve in such a manner that, when the pump handle was depressed to its lowest limit, both the ingress and egress valves were opened, and a continuous passage for the liquid was made from the ram cylinder back to the reservoir. practice it was found that this mechanism frequently got out of order. and the impossibility of lowering the ram was followed by the most disastrous consequences. It was to remedy these annoying and dangerous defects, so detrimental to the usefulness of the wire jack, that the complainant invented the improvement in question. The object of the invention is to permit the liquid to flow freely from the ram cylinder through the egress valve, and around the ingress valve, not through it, as formerly, without the intervention of any delicate or perishable mechanism. The wire is discarded. The new jacks have superseded the old ones in popular favor.

The claims are as follows:

"(1) The combinations and arrangement of the pump-plunger, constructed with longitudinal passages, the pump-barrel, and the reverse passage, substantially as before set forth.

"(2) The combination and arrangement of the pump-plunger, the pumpbarrel with its reverse passage, the egress-valve, and the guard thereof, sub-

stantially as before set forth."

When it is remembered that the description is addressed to those versed in the art, there is no difficulty as to the proper construction of the first claim. It is for a sub-combination intended to be used in hydraulic jacks. Even though the method for tripping the egress

valve should be wholly unlike that described in the patent, even though the use of this valve should be rendered unnecessary by the introduction of other valved passages, still the patentee desired to secure the right to convey the liquid from the ram cylinder back to the reservoir, around, instead of through, the ingress valve, by the described means. There is no reason why he cannot do this.

It is said that the patent is anticipated, or defeated for lack of invention, by the patent granted to Worthington and Baker, April 3, 1849, for an improvement in direct-action pumping engines. The object of the by-passes in this apparatus is to relieve the steam-piston of the strain upon it by the pressure of the water in the pump-barrel; thus permitting the piston to complete its stroke freed from the resistance of the water. The object of the Dudgeon invention, as has been seen, is very different. Indeed, though possessing some features in common, the two are dissimilar in appearance, operation, purpose, principle and result. The one might suggest the other to an inventor, but not to a mechanic. It required a creative faculty, not usually found in the slow, non-perceptive brain of the skilled workmen, to construct the hydraulic jack of 1873 from the steam-pump of 1849.

Assuming that the connection between the two is as intimate as the defendants insist, it is, nevertheless, true that he who possessed the genius to perceive that the principle of the one could be utilized to remedy the serious defects of the other, was something more than a dexterous and intelligent automaton. For 24 years the imperfections in hydraulic jacks were known. For 24 years men of experience and capacity had been endeavoring to remedy these imperfections. For 24 years the combination of the Worthington and Baker steam-pump had been accessible to an army of skilled mechanics. That the idea which occurred to Dudgeon never occurred to one of these is of itself a sufficient answer to the theory now advanced, in the light of accomplished facts, that the combination of the pump is an equivalent for the combination of the jack.

Without pausing to enter into a more minute and elaborate discussion of the Worthington and Baker reference, it suffices to say that the position taken by the complainant's expert witness, Mr. Renwick, is sustained by the proofs; and the reasons assigned by him in support of his opinion seem entirely fair and logical.

As to the infringement of the patent there can be no doubt. The defendants have seized upon the complainant's discovery, and have produced a jack which works in substantially the same manner, and accomplishes the same result by similar or equivalent mechanisms. Of course, there are differences in the two structures, but they are of form rather than of substance. There is no functional distinction. The defendants cut away more of the pump-plunger, and less of the pump-barrel, than the complainant. The methods of forcing the liquid around the ingress valve when the ram is lowered are iden-

tical, only instead of the longitudinal passages in the plunger the metal is cut away around its entire circumference, making a much wider channel. In the pump-barrel, on the contrary, instead of cutting the surface away around its inner periphery, as in the patent, the defendants, at the same point, substitute reverse passages bored through the wall of the barrel. The new apparatus is an improvement upon the old, but every feature of it is covered by the claims of the patent. The defendants have widened in one place, and narrowed in another place, the complainant's channels, but they do not for this reason acquire the right to use the invention.

The patent of May 6, 1884, remains to be considered. It is for an improvement upon the jack of 1873. In this patent the inventor has, speaking generally, accomplished what the infringing jack, just referred to, accomplishes. It is a more perfect machine. By the improved device a smooth bearing is given to the plunger or piston while taking its extended stroke when the ram is lowered. This is accomplished by boring the reverse passages in the walls of the independent internal cylinder in which the plunger operates. This cylinder is so constructed that it can be removed, and the apparatus which it contains renewed or repaired. The advantages over the 1873 patent may be summarized as follows: More perfect action, increased durability, greater ease in repairing, less difficulty in construction.

The second claim, which is alone in controversy, is as follows:

"The combination, with the hollow piston, B, and independent cylinder, C, provided with internal fluid passages, c, of the valve-block or plug, E, valve, e, and a packing, G, and nut or binding-piece, F, substantially as shown and described."

It is not seriously argued that the structure covered by this claim is anticipated, but it is said that, considering the prior patents, there was no invention displayed in producing it. In view of the conceded advantages of the improved jack, the fact that no prior patent suggests the entire combination of the second claim, and no skilled mechanic ever thought of the improvement, if a doubt existed upon this question, it should be resolved in favor of the patent.

The defendants infringe. Prior to this suit they made the jack according to the formula of the complainant's patent, and the patent granted to the defendant Watson, July 15, 1884, shows the same construction of the independant cylinder, valve-block, etc. After the bill in this action was served the defendants made the changes by which they seek to escape infringement. In the defendants' structure a short section of the ram cylinder is cut off, and the internal cylinder is so cast as to fill up the space thus left; the result being that the latter is not supported by the screw-threads of the valve-block, as in the patent, but by being made to fit closely to the ram cylinder. The two methods are equivalents. The defendants' cylinder is "independent" in the sense of the patent. It performs all the functions

that the Dudgeon cylinder performs. All the other differences are based upon or are incident to this unimportant change. It is very clear that the defendants accomplish all that the patent sought to accomplish, and by similar or equivalent means.

There are some changes which, at first sight, seem important and substantial, but when analyzed are of form merely, and force the conviction, when the other circumstances are considered, that they were adopted simply and solely for the purpose of avoiding the complainant's patent.

The complainant is entitled to the usual decree.

THE UMATTILLA.

O'BRIEN and others v. THE UMATTILLA.

(District Court, N. D. California. December 1, 1886.)

Salvage—Seamen as Salvors—Supererogatory Services.

When the master and the major portion of the crew have quitted the ship, renouncing all hopes of saving her, and a few of the crew have remained, in spite of the expostulations, and almost against the commands, of the master, to confront dangers which he and their companions have declined to encounter, and by so doing have saved the ship, justice, as well as the true interests of owners and insurers, demands that the courts should recognize, as a legal right, their claim to compensation as salvors for supererogatory services.

In Admiralty.

Page & Eells, (Arthur Rodgers, of counsel,) for libelants.

Milton Andros, for claimants.

HOFFMAN, J. On the morning of February 9, 1884, the steam-ship Umattilla, Frank Worth, master, bound on a voyage from San Francisco to Seattle, struck on a rock of Flattery reef, some 12 or 13 miles to the southward of Cape Flattery. The captain, warned of danger by short blasts of the steam-whistle, had barely time to reach the deck, when he was felled by the shock caused by the striking of the ship upon the rock. He at once gave orders to the engineer to go ahead slowly, in order to prevent the vessel from sliding off the rocks, and foundering in deep water. The first officer was ordered to sound the forward hold. In his deposition the captain is made to say that the first officer reported 18 feet of water in this lower hold. This is evidently an error, perhaps clerical. There is no doubt, however, that on taking off the fore-hatch the hold was found full of water, and it was by all hands expected that the ship would speedily founder.

¹Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

While the first mate was forward, engaged in getting the stay-sail adrift, and lifting the hatches to ascertain the condition of the hold, the captain had ordered the boats to be made ready, and, when the mate came aft, the port boat had been lowered, and occupied by a crowd, chiefly of coal-passers and firemen, to the number of 17 or 18 persons. A similar rush was made for the starboard boat, but it was checked by the firmness and decision of the mate, who succeeded in restoring some sort of order and discipline. The starboard boat having been lowered, it was immediately filled by the members of the ship's company, including the master, who took with him his dog and his gun. Mr. O'Brien, the mate, remained on deck alone, or, perhaps, with one man, who subsequently got into the captain's boat. The life-raft had in the mean time been launched by Mr. O'Brien, assisted by two of the men. It consisted of two metallic, spindle-shaped, air-tight tanks, connected by a grating, and was ten or fifteen feet long by five or six feet wide. It was provided with rowlocks and oars, but they afforded very insufficient means of propelling her through the water. It was evidently designed to be used, as its name implies, namely, as a raft or float. The engine was still working slowly. to prevent the vessel from slipping off the rock, and going down head foremost, as was by all hands momentarily expected. The pumps were also at work, pumping out the forward ballast tank.

The master did not deem it safe or prudent to wait to see what might be the effect of this operation. He appears to have been anxious to get away from the ship as quickly as possible, and urged Mr. O'Brien, according to the testimony of the latter, to "come along quick, and get away in the boats." "The ship will be going down, and be taking us all down in the boats." The mate had, however, determined to take to the raft, with the view of staying by the ship, and "seeing the last of her." He gathered up, he says, a few of his little effects, and, having put them in a bag, came out on deck. At that time he was the only person remaining on board. All hands, the captain included, were "singing out to him to come off, she will be down, and taking us down." The mate jumped upon the raft, which was attached by a line to the stern of the captain's boat, and called for volunteers to come out of the boat, and remain with him on the raft. Two men, the co-libelants, answered to his As the captain was about to put off, he repeatedly urged Mr. O'Brien to come off the raft into the boat; telling him that the ship would go down very soon, that a gale was probably coming on, and that he didn't wish to see him drowned. Mr. O'Brien replied, in effect that he was not scared; that his life was insured for \$3,000, and which his wife would get; and that this was the only chance he had ever had of getting even with the insurance company. He reminded him, too, in rough but expressive seaman's language, of the discredit that would attach to them if any one else should board the ship, and "we be disconnected with her, or ashore." He offered to get into the boat if the captain would come upon the raft and remain by the ship; telling him that he would assuredly come back for him with a boat's crew. To this the captain made no reply. In his deposition the master states that he went upon the raft, and from it got into the boat, at the mate's urgent solicitation, and upon Mr. O'Brien's declaring that he was unwilling, or felt himself incompetent, to take charge of the boat. In this statement he is not corroborated by a single witness.

Mr. Neiman, chief engineer, a witness called by the claimants, testifies that he saw the captain in the second mate's boat with eight or ten men; that he came out of it on deck, and had a short conversation with Mr. O'Brien, and then went into his own boat. This circumstance, though not mentioned by Mr. O'Brien, is also testified to by several of At the time Mr. Neiman saw the captain in the second mate's boat with eight or ten men, all the rest of the crew were still on the ship. The second mate's was the first boat lowered into the water, as it was the first to put off for the shore. The master thus appears to have been among the very earliest to despair of the safety of the ship, and to provide for his own, by taking refuge in the boat. I feel justified in saying that I do not believe that the master was upon the raft, or ever had any idea of going upon it; and I am satisfied that the foregoing account of the circumstances attending the abandonment of the vessel by all the ship's company excepting Mr. O'Brien and his companions is substantially true.

Before proceeding to state the circumstances under which Mr. O'Brien and the co-libelants succeeded in saving the ship, it will be well to narrate, briefly, what befell the boats, and what was done by the master's orders after leaving the ship. When the master bade good-bye to Mr. O'Brien, he promised that, after reaching the shore, he would send a That this promise was made with any intent or expectaboat for him. tion of resuming possession or command of the ship I do not, for a moment, believe. I do not, of course, think that the master intended, after providing for his own safety, to abandon, without any effort, Mr. O'Brien and his companions to their fate. He knew that if the ship went down, as he confidently expected, it would be almost impossible for them to reach the shore, supposed to be one and one-half or two miles distant, on the raft. Common humanity required that he should make some effort to save his first officer, and the men who had devoted themselves to what they thought imminent risk of death, under what he must have considered the fantastic and absurd notion that duty required them to remain by the ship, and "see the last of her," at whatever hazard. captain's boat put off from the ship about 20 minutes after the second mate's boat.

On its way to the shore, the second mate's boat, with a crew, was met. She had landed the men on an island for temporary safety, and was returning to the ship. The island upon which they had been landed was destitute of water or shelter. The captain, therefore, ordered the boat, which was accompanied by some Indians in canoes, to return to the island, take off the men, and make for the main-land. This was effected, the boats being piloted by the Indians, who took on board of their canoes some of the men. The land was reached in about an hour and a half from the time the captain's boat left the ship. The weather was

very cold, snow was falling, and the men were more or less exhausted by their exposure and labor in the boats. A fire was kindled, hot coffee prepared, and, at the expiration of half an hour or an hour, the master directed the second mate to go with a boat's crew to Mr. O'Brien's relief. The men state that the captain gave no orders on this subject, and that the boat put off at their suggestion. Mr. Neiman, however, says that the captain gave the order; but he also states that he suggested that he and the captain ought to go in it. This suggestion was not acted on by the master, for the reason, as he says, that he was frost-bitten, or had chilblains. At this time the ship was not visible from the shore, and the boat soon became lost to sight. She had not proceeded far, when the steamer was descried with sails set, and under way. An attempt was made to overhaul her, but was soon abandoned as hopeless, and the boat returned to the shore. The men were subsequently taken in a steamtug, which the captain had sent an Indian runner to procure, to Seattle, where they were discharged.

I return to Mr. O'Brien and his companions on the raft. At the time the captain's boat started for the shore the raft was lying at right angles to the bow of the steamer, and distant from her some 100 or 150 yards. Observing that the wind was increasing, Mr. O'Brien directed the men to paddle up to the ship, get on board, and endeavor to procure some food, as they had none on the raft. One of the men, by O'Brien's orders, got on board the ship, took what supplies he could find in the pantry, and returned with them, together with a small compass, to the raft. This was done as quickly as possible, as the vessel was momentarily expected to founder or to break up. The man, before leaving the vessel, threw over a line from about amid-ships, which, though not at the time made use of, proved subsequently of great service. After receiving the supply of food, which consisted of two cans of condensed milk, a few apples, and a couple of rolls of butter, the raft was paddled around to the stern of the vessel, and made fast to her log-line.

In the mate's bag was a pair of blankets. One of these was cut up. and made into mufflers. The men were directed to take off their boots, and wrap the strips of blanket around their feet, to prevent their freez-The other blanket was used as a shelter from the snow, which was falling fast. The weather the mate describes as "bitterly cold." This condition of affairs remained unchanged for perhaps two hours, when the mate noticed that the vessel was drifting. His first thought seems to have been that she would immediately founder; but, after watching her for 20 minutes to one-half an hour, and observing that she was not sinking, Mr. O'Brien proposed to his companions to endeavor to get on board of her. The raft was accordingly pulled up under the vessel's counter, and two unsuccessful attempts were made to run a rope to the rudder chains of After resting a little while, an effort was made to board her amid-ships; the men, in the mean time, having been somewhat invigorated by the contents of a small flask of whisky, a part of which they used as a stimulant, and part to rub on their hands. Their first effort was to catch the line that had been thrown over from amid-ships of the vessel. In this they succeeded, and, after hauling up amid-ships of the vessel, Mr. O'Brien endeavored to get on board of her. In this attempt he failed.

The raft was then dropped astern, when Mr. O'Brien observed that the vessel was drifting broadside, towards some rocks which lay on her star-Seeing that no time was to be lost, he determined to make board bow. one more attempt to get on board. The attempt was attended with much difficulty, and not without risk. The line, where it was out of water, was covered with icicles. The side of the vessel was 12 or 14 feet high, and slippery with "frozen snow." He at last managed to climb up her He immediately threw a line to the men on the raft, and, having cut the ship's side steps or ladder adrift, he pulled them over the deck, which was covered with snow to the depth of two or three inches, and put them over the side. The raft was then hauled abreast of the steps, and the men, taking each a line in his hand, jumped, at the mate's order, for the steps, which they succeeded in catching, and clambered on board in safety. Their first care was to get head-sails on the ship, to make her pay off and clear the rocks, which were looming up, and "seemed," Mr. O'Brien says, "to be very close."

While the men were engaged in getting head-sails on the ship, the mate went to the pilot-house, and, having disconnected the steam steering gear, put the helm hard a-port. The vessel immediately began to pay off, and the mate saw, through the rigging, that she was swinging clear of the rock. The raft had, in the mean time, broken adrift, carrying with it all the mate's effects, clothes, books, watch, and chain, etc. Still apprehensive that the vessel might founder, the men set to work to construct a raft or float. The only available material was a small pair of gang planks, two fore and aft fenders, some eight or ten feet long by eight inches wide, and a couple of inch boards. These they lashed together to make a float, which they hoped, if the vessel went down, would afford them some chance of saving their lives. Finding that the ship still kept afloat, and seeing no boats approaching from the shore, Mr. O'Brien "made up his mind that he would try and save the ship."

The sails were trimmed as well as the circumstances permitted, and the vessel's course was laid for the Columbia river, supposed to be distant about 100 miles. About two hours later a schooner was discovered bearing down to them, attracted no doubt by their signal of distress. After some negotiations, the master of the schooner agreed to send three men on board, to be paid at the rate of \$50 per day. With the aid of these men, other sails were set or trimmed, and the vessel resumed her course.

About 5 o'clock P. M. the steam-ship Wellington was descried. A hawser was got up from the hold, taken on board of the Wellington, and the vessel was towed into Esquimalt harbor. She had remained during the passage in the charge of the mate. His crew was composed of two men, who had been with him on the raft, the three whom he had obtained from the schooner, and two volunteers from the Wellington. The vessel reached Esquimalt harbor safely, but from some accident or mis-

management, into the details of which it is unnecessary to enter, but for which the mate is in no way responsible, she was suffered to sink. The mate was aroused in the middle of the night, and he and the crew barely escaped with their lives. He was the last man to leave the ship. When he left her he was up to his waist in water. The vessel was subsequently raised, and restored to her owners.

From the foregoing narrative it will be at once recognized that there entered into the services performed by Mr. O'Brien and his comrades nearly every element which can impart to a salvage service the highest degree of merit. To their interposition the safety of the vessel may almost certainly be ascribed. But for them she would, in all probabilities, have been lost on the rocks towards which she was drifting, and, even had she escaped that peril, she would have drifted out to sea, and been a total loss, or, at best, would have been picked up by other salvors, who would have been entitled to the reward allowed to salvors of a derelict.

No attempt was made at the hearing to disparage the skill, courage, and devotion of the libelants. Their claim is resisted on the ground that, being seamen attached to the ship, their claim as salvors cannot be allowed. That seamen cannot, in general, be admitted to claim as salvors is well settled. The rule is placed by Lord Stowell on the ground that by the seaman's contract it is his "stipulated duty to protect the ship through all peril, and to devote his entire possible service to that end." For this service his only reward is his wages. He admits, however, that, in "the infinite range of possible events, circumstances might present themselves that might induce the court to open itself to the seaman's claim for salvage." The Neptune, 1 Hagg. Adm. 235. The English admiralty courts, although adhering to the doctrine enunciated by Lord Stowell, admit that the seaman may be considered a salvor if his contract be dissolved; and that this may be effected by the final abandonment of the ship, or by the act of the master giving the seaman a dis-The Warrior, Lush. 476.

In America the harshness of the rule laid down by Lord Stowell has been still further mitigated.

In The Two Catherines, 2 Mason, 338, Judge Story observed:

"In my humble judgment, there is not any principle of law which authorizes the position that the character of seamen creates an incapacity to assume the character of salvors; and I cannot but view the establishment of such a doctrine as mischievous to the interests of commerce, inconsistent with natural equity, and hostile to the growth of sound morals and probity."

In *Hobart* v. *Drogan*, 10 Pet. 121, the supreme court, after announcing the general rule that seamen are not, in general, allowed to become salvors, adds:

"We say, in the ordinary course of things; for extraordinary events may occur in which their connection with the ship may be dissolved *de facto*, or by operation of law, or *they may exceed their proper duty*, in which cases they may be permitted to claim as salvors."

v.29f.no.6-17

"When mariners," observes Mr. Curtis, "may be said to have exceeded their proper duty, the legal relation, being still undissolved, is certainly not capable of definition apart from circumstances. There is much intrinsic difficulty in the question." Curt. Mer. Seam. 290.

The observation is just; but I am persuaded that, if the ruling of the supreme court can apply to any circumstances whatever, it must to the case at bar. The question here presented is not that suggested by Mr. Curtis, viz., if extraordinary services, performed by seamen whose contract remained undissolved; for it is claimed that the contract was dissolved by the final abandonment of the ship by the master, and by his urgent and repeated solicitation to the mate to follow his example.

It is not questioned that, to constitute an abandonment by the master, he must have quitted the ship without hope of saving her, and without the intention of returning to and resuming possession of her. master was among the first to despair of her safety, and to provide for his own, cannot be disputed. No one, not even the salvors, appear to have entertained a hope that the ship could be saved. No such expectation, at least in any definite or conscious way, seems to have been the motive of the mate's conduct. He appears to have acted upon a kind of instinctive feeling as to to what it became a loyal seaman to do, viz., to stand by his ship until the very last. The captain now declares that he intended to return to her. His declarations, made after the event, as to his secret intentions, of which he gave at the time no sign, and which did not ripen into any act or effort to effect them, are entitled to but little That he did not intend, after providing for his own safety, to wholly abandon the mate and his companions to their fate may be admitted; but that he had any intention to return to the ship for the purpose of resuming possession and command of her I cannot believe. The captain and crew had reached shore, made a fire, and had warmed and refreshed themselves. A boat did go to the rescue of the mate; but it is not certain that this was done by the master's order, and it is certain that he did not go in it. His sole object, evidently, was to pick up the men who had been left on the raft, if perchance they had not already perished. All believed that she must already have foundered.

But even if the act of the master in quitting the ship should not be deemed to amount to a final abandonment of her within the meaning of the rule, the circumstances under which the libelants refused to abandon her constitute, in my judgment, a discharge by the master of all claim under their contract for their further services. They did not intrust themselves to the raft by the master's direction. They remained by the ship in spite of his urgent remonstrances; almost against his orders. He was unable to impress them with that solicitude for their safety which he evidently felt for his own. They remained by the ship at the imminent risk of their lives, purely as volunteers, when, had they followed the master's advice and example, the ship would certainly have been lost, or drifted off, a derelict, upon the ocean.

If the salvors have not, in this case, "exceeded their proper duty,"—that is, their stipulated duty under their contract,—it is not easy to imagine

a case, short of a formal discharge, where they would be deemed to have done so. To them may be applied, mutatis mutandis, the words of the great chief justice in regard to a similar claim on behalf of a seaman left on board a ship deserted by her master and crew. After adverting to the general rule, which forbids the allowance of salvage to a mariner belonging to the ship which has been preserved, he says:

"The claims upon him, on the ground of contract, are urged with a very ill grace indeed. It little becomes those who devoted him to the waves to set up a title to his further services. The captain, who was intrusted by the owner with power over the vessel and crew, had discharged him from all further duty under his contract, so far as any act whatever could discharge him, and it is not for the owner to revive the abandoned claim." The Blaireau, 2 Cranch, 240.

I may also apply to those salvors the words of the chief justice, in the same case, with regard to the abandoned seaman: "Every principle of justice, and every feeling of the heart, must arrange itself on the side of the claim."

My judgment is that the libelants are entitled to salvage, nor is the allowance to be diminished because, when they determined to stay by the ship, they had no expectation, and but a faint hope, of preserving her. If they have acted, not from any interested or mercenary motive, but from a spirit of loyal devotion to the ship, and to their duty, which forbade them to desert her until she had perished before their eyes, their merit is enhanced on the same principle as that acted upon by courts of admiralty in awarding increased salvage where the services have been rendered, and gallantry displayed, in saving human life. I am fully impressed with the policy and necessity of disallowing the seaman's claim as a salvor when all that he alleges is that the voyage has been more than ordinarily protracted, or that his labors have been exceptionally arduous or perilous. To entertain such a claim, would give rise to endless litigation, and impose upon the courts the impracticable task of attempting to define the precise limits of the seaman's duty under his con-But I am equally persuaded that where the master and the rest of the crew have quitted the ship, renouncing all hope of saving her, and some have remained in spite of his expostulations, and almost his commands, to confront dangers which he declined to encounter, and by so doing have saved the ship, justice, as well as the true interests of owners and insurers, demand that the courts should recognize, as a legal right. the seaman's claim to a liberal compensation for his supererogatory services.

THE WANDERER.1

SMITH, Owner of Norwegian Bark Wanderer, v. Ashley Phosphate Co.

(District Court, E. D. South Carolina. December 10, 1886.)

DEMURRACE—BILL OF LADING—EVIDENCE—AMBIGUOUS WORDS—ADMISSION OF PRIOR CONVERSATIONS TO EXPLAIN.

Libelant's vessel was, while at sea, let by charter-party. By its terms, the vessel, after discharging at A. the cargo then laden, was to proceed to B., there obtain a new cargo, and carry the same to C. The vessel was to pay the cost of discharging cargo, and 15 lay days were stipulated for in which to load and discharge. In unloading at A., and in loading at B., 13 of these 15 days were consumed. Under these circumstances, it was proposed by the shippers of the new cargo, who were the same firm as the original charterers, that three instead of two working days should be allowed for discharging, and that in consideration thereof the ship should be relieved from its obligation to discharge cargo at its own cost, and that the burden should be assumed by the merchant; the vessel's crew, however, assisting therewith. This modification of the contract was in parol. Bills of lading were subsequently made out and signed. The body of the bills of lading contains the words: "All other conditions as per charter-party of August 1, 1886." Upon the margin of the bill there was contained the following clause: "Three working days are left for discharging." At the bottom of the bill there was written these words: "The cargo to be discharged for account of the merchant within three working days, crew to assist, if more time used, demurrage to be paid as per charter-party." Held, that the written words upon a printed document give rise to an ambiguity which authorizes the admission of the parol agreement, and that, in the light of this testimony, the meaning and use of the words are explained, and that the consignee, to whose order the bills of lading had been assigned, must pay the cost of discharging the cargo.

In Admiralty. Libel in personam for freight.

A. G. Magrath, for libelant.

J. N. Nathans, for respondent.

Simonton, J. The libelant claims \$246.56 freight of a cargo of kainit delivered to respondents, holders of a bill of lading therefor. Respondents admit the amount of freight earned, but claim to have paid the sum of \$129.25 for discharging the cargo, which sum they allege should have been paid by the ship, and therefore must be deducted from the freight. They pay into court \$117.31, the difference between \$246.56 and \$129.25. The question made is, by whom must the cost of discharging cargo be paid, the ship or the merchant? No question is made as to the reasonableness of the amount charged for discharging cargo.

FINDING OF FACT.

On August 1, 1885, a charter-party was made between the agent of the Wanderer and the firm of Hermann & Theilnehmer, of Stettin, whereby it was agreed that the Wanderer, then on her passage to Stralsund, should, after discharging cargo at Stralsund, load at

¹ Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

Stettin a cargo of manure salt, (kainit,) therewith to proceed to Charleston, South Carolina; freight, eight shillings sterling for every ton of 20 hundred-weight, English, taken on board; the freighter to pay all dues and duties on cargo, and the ship all other charges; the cargo to be brought to and taken from along-side at merchant's risk and expense; 15 working days altogether to be allowed the mer-

chant for loading the cargo and discharging the same.

Under this charter-party, the Wanderer, having arrived at Stralsund, and having discharged cargo, proceeded to Stettin, and was ready to receive cargo as in charter-party. When this was completed, it was found that 13 of the 15 days which were allowed for loading and discharging cargo had been consumed. Some parley took place between the parties, which will be alluded to hereafter, and bills of lading were signed by the captain in the office of the charterers. These bills of lading were filled out by some one, presumably a clerk in their office; but it does not appear whether either of the members of the firm, the charterers, was present at the time.

The bills of lading are partly printed and partly in writing. follow the terms of the charter-party in all but two respects. refer to the charter-party, and confirm it. They are between Hermann & Theilnehmer, the charterers, and the captain of the Wanderer, and they are to order. They vary from the charter-party in these particulars: Upon them, in writing, is inserted the provision for freight as is stated in the charter-party, eight shillings for every intaken ton, omitting the provision that the ton should be 20 hundredweight, English, and closing with these words: "All other conditions as per charter-party of first August, 1885." On the margin are written these words and figure, "(3) three working days are left for discharging;" and at the bottom of the bills, above the signature of master, are these words: "The cargo to be discharged for account of the merchant within three working days, crew to assist, if more time used, demurrage to be paid as per charter-party." The punctuation is as in bills. The bill of lading held and produced by respondent is indorsed in blank by Hermann & Theilnehmer.

The Wanderer arrived at Charleston. The respondents claimed the cargo. The question was at once made at whose expense the cargo should be discharged. The master of the Wanderer refused to bear the expense. The respondents, protesting that he should do so, and waiving no right, employed a stevedore, had the cargo discharged,

and paid the bill, \$129.25.

CONCLUSION OF LAW.

The contract under which this cargo was carried is to be found in the charter-party and in the bill of lading. Whatever verbal agreement or understanding preceded each of these written instruments, when they were reduced to writing they expressed the contract, and to them we must look for it. The charter-party and the bill of lading are between the same parties. The bill of lading, signed by the master of the Wanderer, is to the order of the same firm who are the charterers. Whatever doubt there may be in the testimony whether Hermann & Theilnehmer, or either of them, were present when the bills of lading were made out and signed, or whether the clerk who filled them out acted as the agent of that firm or of the master, the firm accepted the bills of lading; acted on them; by their indorsement, when deliverable to order, adopted and confirmed them. The respondents hold title, under this indorsement, of an unnegotiable instrument, and hold as that firm held. The charter-party by its terms provided that the cargo was to be discharged at the cost of and by the ship; "the freighter to pay all dues and duties on cargo, and the ship all other expenses;" "the cargo to be brought to and taken from along-side at merchant's risk and expense."

Was this contract changed in any of its terms afterwards? There can be no doubt that parties to a written instrument,—a contract,—complete in all its parts, may afterwards, on sufficient consideration, vary its terms even by parol; that such parol contract can be set up and proved; that, unless it come in conflict with the statute of frauds, it would be enforced. An effort in this case has been made to prove a parol contract varying this written contract; but, as the bill of lading was prepared after the colloquium offered in evidence, and then the will of the parties was reduced to writing, we cannot look beyond

the bill.

Did the bill of lading change the contract of the charter-party? The first change, omitting the "twenty cwt. English," is unimportant. What of the other words, "the cargo to be discharged for account of the merchant within three working days, crew to assist, if more time used, demurrage to be paid as per charter-party?" If these words made a change in the charter-party, they would not be affected by the preceding words in the first alteration, "all other conditions as per charter-party of first August, 1885." The words we are now considering occur in the same instrument, are in writing and not print. They occur in the latter part of the instrument. It would seem that the parties to this bill of lading realized that some change may have been made by it in the terms of the charter-party, for they expressly exclude the idea that the demurrage provided in the charter-party was changed: "If more time be used, demurrage to be paid as per charter-party."

Now, what change was made? As we have seen, the charter-party provided that the cargo should be taken in and be discharged in 15 working days, and also that the expense of discharging should be borne by the ship; the cargo "to be taken from along-side at expense and risk of the merchant." The bill of lading says: "The cargo to be discharged for account of the merchant within three working days, crew to assist." Whom? The ship? Is this not within the scope

of their employment? Then why insert it? And what place has it in a contract with a third party? The words themselves have a clear, definite meaning. They raise a question only because of the circumstances around them, the other words connected with them, their place in the bill of lading, that they are in the bill of lading, that they are written upon a printed document. Thus an ambiguity exists which calls for explanation.

Mr. Greenleaf, discussing the rule as to the admissibility of parol evidence upon the subject-matter of written instruments, says: "Where the agreement in writing is expressed in short and incomplete terms, parol evidence is admissible to explain what is per se unintelligible, such explanation not being inconsistent with the written terms." Section 282. So, again, section 288a: "Previous conversations between the parties may be shown, when that becomes important, to show in what sense subsequent writings passing be-

tween them were understood." (Redfield's Ed.)

Applying this rule, and admitting this testimony, it appears that, while the ship was at Stettin, the 15 days allowed in the charter-party for loading and discharging cargo had almost expired; that in fact but two days remained. This exposed the charterer to demurrage at a rate of about eight pounds per day. In this condition of things it was proposed that three working days should at all events be allowed for discharging cargo; that, in consideration of this indulgence, the ship should be relieved from its obligation to deliver cargo entirely at its own cost, but that the crew should assist in this discharge,—the burden, however, being assumed by the merchant. In order to carry out this, these words were added to the bill of lading,—words inconsistent with the charter-party, and calling for explanation. In the light of this testimony, the meaning and use of the words are explained.

It is ordered and decreed that the respondent pay to the libelant the sum of \$246.56, and costs of this suit, and that the amount paid

by them into court be credited on this sum.

THE SARAH E. KENNEDY.1

McCarthy and others v. The Sarah E. Kennedy.

(District Court, D. New Jersey. November 10, 1886.)

 SEAMEN—WHO ARE—WAGES—LIEN—LABORERS CLAIMING AS MARINERS.
 While there exists an undoubted tendency to extend to all persons, when necessarily and properly employed as co-laborers on a vessel for the purposes of the voyage, the privilege of mariners, and while, subject to this qualification, the rule is independent of sex, character, or profession, it would be inequitable and unjust to extend the rule, by implication, to laboring men hired by the freighter, and not by the vessel, whose contract was solely with the former, and to whom the latter was a stranger, and whose only material connection with the vessel was that they were transported in her as passengers to the port of destination for the purpose of excavating cargo. The circumstance of their having, during the passage, of their own motion, rendered occasionally slight and immaterial assistance in working ship, cannot be used as a pretext when from the evidence it appears that the vessel was provided with a full complement of officers and men.

2. Same—Pleadings and Proofs—Variance.

While, from the evidence, it is possible that the libelants might, perhaps, have had a claim as salvors or lighter-men, it is unnecessary, under the pleadings, to consider the question. The libelants, having claimed as mariners, must recover, if at all, in that capacity.

In Admiralty. Libel in rem by laborers claiming a lien upon the vessel for the payment of their wages.

John Griffin, Jr., for libelants. Owen & Gray, for claimants.

Wales, J. The libelants, 13 in number, sue for seaman's wages, and their libels have been consolidated. Their services are alleged to have been rendered on board the brig Sarah E. Kennedy. The brig belonged to Somers Point, New Jersey; and while lying at the port of Baltimore, on the seventeenth of July, 1885, was chartered by Daniel Walters, her master and agent for owners, to Charles Smedley for a voyage from the last-named port to Arenas Key, a small island in the Gulf of Mexico, and back to Hampton roads for orders not east of New York. By the terms of the charter-party, Smedley stipulated to provide and furnish to the vessel a full and complete cargo, under deck, of guano in bulk for the homeward voyage, to carry out men and materials, to gather cargo, and bring men back, to furnish a steward, provisions, take entire care of the men, and to load materials, etc., free of expense to the vessel. He was to pay the master or agent, for the use of the vessel during the voyage, at the rate of four dollars per gross ton for each ton delivered, and deliver the guano along-side at Arenas Key at his own expense. Twenty-five days were allowed for loading and discharge; and for each day's detention by default of the charterer, he was to pay \$48. Performance of the con-

¹Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

tract by Smedley was guarantied by third parties. The brig had her own master, and a full complement of officers and crew, with an ample supply of provisions for their separate use. The libelants, each for himself, by written agreement, engaged to go with Smedley to the island "for a cargo," in consideration of wages varying from fifteen to twenty dollars per month, and found, "and to be under orders, and work diligently as he may direct." The brig was to sail on the twenty-first of July, but did not get off until the twenty-seventh. Smedley

accompanied the men.

Nothing unusual occurred on the outward voyage until the island was sighted, on the twentieth of August, at about 7 P. M., when the brig ran on a coral reef or bar, and all hands on board, including libelants, went to work throwing over ballast. The tide was low, but rising, and, after 15 or 20 tons or more had been thrown over, and the top-sails backed, the vessel floated, in about an hour after she had struck, and without damage. The weather was calm. The brig put to sea, and the next day came to anchor off the island. On the 22d. the master notified Smedley that he was ready to discharge supplies and receive cargo. Sunday intervening, the libelants did not get to work until the 24th. They were quartered on the island during the time of loading the vessel, digging out and carrying the guano alongside in scows, from which it would be hoisted on board by the crew. The libelants continued at this work until the fifteenth of September. when, in consequence of a rumor that the water on the brig was falling short, they refused to work any longer, but were prevailed on by the united efforts of Smedley and the master to bring off two more loads in order to trim the vessel; and on the evening of that day the brig sailed on her return voyage, touching at Hampton roads for orders, and arrived off Jersey City on October 15th. The libels were filed four days afterwards.

The libelants were landsmen. Only two of them had been at sea before,—one as a fireman, and the other as a passenger or cook. On the voyage out and back, Smedley, with some of his men, would occasionally assist at the windlass, and at the braces when the vessel was tacking, but they never went aloft, stood watch, or steered. At the time of signing the charter party, Smedley agreed to let the master have the use of the men when he wanted it, but the master says he never called on him for assistance. He had seen Smedley and his men take hold of the windlass and help heave; had seen them catch hold of the braces, and help pull round sometimes; but that most of the men never did anything at all. McCarthy, one of the libelants, says that he helped any time "he was asked,—not every day, but when he was up out of the hold."

The cargo was sold for \$3,300. The master's claims for freight, demurrage, etc., exceeded this sum, and he and Smedley had some kind of a settlement in the office of Lister Bros., the purchasers of the guano, in New York. Smedley received \$400, with the under-

standing, on his part, that out of the balance the master would pay his own claims, and the wages of the libelants. The master denies that he made any such promise. He and Smedley flatly contradict each other, and the only reliable testimony on this subject is that of Mr. Post, a lawyer, who was present at the time the \$400 were paid to Smedley. This witness says that the master's claim was in excess of the value of the cargo, and that, "in making up the statement upon which the settlement was effected, it was stated that this libel had been put upon the vessel. It was part of the settlement that the captain should take care of the claim of these libelants. either by resisting and defeating it in the court, or by satisfying it if a judgment should be obtained." The defense is that the libelants did not sign shipping articles as seamen, and did not in fact render any services as such: that they were not employed by the vessel as laborers, but contracted to work on the credit of Smedley, and not on that of the brig or cargo; and that the slight and occasional help contributed by them in working the ship was entirely voluntary, and not of such character and importance as to give them a maritime lien.

It is contended for the libelants that they are entitled to payment for services rendered, as seamen, or as salvors, or as stevedores. But this contention is founded on the evidence, and not on the allegations contained in the libels, which omit any mention of claims for salvage or for loading the brig. The libelants must recover, if at all, as seamen, secundum allegata et probata. The Boston, 1 Sum. 331, where it was held not sufficient that there are facts proved which might have a material bearing, unless there are allegations suited to bring them, as matters of plea and controversy, before the court. See, also, Admiralty Rule 23, and Ben. Adm. § 401. The only question, then, is, can these libelants recover, under the head of seamen or mariners, on the law and the facts of the case. The solution of this question will govern the decree of the court.

The main proposition in support of the affirmative is that "all the persons who have been necessarily or properly employed in a vessel as co-laborers for the great purpose of the voyage, have by the law been clothed with the legal rights of mariners,—no matter what might be their sex, character, station, or profession." Ben. Adm. § 241. And the cases chiefly relied on to sustain and illustrate this rule are The Ocean Spray, 4 Sawy. 105; The Highlander, 1 Spr.

510; The Canton, Id. 437; The Minna, 11 Fed. Rep. 759.

In The Ocean Spray, 30 Indians were shipped by the vessel, at Victoria, to go to the northern waters to take seal, "and to lend a hand on board whenever they were wanted," for \$30 per month, until they returned to Victoria, where they were to be paid off and discharged. During the outward voyage, when head winds prevailed, they helped to reef and make sail, heave the anchor and clear decks, but did not stand watch. They were also employed in procuring

drift-wood and water for the use of the vessel, and were under the control of her officers. Judge Deady, in an able opinion, decided that, even if the libelants shipped and served as sealers only, they ought to be deemed mariners, as they were certainly co-laborers in the only purpose of the voyage,—the taking of fur seal,—and that the sailors on the schooner only contributed to this purpose by nav-

igating her.

The Minna was a tug employed in fishing; her crew consisting of a master and engineer. The libelant took no part in navigating the vessel, but was employed solely as a fisherman. His contract required him to go out every day, to set and lift the nets, clean the fish, discharging the catch, and reeling the nets on shore. He also lodged on shore at night. It was there held, following the rule in The Ocean Spray, and in Ben. Adm. § 241, that all hands employed upon a vessel, except the master, are entitled to a lien if their services are in furtherance of the main object of the enterprise in which she is engaged.

In The Highlander, the services of divers and wreckers on board of a sea-going vessel were held to be maritime, and therefore a lien. In that case the libelants were all regularly shipped by the vessel, and some of them were expressly required to take part in her general

management.

The Canton presents the case of persons employed to load, navigate, and unload a vessel plying principally between Quincy and Boston, for the transportation of stone, in which it was decided that when the contract of service is for the navigation of tide-waters, and laying stone in wharves is merely incidental and subsidiary to the prin-

cipal business, the whole service may be maritime.

These decisions are not open to criticism under the particular facts on which they were made, and the general principles declared in them may be fully approved; but they are distinguishable from the case at bar in two important elements, if not more. In the cases cited, the libelants were employed by and upon the vessel; their services were directly given to the vessel; and, in The Ocean Spray, the vessel was expressly bound for the wages. In the present instance the men were not shipped by or engaged to work on the brig. Their contract was with Smedley, and was made independently of the vessel. They were at no time under the control of her officers, and it is not pretended that whatever service they may have performed on the vessel was given in obedience to orders, or otherwise than voluntarily. They were neither skilled as seamen, wreckers or divers. stevedores or fishermen. They were common laborers, and contracted to go out to the island as such, with the exception of one or two, whom Smedley had hired, as rough carpenters, to build the scows. They went out and returned as passengers. The work done by them was for Smedley, and on his credit, and not for the brig, or on her credit, or on that of the cargo; and it would be extending the doctrine of co-laborers too far to include their services under that head.

There is no evidence of any imposition on the libelants by the master or officers of the brig, in taking advantage of their ignorance, and endeavoring to use their labor without compensation. If they had been inveigled on board as passengers, or on the pretense of being carried out as landsmen to work on shore for a third party, and had been compelled to do duty on the vessel, they would have a just and legal claim on the owners. But there is no evidence that any fraud or deceit was practiced on them. Their labor was all on shore, and not on the vessel. Smedley was not even the owner pro hac vice. His contract was one of affreightment, though styled a charter-party. They gave credit to him personally, and were not deceived by the master or agent of the owners; and, though their situation may be a hard one, entitling them to sympathy, a maritime lien, being stricti juris, cannot be intended by implication or construction for their benefit.

The Ole Oleson, 20 Fed. Rep. 384, has a suggestive resemblance to the present case. There, the intervenors sought to obtain a share of the proceeds arising from the sale of the vessel, on the ground that they had rendered maritime services. They had been employed as stone pickers by the master, who was also managing owner, to gather stone on the shore of Lake Michigan, at or near Alpena, and to assist in loading the stone on board as cargo to be carried to Chicago. While engaged in this service, they lived and slept on the vessel as she lay off shore; and when the weather was such that stone could not be gathered, the schooner would run into Alpena, and the intervenors would then lend a hand in hoisting sail. But they did not accompany the vessel on her voyages, and were not employed as seamen, the vessel having a full crew without them. It was not insisted that the men were seamen, but that their services were of a maritime nature, and entitled to a lien. Judge Dyer, while giving his approval to The Canton, The Ocean Spray, and The Minna, says the intervenors were mere landsmen, procuring cargoes on shore, and assisting in loading them. In a general sense, their services were in furtherance of the vessel's employment, but not more so than the services of stevedores, who, as he understood the authorities, were not entitled to a lien, though as an original question he thought otherwise.

Conceding, however, that under recent decisions a stevedore is entitled to a lien, the libelants in the present case did not act as stevedores. Their work ended along-side of the vessel. The guano was hoisted on board, and stowed by the crew. They might, perhaps, have had a claim as lighter-men had they been employed by the brig in that capacity, (Ben. Adm. 284;) but being restricted, as we have already said, to the allegations of the libels, we find nothing in them to warrant a decree for that service. Their claim is that they hired on board the brig as seamen on the credit of the vessel and cargo, as

well as the owners and charterer, and that, during the whole of the voyage they were obedient to the lawful commands of the master and Smedley. The evidence does not bear out this claim; and, under the pleadings and on the facts proven, the brig is exempt from lia-

bility.

This conclusion makes it unnecessary to consider the claims for damages for a shortage of provisions and general bad treatment during the voyage, because the owners were not responsible to the libelants on account of these charges, even were they true. Neither can the owners be held responsible for the alleged undertaking of the captain to pay the libelants out of the proceeds of the sale of the cargo. The latter undertaking, had it been made, being without the scope of the captain's authority, could not bind the owners. The Norman, 28 Fed. Rep. 383.

The libels must be dismissed.

THE G. BARBER.1

STEVENS v. THE G. BARBER.

(District Court, W. D. Michigan, S. D. August 6, 1885.)

SALVAGE—SERVICES RENDERED AT THE REQUEST OF CONTRACTOR—KNOWLEDGE

OF AGREEMENT—EFFECT OF.

One who declines to assist a stranded vessel when requested by her master, but who subsequently, without any such invitation, joins in the undertaking at the request of one who, for a fixed price, has undertaken the work, with a full knowledge of the relations of the parties, and the terms of their agreement, must look to the contractor, and not to the vessel or her proceeds, for payment.

In Admiralty. Libel in rem for salvage. Crinckshaw & Grier, for libelants. M. C. & A. A. Krause, for respondents.

WITHEY, J. The libel in this case is for the recovery of salvage performed by the tug Joseph H. Martin, of Charlevoix, upon the schooner G. Barber, while a wreck on the beach near Leland, on the west shore of Lake Michigan, in this district. The services were rendered in June and July, 1884, for which \$560 are claimed. Andrew Holmand, master and managing owner of the schooner, has appeared and answered, setting up as a defense that libelant's services were not performed at the instance or request of either the master or owners of the vessel, but at the request of Eli Toulouse, who undertook to rescue the wreck, and take her into port, for a title to one-half of the vessel, and that libelant, at and prior to the time of the alleged services, had notice of such contract

Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

undertaking. The answer also states, by way of demurrer, that it appears on the face of the libel that libelant is the owner of but one-half of the tug J. H. Martin, and therefore cannot maintain the suit by reason of the non-joinder of the other owner. I shall dispose of the case on other grounds than the non-joinder of the owners as libelants.

The matters set up in the answer as a defense to the merits of libelant's claim of a lien are fully sustained by the evidence. There is no dispute as to whether the services were rendered, nor as to their value. schooner went onto the beach in April, 1884. No effort was made to relieve her until June, when Capt. Holmand applied to libelant to go with his tug to her rescue, which he refused to do. Libelant says in his testimony that the reason of his refusal was he did not know the condition the vessel was in, was not acquainted with Capt. Holmand, and was unwilling to go to work without a guaranty of payment. The captain then applied to Capt. Eli Toulouse, of the tug Payne, of Charlevoix, and offered him title to one-half of the schooner if he would release and take her into port. Toulouse finally accepted the terms, and entered upon the undertaking. He left Charlevoix for the wreck, and, at Leland, sent, June 11, 1884, a telegram to the tug Martin at Charlevoix to come that night to the schooner Barber with 100 oil barrels. Libelant received the dispatch about midnight, and at once proceeded to take on the barrels where the dispatch indicated they would be found, and conveyed them to Leland. Here they were received by Toulouse, and the Martin returned to Charlevoix. A short time subsequent to freighting the barrels, the tug Martin was taken by libelant to the wreck, at the personal request of Toulouse, and there engaged her in dredging a channel to where she lay on the beach. Before completing such work libelant returned with his tug to Charlevoix to tow out vessels, but soon sent back the tug in charge of another captain, with Toulouse and a double crew upon her, and renewed with her the work necessary to rescue the wreck. On this occasion the vessel was moved into deeper water about 20 feet, but she settled down, her bottom resting on the sand, her decks under water to her forward hatch.

Capts. Holmand and Toulouse were present, as they had also been on the previous occasion, assisting in the work. It appears to have been the opinion of both that the vessel would not float in her then condition, and Toulouse expressed a determination to abandon his undertaking, and remove from the wreck his barrels. He even made an attempt to accomplish this; but some objection being made by Capt. Holmand, and it being suggested that additional barrels ought to be procured and further effort be made to float the schooner, Toulouse concluded to, and did return to Charlevoix with the tug Martin and crew, without any definite understanding of what further would be done. After waiting at Leland for about 10 days, without hearing from Toulouse, Capt. Holmand went to Frankfort, and engaged the owners of the tug Hall of that port to go to work to rescue the vessel. On his return from Frankfort he met Toulouse, on his way to the wreck for his barrels, and informed him of the engagement of the Hall. Toulouse was dissuaded from his purpose of

abandoning the wreck, requested Holmand to wire the Hall to come to the wreck at once, which she did, and in a few hours the schooner was affoat. Capt. Holmand then offered Toulouse, in case he would pay the charges of the Hall, and take the vessel into port at Charlevoix, to carry out the contract, and convey to him one-half of her. To this Toulouse consented, and the Payne towed the vessel into port.

Capt. Holmand, within a short time, caused to be conveyed to Toulouse half of the schooner, and proceeded to make repairs on her at a cost of about \$1,000, occupying about three months in fitting her up, when she was employed in freighting. Subsequently, some time during the following winter, I believe, she was libeled by the owners of the tug Hall to enforce a lien for salvage, which service Toulouse had neglected to pay. A decree has been rendered in their behalf, and the vessel has been sold for \$982, which sum is now in the registry of the court.

At the time the schooner was towed into Charlevoix, before the repairs were made, she was of the value of not more than \$300. When fully repaired, her value was about \$1,300. Capt. Holmand paid for the entire cost of the repairs, except twenty or thirty dollars paid by Toulouse. The sum decreed in favor of the owners of the tug Hall is \$245. Capt. Holmand is sole claimant before the court for the remnant, which will be considerable less than he expended on repairs subsequent to the time the claims accrued for salvage.

Such being the substantial and material facts of the case, it appears that Capt. Toulouse had a definite and explicit bargain with Capt. Holmand to release the wreck for title to one-half interest in her, and that libelant knew of such bargain, and assisted in the work at the special instance and request of Toulouse, having previously refused to go to It is manifest, under the work on the credit of owners or of the vessel. facts, that Toulouse would have no action in rem, and I think it equally manifest that libelant cannot maintain an action in rem against the ship. for the reason that the maritime law gives no lien in such case. incumbent on the claimant to show that there was a definite bargain with Toulouse as to the compensation he was to receive, but this he has done. There is no foundation for claiming that libelant understood that he was rendering assistance at request of the master of the vessel, or for saving that he understood his work was being done upon the credit of the vessel or of her owners. His refusal to work on her without first being secured. and subsequently assisting at the request of Toulouse with notice of the latter's undertaking, without any conference whatever with Capt. Holmand on the subject, renders it quite clear to an impartial mind that libelant had no such understanding.

A reward for salvage is not generally participated in by those who fail to effect a rescue, if they voluntarily and without justification abandon the wreck; and, when compensation is awarded, it is usually a share of the property rescued, and nothing more. In which case, if libelant's claim was enforceable, as the value of the rescued ship was but \$300, this would be the compensation, at most, to be shared between all the salvors. The evidence shows that libelant made no claim upon Capt.

Holmand or the vessel until after the repairs were made, though they were made at Charlevoix, where libelant resided, and employed his tug in towing vessels in and out the harbor, and not until half the vessel had been conveyed to Toulouse in fulfillment of the contract made with him. All the facts go to defeat all claim of justice and equity on the part of libelant. Any other view than that I have expressed would give to one so disposed, who contracts to relieve a vessel in distress for a definite price or specific payment, power to do great wrong to her owner. The owner, Capt. Holmand, and his original co-owner, are not liable in personam, under the facts presented by the evidence; whereas Toulouse manifestly is liable, and there would be barefaced injustice to allow libelant, upon the plea of a claim for salvage, to take funds belonging to the claimant, Holmand, by decreeing a lien against the ship for a debt owing by Toulouse, and by him only.

The usual decree will be entered, in accordance with this opinion, dismissing the libel of Hiram S. Stevens, and for costs in favor of claimant against libelant and the stipulators.

THE CLOUD.1

BERGANTZ and others v. THE CLOUD.

(District Court, E. D. Pennsylvania. December 8, 1886.)

SALVAGE-TUG AT WHARF ON FIRE.

A tug took fire while tied to a wharf. While the fire was burning, and the firemen on shore were trying to put it out, the tug got loose, and was in danger of escaping beyond the reach of the firemen. Libelants secured the tug, made her fast, and aided in extinguishing the fire. Held, that they had rendered a salvage service, and were entitled to compensation.

In Admiralty.

Theodore Etting, for libelants.

Flanders & Pugh, for respondent.

BUTLER, J. In view of the proofs, it must be held that the libelants rendered a salvage service. It is clear that they tied up the tug, which had become unfastened, with no one on board, and was so near the outer end of the dock as to be in some danger of escaping, or passing beyond reach of the firemen on shore; they also did something towards extinguishing the fire, and preventing her destruction. The services were not hazardous, nor of great value, and occupied but little time. They must be compensated accordingly. I believe the sum of \$75 will be a sufficient and fair compensation, and this sum is allowed. A decree may be so entered.

Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar,

Young v. Merchants' Ins. Co. of Newark, N. J.

(Circuit Court, D. South Carolina. December 10, 1886.)

- 1. Removal of Causes—Costs—Witnesses Subfœnaed after Petition Filed.

 Where a cause is removed from a state court to a federal court, on the ground that it is a controversy between a citizen of the state where the action is brought and a corporation created under the laws of another state, the state court loses jurisdiction immediately upon the filing of the petition for removal; and costs for witness fees in the state court for witnesses subpœnaed thereafter will not be allowed.
- 2. Same Witnesses Attending to Give Depositions Depositions Issued from State Courts not Used Commissioners' Fees Number of Commissioners.

Where a cause is removed from a state court to a federal court, costs of witnesses attending at the taking of depositions issued out of the state court will be allowed if the depositions were issued before the removal of the cause, even if they were not used, because of the presence of the witnesses, or because the facts testified to were admitted at the trial. The fees of three commissioners for taking the depositions will be allowed, if the defendant against whom the costs are taxed assented to that number being employed; if not, the costs of but one will be allowed.

8. WITNESS—MILEAGE AND PER DIEM.

All parts of the state of South Carolina are within the jurisdiction of the United States circuit court for the Eastern district of South Carolina; and per diem and mileage will be allowed witnesses attending at a trial in that court who come from the Western district of that state, no matter what the dis-

tance.

4. Same—Attendance on Court in Another Action—Double Fees,
Witnesses will not be deprived of their per diem and mileage by the fact that
they were in attendance on the court in another cause between different parties, and received per diem and mileage therefor.

5. Same—Number of Witnesses on Each Issue—Gen. St. S. C. § 2192.

Under Gen. St. S. C. § 2192, mileage and per diem will be allowed for but three witnesses to each issue raised in the action in which they are subpornaed.

6 Same—Fees, how Calculated—Point Admitted, on Which Witnesses are Called—New Trial.

Witnesses subpænaed to testify to a particular point will be allowed mileage and per diem up to the admission of their testimony, although the other party admits at the trial the point to be proved by such witnesses, and a second trial being had and no stipulation or entry made on record that the point would be admitted at such second trial, such witnesses will be allowed per diem and mileage for attendance at that trial also.

7. Same — Witnesses not Demanding Prepayment — Obligation of Party Summoning—Taxation.

Witnesses do not lose their right to mileage and per diem by not insisting upon prepayment; and the party summoning them, being bound to pay such mileage and per diem, may tax them in his costs.

8. Same — Witnesses Subprenaed and Present — No Trial — No Notice to Witnesses.

Where a cause was on the docket, and could be tried at a term of court at which it was not tried, and before learning that the trial would not take place, a party summoned witnesses whom he was not able to notify that the trial would not be had, such witnesses, attending court, are entitled to their mileage and per diem.

On Motion to Tax Costs.

De Bruhl and Mitchell & Smith, for plaintiff.
v.29f.no.7—18

H. R. Jackson, Jr., for defendant.

Simonton, J. This is a question of taxation of costs, coming up on review of a taxation by the clerk of this court. The action was on a policy of insurance. It was originally brought in the circuit court of South Carolina, sitting for the county of Abbeville, and was removed into this court, the controversy being between a citizen of South Carolina and a corporation created under the laws of the state of New Jersey.

The first question is as to costs incurred in the state court. As we have seen, the action was commenced in the state court. A petition for removal, with every formality required by law, was filed on seventeenth October, 1884, to the first term at which the case was triable. The case was within the act of congress. The state court had no power to refuse the removal, could do nothing to affect the right of removal, and its rightful jurisdiction ceased co instanti. Dill. Rem. Causes, (3d Ed.) 92. Every subsequent exercise of jurisdiction was null and void, and every step coram non judice. Dill. Rem. Causes, (3d Ed.) 93, note; Steam-ship Co. v. Tugman, 106 U. S. 122; S. C. 1 Sup. Ct. Rep. 58. Nor is the adverse party entitled to notice of the time and place of presenting the motion. Dill. Rem. Causes, (3d Ed.) 92, note 2. This being the case, all costs taxed for witnesses in the state court on subprena issued, as is admitted, after seventeenth October, 1884, are disallowed, and all costs of the clerk and sheriff after that date are not chargeable on defendant.

The action having been removed, and motion to remand having been refused, was tried in this court, April term, 1885, and resulted in a verdict for the plaintiff, which was set aside. It was tried again at April term, 1886, resulted in a verdict for plaintiff, and a motion to set aside the verdict was refused.

The witnesses resided more than 100 miles from the place of trial, but were residents in South Carolina, in the county of Abbeville, for the most part. Abbeville is in what is known as the Western district of South Carolina. The place of trial was at Charleston, in what is known as the Eastern district. All, or nearly all, of the witnesses on the first trial were also witnesses under subpena in another cause between the same plaintiff and another insurance company, known as the Farmers' Insurance Company, and were paid per diem and mileage. The number was 13 in all. At the trial in April, 1885, when witnesses were called as to the value of the property, the defendant's attorney admitted as proved the testimony they were prepared to give, and they were not examined. Thirteen witnesses were present under subpena. There is no evidence that plaintiff has paid them their per diem and mileage. The clerk has taxed up as costs per diem and full mileage for those witnesses.

The first objection taken by defendant is that mileage cannot be taxed for witnesses who reside more than 100 miles from the place of trial,—certainly for not more than 100 miles going, and the same number returning. Mileage can be charged in every instance in which a subpœna

can be issued and enforced. The subpoena can be used to compel the attendance of a witness, if he lives within the jurisdiction of the court out of which it is issued, or, if he be without the jurisdiction, if he live within 100 miles of the place of trial. Dreskill v. Parish, 5 McLean, 241; Anon, 5 Blatchf. 134; Spaulding v Tucker, 2 Sawy. 50. All parts of the state of South Carolina are within the jurisdiction of this court. Its process runs all through the state. It does not know, in the sense which affects its jurisdiction, either the Eastern or Western district. This objection is overruled.

That any or all of the witnesses examined in this action in April, 1885, were also in attendance on the court in another cause, not between the same parties, and that they have been paid for such attendance, cannot deprive them of their right to per diem and mileage in this case. If they were under subpœna to testify in this case, and so came and attended, they have earned their compensation. Parker v. Bigler, 1 Fish. 285, quoted by Desty, Fed. Proc. 445. This exception is overruled.

Although 13 witnesses were examined, the plaintiff cannot tax per diem and mileage for more than three to each issue. Bussard v. Catalin, 2 Cranch, C. C. 421; Gen. St. S. C. § 2192. The clerk will reform the

taxation, if need be, to conform to this rule.

Where issue has been joined, and the points in controversy fixed, it is the duty of the plaintiff, or the party on whom is the burden to summon his witnesses, to have them present to testify. If at the trial the other party admit the particular points to be proved by such witnesses, they, nevertheless, are entitled to per diem and mileage,—that is to say, their per diem up to the admission of their testimony. They cannot get per diem for any day afterwards during which they may attend the trial. To this extent this objection is overruled.

It is also claimed that no per diem or mileage can be taxed for witnesses, unless it be shown that such witnesses have been paid by the party who subprenaed them before or at the trial. The case of The Highlander, (Betts, J.,) 19 How. Pr. 334, quoted in 4 Ben. 358, is cited. The true rule is this: The per diem and mileage of a witness cannot be taxed in the costs of the judgment, unless the witness himself claims this compensation. Clark v. Linsser, 1 Bailey, 190. He can demand them before he obeys the subprena. He does not waive them by not insisting upon prepayment. Having made his demand before judgment entered, the party summoning him is bound to pay them, and being so bound he can tax them up in his costs. The per diem and mileage of all witnesses who, under this opinion, are entitled to them, and who have presented and proved their claims, can be taxed in this

At the second trial in April, 1886, nine witnesses attended. Some of these were subprenaed to testify as to points admitted on the former trial. All of them lived more than 100 miles from the place of trial and in this state. No stipulation or entry was made on record that the facts admitted on the first trial would be admitted on the second trial, nor was any assurance, verbal or otherwise, given to this effect. The

plaintiff was bound to prepare and prove his case. The per diem and mileage of these witnesses, subject to the rule that but three could be

used for each issue, can properly be taxed.

Between the first and the second trial this court met in Columbia, in November, 1885. The cause was on the docket, and could be tried. The plaintiff's attorney learned before court met that there would be no trial, and was able to inform all but two witnesses. These attended that court. They are entitled to mileage and per diem.

Certain depositions were taken in the cause, de bene esse, issued out of the state court. If these were issued before petition for removal, costs of witnesses attending them can properly be taxed, even if the depositions were not used because of the presence of the witnesses who were thus examined, or because the facts testified to by them were admitted. Otherwise, they cannot be taxed. The fees of three commissioners are also charged. Three were unnecessary, unless the defendant assented. If he did not so assent, and if the depositions were issued before petition for removal was filed, let the costs of one commissioner, \$10, be allowed.

Let the clerk reform the taxation in accordance with the rules above

laid down.

MEEHAN v. VALENTINE.1

(Circuit Court, E. D. Pennsylvania. October 11, 1886.)

1. Partnership—What Constitutes—Participation in Profits.

Participation in the profits does not conclusively establish a partnership relation, but such participation must be considered as evidence tending to establish that relation, and, in the absence of other proof, is to be regarded as sufficient to make out a partnership.

2. SAME-WRITTEN AGREEMENT.

Where the agreement for the partnership is in writing, its terms must be considered in connection with the participation in the profits, in determining whether the partnership relation has been established or not.

Assumpsit by Meehan against Valentine, executor of W. G. Perry, upon promissory notes made by L. W. Counselman & Co., of which firm the defendant's testator was alleged to have been a member. The plea was no partnership. Upon the trial it appeared that the ostensible partners of L. W. Counselman & Co. were L. W. Counselman and Charles Scott. In March, 1880, W. G. Perry loaned L. W. Counselman & Co. \$10,000. The terms of their agreement were expressed in the following writing:

L. W. COUNSELMAN.

ALBERT L. SCOTT.

Office of L. W. Counselman & Co.,

[Trade-mark.]

Oyster and Fruit Packers, Cor. Philpot and Will Streets.

BALTIMORE, MD., March 15, 1880.

For and in consideration of loans made and to be made to us by Wm. G. Perry, of Philadelphia, amounting in all to the sum of \$10,000, (ten thousand dol-

¹Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

lars,) for the term of one year from the date of said loans, we agree to pay to the said Wm. G. Perry, in addition to the interest thereon, one-tenth of the net profits over and above the sum of ten thousand dollars on our business for the year commencing May 1, 1880, and ending May 1, 1881,—i. e., if our net profits for said year's business exceed the sum of ten thousand dollars, then we are to pay to said W. G. Perry one-tenth of said excess of profits over and above the said sum of ten thousand dollars; and it is further agreed that, if our net profits do not exceed the sum of ten thousand dollars, then he is not to be paid more than the interest on said loan, the same being added to notes, at the time they are given, which are to date from the time of said loans, and payable one year from date.

[Signed]

L. W. Counselman & Co.

Approved by me. [Signed] L. W. Counselman.

The loan was renewed in May, 1881, 1882, 1883, 1884, similar agreements being executed. In November, 1884, William G. Perry died, and in April, 1885, the insolvency of the firm was announced. During the years 1880, 1881, 1882, and 1883, moneys were paid to Perry as profits under the terms of the agreement. At the close of the plaintiff's case, defendant's counsel moved for a nonsuit, upon the ground that, under the terms of the writings in evidence, no partnership relation was established.

John G. Johnson, for plaintiff.

The original rule, well settled both in England and in the United States, was that a participation in profits constituted a partnership as to third per-There were certain well-known and special exceptions to this rule, but the rule itself was well settled. This rule was entirely overturned in England in the case of Cox v. Hickman, and the question of partnership was made to rest upon the intention of the parties themselves. It was universally conceded that this was an entire and complete revolution of an existing and well-settled rule; and parliament, recognizing this fact at once, undertook to regulate the whole subject by legislation, and the law in England is now governed by statute. In this country, in one or two of the states, as, for example, Rhode Island and probably New York, the courts have followed the English case of Cox v. Hickman, and by a species of judicial legislation overturned the existing rule. In other states they have refused to depart from the original rule. Rowland v. Long, 45 Md. 439; Pratt v. Langdon, 97 Mass. 97; Lockwood v. Doane, 107 Ill. 235; Sager v. Tupper, 38 Mich. 258. Other of the states, as, e.g., Pennsylvania, have wisely preferred to make the necessary changes in the law by legislation.

The rule in the federal courts is firmly established in accord with the doctrine of the earlier English cases. The supreme court announced its adherence to this rule in *Berthold* v. *Goldsmith*, 24 How. 536; *Beauregard* v.

Case, 91 U.S. 134.

In the circuit courts the decisions have been in affirmance of the doctrine of Berthold v. Goldsmith, that the partnership depends on the participation of the profits, and in disaffirmance of the rule of Cox v. Hickman, that the intention of the parties is to govern. In re Ward, 8 Reporter, 136; In re Francis, 2 Sawy. 286; Oppenheimer v. Clemmons, 18 Fed. Rep. 886.

H. P. Brown, R. C. Dale, and S. Dickson, for defendant.

An agreement to pay a share of profits in consideration of a loan of money does not necessarily impose upon the lender the liabilities of a partner. The question is one of intent; and if, from the whole transaction, it is seen that

che elements of the partnership relation do not exist, the agreement to pay a share of the profits is not conclusive. Grace v. Smith, 2 W. Bl. 998; Waugh v. Carver, 2 H. Bl. 285; Lindl. Partn. 20, 25; Burnell v. Hunt, 5 Jur. 650; Lindl. Partn. 34; Cox v. Hickman, Lindl. Partn. 40; Bullen v. Sharp, L. B. 1 C. P. 86; Mollwo v. Court of Wards, L. B. 4 P. C. 419; Pooley v. Driver, 5 Ch. Div. 458; In re Ward, (U. S. D. C. Tenn.) 8 Reporter, 136; Burckle v. Eckart, 1 Denio, 337; Holmes v. Railroad Co., 5 Gray, 58; Boston Smelting Co. v. Smith, (R. I.) 11 Cent. Law J. 211; Hart v. Kelley, 83 Pa. St. 286; Pleasants v. Fant, 22 Wall. 116; Einstein v. Gourdin, 4 Wood, 415; Swann v. Sanborn, 4 Wood, 625; Oppenheimer v. Clemmons, 18 Fed. Rep. 886; Richardson v. Hughitt, 76 N. Y. 55; Cassidy v. Hall, 97 N. Y. 159.

McKennan, J., (orally.) I have no doubt that, under the law as it stood before the modern decisions, one who participated in the profits of a partnership was to be regarded as a partner, and, as between himself and third persons, was liable for debts contracted by the par-This was so determined in Grace v. Smith in the latter part of the last century. The reason of the decision was that a person who received a portion of the profits, and thus withdrew from the creditors of the firm a portion of the fund to which they were entitled. was justly liable for the debts of the firm. This seems to have been the rule without any exception. But afterwards it was held, in the case of an employe who was compensated out of the profits—whether by devoting to him a portion of the profits, or by giving an equivalent out of the profits of a certain sum agreed to be paid him—that that did not constitute a partnership. I can see no reason for this exception. It seems to me the reason why other persons who do not. stand in the relation of employes are subject to liability under circumstances precisely the same as those in the cases of employes is not clear. But the exception was made.

Thus the law seems to have stood in England for many years. As is suggested by Mr. Johnson, the law had not been determined by the highest judicial tribunal in Great Britain until 1860. The law was thus declared by the other courts in England until the case of Cox v. Hickman, which changed the rule as it had existed before, and greatly modified it in the decisions which have been made. If the question was an open one in England, it ought to be regarded as an open question in this country, in so far as the decisions here rested upon the decisions in Grace v. Smith and Waugh v. Carver, and by inferior courts in England. But in 1860 it was decided by the house of lords that the rule which prevailed before, founded upon these two early decisions, was wrong; and a new rule, or a modified rule, was established. The rule as determined by those two old cases was that to share in the profits was to make the sharer a partner. As I understand the decision in Cox v. Hickman, that is not altogether discarded. Participation in the profits may be, and still is to be, considered as evidence tending to establish the partnership relation, and, in the absence of any other proof, is to be regarded as sufficient to make

that out. In Cox v. Hickman it is still admissible, and is to be considered as evidence touching the alleged relation of partnership, and is sufficient if no other evidence is offered. But, as determined in that case, it is not conclusive. Other circumstances surrounding the transaction (where the agreement is in writing, the terms in which that agreement is couched) are to be considered, in connection with the participation in the profits, in determining whether the partner-

ship relation has been created or not.

Now, that is just the difference between the law as it stood until 1860, in England, and the law as it stands now. Before 1860 a mere participation in the profits, whatever may have been the intention of the parties, whatever may have been their agreement, was conclusive of the liability of the participant to the creditors of the firm. Since then the whole transaction is to be taken into consideration, and from that it is to be determined whether the relation of partner was to be created. As I said before, the American courts, following those early cases, held the rule as it was there enunciated. Since the decision in Cox v. Hickman, perhaps the American courts have been prompted to consider this question by the light thrown on it by that decision; and there has been unquestionably a great change or modification in this country of the law as it stood before that decision. In many of the states, the rule as it was recognized in England, and established by these earlier cases, was changed, and was made to conform to the decision of the house of lords in Cox v. Hickman; notably so in Massachusetts, in Rhode Island, in New York. and also in Pennsylvania, because undoubtedly, until within a few years past, the law in Pennsylvania has been held to be as it was in England before the case of Cox v. Hickman. That is a very striking evidence of the marked progress made by the courts of this country in that branch of the law.

So in the federal courts we have the case reported in 24 How. (Berthold v. Goldsmith.) That did not involve the scope of the established rule, except in so far as it applied to employes. It was there held by the court that an employe who was to be compensated out of the profits of a partnership did not thereby become a partner. But there are utterances by the court in both directions. They do say that actual participation in the profits creates a partnership between the parties as to third persons, whatever may be the intention in that behalf. But there are expressions in the other direction: that. in determining the actual relation that exists between the parties, all circumstances having a bearing upon that inquiry are to be taken into consideration. But in the cases before Judge Hammond and Judge DEADY the law is stated to be that an agreement between persons sharing in certain proportions of the profits of the business does not necessarily make them partners as to each other under circumstances such as to render them liable to third persons. It is said by both of these judges, although I have not been able to verify their statement by my own examination of the case, that the case in 24 How. is not to be regarded as a decision in favor of the old rule of the common law. That a participation in the profits is ipso facto conclusive of a partnership is not established by the supreme court of the United States.

So that, in view of all these decisions, it seems to me to be an open question, or at least one not closed by such authoritative decisions as are binding upon this court; and I think, in view of those which have been presented to the court, the decisions may hereafter reach the point which has been reached by the house of lords in England. This seems to me to be the most reasonable and fair interpretation of the rule, and, as I am not constrained by any decisions to which I have been referred. I am inclined so to hold the law in this case.

The question is, then, as to the effect of this agreement. a matter for the determination of the court. The paper must be taken together, in its entirety, to ascertain what was the intention of the parties, and what was the effect of what they did. In the first place, it is to be considered that this transaction, upon its face, was intended to evidence a mere loan. It was secured, in the ordinary form, by this paper, setting forth the obligation of, or the bargain made by, Counselman & Co., acknowledged as such, and stipulating for its payment at the end of the year. In that connection it is agreed, and clearly, as it seems to me, in consideration of the loan, and as a compensation for the loan, to pay more than the interest That is all that the agreement amounts to. There is no stipulation here of any right of the lender to participate in the control of the business. There is nothing touching that within the four corners of the agreement; but it evidences a loan of \$10,000, an obligation to repay it, and, as compensation for it, the usual rate of interest, and, if the profits of the business exceed \$10,000, then 10 per cent. of such profits, in excess of that sum, to be received by the lenders as a compensation for the use of the money by the borrowers. I cannot, therefore, regard it, either in its terms or in its proper significance, as anything else, from beginning to end, than a loan of money, and a provision by the parties for the compensation of the lender for the use of such money, and as in no sense, therefore, indicating an intention on the part of these persons, or any one of them, to change the relation of debtor and creditor (which is that which the paper purports, as I have said) into a contract of partnership, or into an agreement in any way to make the lender responsible for any of the debts contracted by the members of the company. Such being my view of the proper construction of this paper, I must say that, in my judgment, the plaintiffs are not entitled to recover, and the motion for a nonsuit is granted.

Note. Subsequently a motion to take off the nonsuit in this case was made by plaintiff's counsel, which motion the court overruled.

ROYER v. SHULTZ BELTING Co.1

(Circuit Court, E. D. Missouri, November 8, 1886.)

Trial—Ordering Verdict.

Where the court would set aside the verdict to instante if found for the plaintiff at the close of his case, it should instruct the jury to find for the defendant

At Law. Motion by plaintiff for a new trial. For report of trial, see 28 Fed. Rep. 850.

M. A. Wheaton and Broadhead & Hæussler, for plaintiff.

Krum & Jonas, for defendant.

TREAT, J., (orally.) This case being for an alleged infringement of an expired patent under the recent rulings of the supreme court of the United States, it became necessary to go to the jury on the law side of the court. Those who have had any experience in this class of litigation know how difficult it is for 12 gentlemen, sitting in a jury-box, to go through an examination of a long series of patents, hurried as they must be, in order to reach a right conclusion; but the law devolves that duty upon them under proper circumstances.

The patent in this case of Royer was before the jury, with the specifications and claims, and a draft, admitted to be correct, of the apparatus used by the defendant. The court instructed the jury to find for the defendant. In doing so it laid the strain of the case on what it believed to be non-infringement. True, the counsel for the defendant insisted very strenuously, as he has on the motion now pending for a new trial, that the contrivances were not patentable, because there was no novelty, or no patentability I should say. court did not consider that question, for the reason, to suit the convenience of the court and all concerned, it was suggested by the court that the question of infringement should be at first considered, and, if there was an infringement, the court would then proceed, in proper order, to determine the patentability or non-patentability of plaintiff's contrivance. The ground on which the court instructed the jury, as stated orally at the time, was that, admitting the plaintiff's patent to be valid, the defendant did not infringe. The reasons were then stated, and are preserved in the record. I have seen no reason to change my view with regard to the non-infringement by the defendant of plaintiff's patent. I held up the case on another question, whether, inasmuch as the patentee, being a witness on the stand, said that the defendant's machine was substantially the same as described in his patent, it should not have been submitted to the jury. Now, the case referred to in 13 Wall., and succeeding cases, as I understand them, are practically these: that, where a court should set

¹Edited by Benj. F. Rex, Esq., of the St. Louis bar.

aside the verdict eo instante if found for the plaintiff at the close of the plaintiff's case, it could instruct the jury to find for the defendant, thus saving time, costs, expenses, and annoyance. It was upon that doctrine, which I understand to be the doctrine now laid down by the supreme court, that the jury were instructed to find for the plaintiff.

There is no error. Therefore the motion will be overruled.

WILLIAMS and another v. Morrison and another.1

(Circuit Court, E. D. Missouri. November 3, 1886.)

REPLEVIN—VERDICT—ASSESSMENT OF VALUE.

Where, in a replevin suit, a number of the articles seized under the writ, delivered to the plaintiff, and by him disposed of, are found by the jury to have belonged to the defendant, and to have been unlawfully taken from him, their value should be assessed.

At Law. Motion by defendants for a new trial. For the report of the trial, see 28 Fed. Rep. 872. Charles A. Davis and C. D. Saucey, for plaintiffs. Frank M. Estes, for defendants.

TREAT, J., (orally.) This was an action of replevin. The case was submitted to the jury under instructions given by the court. The case is peculiar in many of its incidents. I was very strongly under the impression, from all that was developed in the trial, that the court ought at once to have ordered the dismissal of the case. Whether it should so do will be reserved for the next trial. In no possible aspect of the case can this verdict stand.

The circuit court of Wayne county issued a writ of replevin, under which writ, as far as the record discloses, 2,500 blocks of granite had been seized, and were in the custody of the law; the rights of the parties thereto to be determined by the state tribunal. ties supposing that they could treat the proceedings there, under some supposed decisions of the supreme court of the state of Missouri, as void, brought this case, seized all those blocks, and other blocks that happened to be on the premises; the property was delivered by the United States marshal to the plaintiffs, by them disposed of, and the proceeds retained.

Now, taking the verdict of the jury as a basis for the action of this court, while it decides that 2,500 of the blocks were not the property of these plaintiffs, but were included in the levy under the Wayne county process, the jury gave no value therefor; and the result is, if this verdict

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is to be upheld, these parties plaintiff get property that did not belong to them, and do not account for it. It is one of those cases where it is very difficult for a jury, without specific instructions, to so frame their verdicts as to enable the court to render judgment; but in no possible aspect can the verdict stand as rendered. The motion for new trial will be granted, and the motion in arrest overruled.

There is another thought that might be added. This attempt to use United States courts to interfere with the lawful jurisdiction of other courts, on very doubtful propositions, deserves the largest measure of discouragement. This court would unhesitatingly repel an attempt on the part of a state court to interfere with the lawful custody of its ministerial officer, and, with equal regard, would repel any attempt to have it used to interfere with the lawful custody of the state courts. It should not suffer itself to be used for any such purpose. A practical illustration of this occurred at a very early day. —I think as early as 1858 or 1859,—the doctrine of which will be found in the case of Taylor v. Carryl, 20 How. 583, where the supreme court of the United States went over all these questions, urging, I think with great wisdom, (and, of course, that court is always wise,) the necessity of observing these rules. I am also informed by my brother judge that there is a similar case in the same direction. Covell v. Heyman, 111 U. S. 176; S. C. 4 Sup. Ct. Rep. 355. I had so much to do with the Taylor and Carryl Case that it impressed itself more distinctly upon my memory. If this complex government of ours is to be administered with perfect harmony of systems, each must be careful not to overstep its jurisdiction, or suffer itself to be used, for any mere casual purpose, to destroy the harmony of the systems. I make these remarks because, if I should sit at the next trial of this case, I wish the parties to prepare themselves for the particular question. I am in great doubt whether I should not have dismissed the suit in the first instance.

Brewer, J., (orally.) I may be pardoned if, in connection with the matter referred to by Judge Treat, I call attention to what seems to me to be a very felicitous expression by Justice Matthews in deciding the case of Covell v. Heyman, that went up from Michigan. He said that courts of the United States and the courts of a state, though occupying the same territory, do not occupy the same plane, and that, when goods are seized under process issued out of one court, it is the same, so far as the other is concerned, as though the goods were removed out of the territory. The same question was argued before me last Friday, in which that case was cited; and I thought the expression very felicitous, as showing that the two courts never interfere with each other.

United States v. Beacham.

(Circuit Court, D. Maryland, 1886.)

Manslaughter on Navigable Waters—Indictment—Averment of Place—Rev. St. U. S. § 5344.

An indictment against a captain of a steam-boat under section 5344, Rev. St. U. S., which alleges that the steam-boat was at the time navigating the Chesapeake bay between Baltimore and Annapolis, in substance alleges that the steam-boat was being used on the navigable waters of the United States. (Syllabus by the Court.)

Demurrer to Indictment.

This indictment for manslaughter, under section 5344 of the Revised Statutes, against the defendant, as captain of a steam-boat, charges, in the first count, that the defendant, by inattention to his duties as captain, permitted a rail on the saloon deck to be without a guard, in consequence of which Ella Martin, a passenger, stepped overboard in the dark, and was drowned.

The second count charges that, contrary to section 4477 of the Revised Statutes, and contrary to his duty as captain, the defendant neglected to keep a suitable number of watchmen on said deck, by reason of which neglect of the defendant no proper measures for the rescue of Ella Martin were taken, and she was drowned, whereby the defendant was guilty of manslaughter.

Thomas G. Hayes, for the United States.

J.S. Lemmon, for defendant.

Morris, J. The first objection relied upon in support of the demurrer is that the averments of the indictment do not show an offense cognizable under federal law. It must be conceded that the offense charged is within the language of section 5344 of the Revised Statutes; but it is urged that the statute must be shown to be constitutionally applicable by alleging facts which will support the constitutional validity of the statute. The authority for the statute is to be found in the constitutional grant of power to congress to regulate commerce among the several states. The supreme court has construed this clause of the constitution in many cases, and, among others, in Gilman v. Philadelphia, 3 Wall. 724; The Daniel Ball, 10 Wall. 557; The Montello, 11 Wall. 411; Lord v. Steam-ship Co., 102 U. S. 541; Sherlock v. Alling, 93 U. S. 103. The result of these decisions is that, as commerce includes navigation, congress has power to regulate navigation, and to regulate steam-boats as instruments used in navigation whenever they are used on the navigable waters of the United States.

The allegation of the indictment is that, at the date of the alleged offense, the defendant was the captain of a certain steam-boat called the "Excelsior," which steam-boat was being used in carrying pas-

sengers on an excursion from the city of Baltimore to a certain landing on the Chesapeake bay not far from the city of Annapolis, called "Bay Ridge," and back again to Baltimore. This, in substance, alleges that the steam-boat was navigating the Chesapeake bay between Baltimore and Bay Ridge, near Annapolis. It is not alleged that the Chesapeake bay, so navigated, was one of the navigable waters of the United States, but it seems to me that this is a fact of such universal notoriety that the court must know it judicially, and that it need not be either averred or proved in such an indictment as the present one, based upon section 5344 of the Revised Statutes. This section declares that every captain of any steam-boat by whose misconduct or inattention to duty the life of any person is destroyed shall be guilty of manslaughter. The section does not limit the offense to the navigable waters of the United States, but is in terms without limit. It is the restriction in the constitutional grant of power to congress which limits the application of the law. The indictment alleges facts sufficient, in substance, to give valid operation to the law within that restriction. It alleges the defendant to have been captain of a steam-boat engaged in navigation; therefore the steam-boat was an instrument of commerce. It describes that navigation to have been upon the Chesapeake bay, between Baltimore and a point near Annapolis; therefore, of necessity, to the judicial knowledge of the court, and as a fact of universal notoriety, upon the navigable waters of the United States.

It is also urged against the first count that there is no sufficient averment that it was the duty of the captain to see that the rail, the absence of which is charged as negligence, was in place, and no sufficient averment that the absence of the rail left the place from which Ella Martin fell into the water dangerous and without protection. The allegation is that the absence of the rail left a portion of the deck unguarded, and, by reason and in consequence of the absence of the rail, Ella Martin stepped upon the unguarded part of the deck, and fell into the water, and that it was by the inattention and neglect of the defendant to his duties as captain that the rail was suffered to be absent, whereby the life of Ella Martin was destroyed. It seems to me that the neglect complained of, and the connection with it charged against the defendant, and the consequences of the alleged neglect, could not be more precisely stated.

The second count is based upon section 4477 of the Revised Statutes, which requires passenger steamers, during the night, to keep a suitable number of watchmen on each deck, to give alarm in case of accident. The allegation is that the defendant, contrary to his duty as captain, did not, on the night of the day stated in the indictment, keep a suitable number of watchmen on the saloon deck of the steamboat, by reason of which neglect no proper measures for the rescue of Ella Martin were taken, for want of which measures Ella Martin was drowned, and that, by this neglect of his duty as captain of the steam-

boat, the life of Ella Martin was destroyed. Notwithstanding the many ingenious objections urged by defendant's counsel against this second count of the indictment, I think it is good, and contains every necessary averment.

The demurrer is overruled.

United States v. Wilson.

(District Court, D. Massachusetts. November 30, 1886.)

Pensions—Indictment—Sufficiency—Rev. St. U. S. § 5485—Act of Congress of June 20, 1878.

An indictment following the language of section 5485, Rev. St. U. S., charging the accused with receiving an excessive fee for his services "in prosecuting a pension claim," sufficiently charges him with receiving the same "in a pension case;" the language setting forth the elements necessary to constitute the crime, and apprise the accused with reasonable certainty of the accusation against him.¹

Motion in Arrest of Judgment.
G. M. Stearns and J. R. Reed, for the United States.
Edward Avery, for defendant.

Nelson, J. By Rev. St. § 4785, under the title "Pensions," it is provided that "no agent or attorney or other person shall demand or receive any other compensation for his services in prosecuting a claim for pension * * * than such as the commissioner of pensions shall direct to be paid to him, not exceeding twenty-five dollars;" and by section 5485, under the title "Crimes," that "any agent or attorney, or any other person instrumental in prosecuting a claim who shall directly or indirectly contract for, for pension. demand, or receive, or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension than is provided in the title pertaining to pensions, be deemed guilty of a high misdemeanor; and, upon conviction thereof, shall, for every such offense, be fined not exceeding five hundred dollars, or imprisonment at hard labor not exceeding two years, or both, at the discretion of the court." By the act approved June 20, 1878, (20 St. 243,) congress repealed section 4785, and enacted that "it shall be unlawful for any attorney, agent, or other person to demand or receive, for his services in a pension case, a greater sum than ten dollars:" and by the act of March 3, 1881, § 1, (21 St. 408,) congress further provided that "the provisions of section 5485 of the Revised Statutes shall be applicable to any person who shall violate the provisions of" the act of June 20, 1878.

¹See note at end of case.

The indictment, following the language of section 5485, charges that the defendant, on the thirtieth day of April, 1883, at Winchester, in this district, unlawfully received for his services and instrumentality, in prosecuting for one Sorell Gove a claim for a pension from the United States, a greater compensation than was allowed by law, to-wit, the sum of \$84.

It is argued for the defendant that this language does not describe with sufficient certainty the offense of receiving for his services, in a pension case, a greater sum than \$10, as defined by the act of 1878. But the words "services in a pension case" in that act were evidently intended to take the place of the words "services for prosecuting a claim for pension" in section 4785, and to have the same meaning. Both describe the same offense, though in different language. only purpose of the act of 1878 was to change the rate of compensation which might be charged for services rendered for another in procuring a pension. There is nothing in the language used, or in the history of the legislation, to indicate that congress had any other object in view. This is especially apparent from the act of 1881. which makes section 5485 applicable to persons violating the act of It is not the penalty only that is made applicable, but the whole section. In an indictment upon a statute it is sufficient to set forth the offense in the words of the statute, if the words themselves duly set forth all the elements necessary to constitute the offense, and apprise the accused with reasonable certainty of the accusation against him. U. S. v. Britton, 107 U. S. 655; S. C. 2 Sup. Ct. Rep. 512, and cases cited. Tested by this rule, the indictment is not open to this objection.

Other objections were made to the indictment, but none of them seem to be of enough importance to require comment, and they are all overruled.

Motion in arrest of judgment overruled.

NOTE.

INDICTMENT FOR STATUTORY OFFENSE. An indictment for a statutory offense may, in charging the offense, merely use the language of the statute creating it, United States v. Britton, 2 Sup. Ct. Rep. 512; People v. Marseiler, (Cal.) 11 Pac. Rep. 503; People v. Murray, (Cal.) 7 Pac. Rep. 178; Cohen v. People, (Colo.) 3 Pac. Rep. 385; State v. Foster, (Kan.) 2 Pac. Rep. 628; Scoles v. State, (Ark.) 1 S. W. Rep. 769; Fortenbury v. State, (Ark.) 1 S. W. Rep. 58; or words of equivalent meaning, Franklin v. State, (Ind.) 8 N. E. Rep. 695; Graeter v. State, (Ind.) 4 N. E. Rep. 461; People v. Edson, (Cal.) 10 Pac. Rep. 192; when such language is sufficient to apprise the defendant of the nature of the accusation against him, United States v. Britton, 2 Sup. Ct. Rep. 512; Cohen v. People, (Colo.) 3 Pac. Rep. 385; Scoles v. State, (Ark.) 1 S. W. Rep. 769.

PENNSYLVANIA DIAMOND-DRILL Co. v. SIMPSON and another.

(Circuit Court, W. D. Pennsylvania. August 30, 1886.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—PRIORITY OF INVENTION—WHAT

Constitutes—Rotary Drills.

Robert Allison, in 1870, conceived of the invention described in his patent, No. 261,978, for an improvement in rotary drills, dated August 1, 1882, and made rough sketches thereof, but no model or machine, and did not consider the invention worth putting into a permanent form, and did not apply for a patent until May 4, 1882, after Ball and Case, subsequent, but independent, inventors of the same improvement, had obtained patents therefor, dated October 4 and November 1, 1881, and had put the patented article on the market. Held, that rightful priority of invention was to be adjudged to Ball and

2. Same—Conception, Unless Followed Seasonably by Practical Steps, not Invention.

A mere conception, not seasonably followed by some practical step, counts for nothing as against a subsequent independent inventor, who, having complied with the patent laws, has obtained his patent.

8. SAME—NEGLECT TO OBTAIN PATENT FOR TWELVE YEARS.

One who has conceived of a new device, and proceeded so far as to embody it in rough sketches, or even in finished drawings, cannot there stop, and yet hold that field of invention against all comers for a period of 12 years.

4. Same—Testimony as to Fact of Invention.

In an interference proceeding in 1878, upon a different invention of the same general character, Allison had testified to making the invention here in question; but this testimony did not constitute invention, any more than did his previous sketches.

5. Same—Pleading—Question of Priority, how Raised.

It was sufficient to raise the question of priority of invention for defendants in their answer to deny that Allison was the original and first inventor, and to justify under the Ball and Case patents, without alleging abandonment by Allison.

6. Same—Core-Lifters.

Letters patent No. 147,492, granted to Gideon Frisbee, February 17, 1874, for core-lifters, held valid, and infringed by defendants.

7. SAME—INFRINGEMENT—SIMILAR OPERATION—DIFFERENT CONSTRUCTION.

Where the claim of the Frisbee patent is for the combination of an annular core-lifter and a tube with an inner tapering recess, and the patent described a loose, elastic cut ring, within a tapering recess in a boring tube, and the defendants use a loose, solid, unelastic ring, in a cylindrical recess in a boring tube, but this ring had four dependent springs, with grasping jaws arranged in an annular position, and equidistant, which are forced into a tapered drill-head at the lower end of the recess, and the purpose and mode of operation of the two devices are similar. held, that the difference of construction is not material, and the claim is infringed.

6. Same—Failure as to Part of Complainant's Case—Decree—Apportion-

MENT OF COSTS.

Where the suit fails upon one patent, and prevails upon another, the complainant is entitled to a decree; but the costs should be equitably apportioned.

In Equity.

G. G. Frelinghuysen and W. Bakewell, for complainant.

E. T. Rice and George H. Christy, for respondents.

Acheson, J. The bill of complaint, as it now stands, charges the defendants with the infringement of two patents, viz.: letters patent No.

261,978, for an improvement in rotary drills, granted to Robert Allison, August 1, 1882, on an application filed May 4, 1882; and letters patent No. 147,492, for an improvement in core-lifters for annular rock-drills, granted to Gideon Frisbee, February 17, 1874,—of which patents the

plaintiff is assignee.

1. That the improvement which is the subject-matter of this Allison patent is of patentable novelty is not controverted, and, for the purposes of the case, will be assumed. The proofs disclose the use by the defendants of prospecting drills, manufactured by the Sullivan Machine Company, and equipped with a single-cylinder hydraulic feed device, constructed under two patents granted to Albert Ball and George F. Case, one dated October 4, 1881, No. 247,872, and the other dated November 1, 1881, No. 248,982, issued on applications made August 8, 1881. And the further fact appears that the invention described in and embraced by the Allison patent is also described in and covered by the Ball and Case patents.

In the view, then, I take of this branch of the case, the controlling question is one of rightful priority of invention, as between the Allison patent, on the one hand, and the Ball and Case patents, on the other. And, notwithstanding the criticisms indulged in by the plaintiff's counsel upon the frame of the answer, that question is, I think, distinctly raised thereby; for it expressly denies that Allison was the first and original inventor of the improvement in rotary drills here involved, and it sets up the prior patents of Ball and Case in justification of the defendants' use of the device. True, the answer does not allege abandonment: but, then, the defendants do not rely on the statutory defense of abandonment to the public. Lawful priority for the Ball and Case patents is what is asserted. And that the answer was understood by the plaintiff as so averring is not doubtful; for, as part of its case in chief, proofs were introduced to carry back Allison's invention to a date anterior to the applications of Ball and Case. These proofs, it must be conceded, establish that, as early as the year 1870. Allison had conceived the idea of the invention set forth in his patent of 1882, and also two other kindred improvements in the same class and kind of machinery. One of these latter improvements was a single-cylinder machine for drilling short holes. and the other was a two-cylinder hydraulic feed mechanism for revolving drills. For the last-mentioned mechanism Allison obtained letters patent No. 145,775, dated December 23, 1873, after a decision in his favor in an interference declared between him and Brodie and Wheeler. In that interference proceeding, Allison, on March 19, 1873, made a deposition, in which, although the issue only involved the two-cylinder hydraulic feed device, he mentioned his conception of the two other devices; producing a drawing, now an exhibit in this case, of his singlecylinder device for drilling short holes. And then, referring to the particular device now in dispute, he testified that he had conceived the idea of such invention, which he described in his deposition as "a singlecylinder machine, with a hollow piston-rod, through which the drill passed, for drilling deep holes."

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inquiry on their part.

The evidence now adduced shows that, in the year 1870, Allison made rough sketches of this device,—some pencil sketches, and some with chalk, on a drawing board,—none of which, however, were preserved. But he made no model thereof, and he never made the device itself. Beyond his rough sketches he advanced not a step. He did nothing to put his invention in a fixed and practical form. Indeed, in his testimony here, he states that he did not originally consider the invention of consequence enough to reduce it to a more permanent shape. He did not apply for a patent until many months after Ball and Case had made the device, and obtained their letters patent, and the market was being supplied with machines equipped with the patented device; and, even then, his application was made at the solicitation of the plaintiff, the assignee of his patent of 1873, and because the value of that patent was involved.

According to my apprehension of the proofs, the device in question is quite distinct from the single-cylinder machine for drilling short holes, already mentioned as one of the three kindred inventions of which Allison had conceived in the year 1870. But, at any rate, all that Allison is shown to have done with respect to that invention was to embody it in the drawing now in evidence. His statement as to a model thereof having been used in the interference issue, is qualified and much weakened by his cross-examination. There is no satisfactory proof of the existence of such model, and it is certain that no such machine for drilling short holes was ever made by him.

been original and independent inventors of the device in controversy. Nothing whatever to the contrary appears. The suggestion that, by reason of their mere casual knowledge of the Allison patent of 1873, they must be deemed to have had constructive notice of the contents of Allison's deposition, taken in the interference issue between him and Brodie and Wheeler, is wholly untenable. Ball and Case were entire strangers to that controversy. They never had any sort of interest in, or connection with, the patent of 1873, and there was no occasion or reason for

After completing their invention, Ball and Case were prompt to apply for letters patent, and, by the Sullivan Machine Company, their assignee, were commendably diligent in furnishing the public with machines equipped with the device. As against the Ball and Case patents, then, will the law adjudge priority of invention to Allison? The answer is not doubtful under the authorities. In a race of diligence between two independent inventors, he who has first perfected and adapted the invention to actual use is entitled to the patent. Agawam Co. v. Jordan, 7 Wall. 583; Whitely v. Swayne, Id. 685. Here, Allison, it would seem, was the first to conceive the invention; but mere conception, which is not seasonably followed by some practical step, counts for nothing as against a subsequent independent inventor, who, having complied with the patent laws, has obtained the patent. It would indeed be a strange perversion of the purpose of the patent laws if one who had conceived of a new

device, and proceeded so far as to embody it in rough sketches, or even in finished drawings, could there stop, and yet hold that field of invention against all comers for a period of 12 years. The law does not so reward supineness. Hence, in Reeves v. Keystone Bridge Co., 5 Fish. 456, 463, Judge McKennan declared the established rule to be "that illustrative drawings of conceived ideas do not constitute an invention, and that, unless they are followed up by a seasonable observance of the requirements of the patent laws, they can have no effect upon a subsequently granted patent to another." And this principle was enforced by Mr. Justice Matthews in the more recent case of Detroit Lubricator Manufig Co. v. Renchard, 9 Fed. Rep. 293, although the antedating drawing there exhibited a perfect machine in all its parts.

I cannot see that Allison's interference deposition can influence the result here. The interference issue, as we have seen, only related to, and affected the right to, the invention for which the patent of 1873 was granted; and Allison's sworn statement, concerning his other conceived ideas, no more constituted invention, within the meaning of the patent laws, than did his previous sketches. In an earlier contest for priority, that deposition might have proved valuable as fixing the date of his conception, but, by his long-continued inaction, he lost whatever inchoate right he once may have had. As respects the Allison patent, therefore,

the plaintiff's bill must fail.

2. We pass now to a consideration of the other branch of the case; and here the only question is whether infringement has been shown. The Frisbee invention consists in a combination of an exterior pipe or ring, constructed with a tapering recess in its inner surface, and a ring or annular wedge inserted in that recess, and which, as the drill advances, slides over the core, but is wedged against it by the withdrawal of the drill. The specification describes an annular core-lifter, consisting of a cut ring of steel sprung into the recess, this ring being tapered outside to fit the recess, and having projections on its inner surface between which the ring is filed thin, so as to be elastic, the projections having small pieces of bort or carbon set in their faces, to prevent them from being worn by the work. The described operation is this, viz.: As the bit excavates the rock, and the core enters the core-lifter, the latter first becomes stationary on the core, and is then forced over it by the shoulder of the recess, the exterior pipe or tubular rod revolving round the corelifter till the required depth is reached. When the drill-rod is withdrawn, the core-lifter is forced towards the small end of the recess, clamping the core more firmly as the pipe or tube recedes, until it detaches the core from the solid rock. The specification states that, instead of the thin ring with projections, an annular wedge may be used, made in two pieces, fitting the tapered recess; but this form of core-lifter is not illustrated by the drawings, or further explained.

The claim of the patent is in these words: "The combination, operating substantially as described, of an annular core-lifter, and a tube or ring constructed with a tapering recess in its inner surface."

Without pausing to point out the marked distinctions between this in-

vention and all previously known core-extractors, I content myself with simply saying that the Frisbee invention is one of decided originality, and the patent well deserves to be so construed as to afford to the inventor and his assignee the amplest protection against devices, which, however greatly differing in form, yet copy the principle of the invention, or its mode of operation. No reason here exists for limiting the patent to the particularly described form of grasping device; for the claim is not for any specified form, but for the combination of an annular corelifter and a tube or ring constructed with a tapering recess in its inner surface, "operating substantially as described."

The defendants' core-lifting device complained of consists of a solid ring of metal, provided with four depending springs or grasping-jaws, arranged in an annular position, and equidistant. This ring, with its depending springs or jaws, is placed in a recess formed in the tubing just above the drill-head. Between the annular shoulder, at the upper end of this recess, and a lower shoulder formed by the top of the drill-head, the recess is cylindrical; but from this lower shoulder downwards, for the distance of about one-half inch, the interior of the drill-head gradually decreases in diameter, or is tapered in its inner surface. During the work of boring, the depending springs or jaws hug the core, but permit it to pass through them, the ring being pressed up under the upper shoulder of the said recess, and, the diameter of the cylindrical recess being somewhat greater than that of the core-barrel above it, and of the drill-head below it, the tubing can revolve round the core-lifter. But when the desired depth is reached, and the drill-rod is withdrawn, the ring descends, and its springs or jaws are forced into the tapered part of the recess, and are wedged tightly against the core, clasping it more firmly as the drill-rod is drawn upwards, until the core is broken off.

Now, while it cannot be gainsaid that to the eye these two described core-lifting devices present some striking dissimilarities, yet, in my judgment, the differences are in matters of form, and not of substance. Both act upon the same principle, in substantially the same way, and produce the same result. There is evidence showing that the designer of the defendants' core-lifter had first made a study of Frisbee's invention. The changes he has effected, doubtless, display some ingenuity, but they

are, I think, colorable and unavailing.

I need scarcely add that the plaintiff, having shown infringement by the defendants of the Frisbee patent, will not fail of relief on this bill. because, as to the other patent sued on, the conclusion of the court is favorable to the defendants. Matthews v. Lalance & Grosjean Manuf'g Co., 17 O. G. 1284; S. C. 2 Fed. Rep. 232. There must, however, be some equitable apportionment of the costs of suit, which can be settled when the decree is signed.

Let a decree be drawn by counsel.

Cross and others, Trustees, v. Union Metallic Fastening Co. and others.

(Circuit Court, D. Massachusetts. December 7, 1886.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—EVIDENCE—EPPLER NAILING-MA

On the evidence, held, that the pivoted foot-presser improvement on defend ant's nailing-machine, alleged by plaintiffs to have been invented by one Nagle, and used for the first time by him on defendants' Eppler nailing-machine in September, 1883, had been used on said machine by defendants prior to that date, and therefore Nagle had not a patent-right therein.

2. Same—Invention.

An improvement in the nail-carrier of a nailing-machine, which consists in making the edge of the carrier smooth instead of corrugated, cannot he held to be an invention.

8. SAME—NAILING-MACHINES.

Patent No. 308,370 of November 25, 1884, to James Nagle for improvements in nailing-machines considered and held void; part as being anticipated by the owners of the Eppler nailing-machine patent issued August 14, 1883, and part as not amounting to an invention.

In Equity. Suit for the infringement of a patent. B. F. Butler and W. A. Macleod, for complainants. Livermore & Fish, for defendants.

Colt, J. This suit is brought for the infringement of letters patent No. 308,370, dated November 25, 1884, granted to James Nagle for improvements in nailing-machines. These improvements relate to certain changes made in the Eppler nailing-machine, for which a patent was issued August 14, 1883. The main improvement consists in the substitution of a pivoted for a rigid presser-foot. In the Eppler machine the presser-foot is rigid, in consequence of which it is said that the nail-throat sometimes catches on the head of the nail when moving backwards to the next nail-hole. To remedy this supposed defect, the presser-foot is pivoted or made yielding in the Nagle machine. The defenses are want of novelty, and a denial that Nagle was the first inventor.

Want of novelty is based largely on the fact that there is found in the prior Merritt machine a yielding presser-foot. The plaintiffs contend that the mode of operation of the Nagle presser-foot is different from the Merritt, and that, therefore, the first claim of the patent should be sustained. I have considerable doubt whether this position can be successfully maintained. But, without deciding this, I am satisfied, upon the evidence, that Nagle was not the first inventor of the pivoted presser-foot described in his patent. This question turns upon whether the pivoted presser-foot was first applied to the Eppler machine during the Institute Fair, in Boston, in September, 1883. At this time Nagle was in the employ of the Union Fastening Company, the defendant company being its successor, and his duty at the

fair was to operate the Eppler machine. He says that, to remedy a defect in the working of the Eppler machine, exhibited at the fair, he conceived the idea of the pivoted presser-foot; that he made a wooden model, and exhibited it to John B. Flint, a fellow-workman, also to Henry S. Bacon, the superintendent of the company, and to Andrew Eppler, Jr., the foreman; that Eppler said it would not work, while Bacon thought it was worth trying, and ordered one made, which, when applied to the machine, gave satisfaction. This testimony is supported, in substance, by Bacon. It appears, however, that Bacon shortly afterwards, owing to some disagreement, left the company, and he does not deny that he is now interested in a

rival company.

As opposed to this, we have the testimony of Eppler, the inventor of the nailing-machine; Eaton, a machinist in the employ of the defendant company; and Moses Coupal, Fish, Peter A. Coupal, and Flint, employed by the predecessor of the defendant company during the summer and fall of 1883, but who, at the time of giving their testimony, had no connection with the defendant company. witnesses all testify to the effect that the pivoted presser-foot was applied to the Eppler machine previous to the fair. Eppler says he thought of the pivoted presser-foot in the summer of 1883, and gave directions to Flint and P. A. Coupal how to do the work, and Flint and Coupal confirm this statement. There are some discrepancies in the testimony of some of these witnesses, brought out upon long and rigorous cross-examination. But this is not strange, where questions of detail relating to past facts are critically gone into, and witnesses have to depend on their recollection. I am also aware of the attempt, on the part of the complainants, to impeach Flint's testimony. Bearing in mind all this, I think the defendants' evidence, taken as a whole, remains unshaken.

There is another class of evidence which the complainants seem to deem important. From the latter part of July to December, 1883, each workman employed by the company was required every day to report the character of the work done by him, and the time spent upon it, on a slip of paper, which was called a time-slip. scription of the work upon these slips is of such a character that it is difficult to tell whether or not they relate to changing the presser-If the defendants are unable to show from the time-slips that the presser-foot was changed before the first part of September, 1883, so neither can the complainants prove from them that the change was made at the time of the fair. The entry upon the slip of Peter A. Coupal, of September 10th, may relate to the change made in the presser-foot, but this is not clear. The evidence of the time-slips. taken together, is of too indefinite a character to be given any considerable weight. Weighing carefully the evidence upon both sides, I think the defendants have shown that the pivoted presser-foot was applied to the Eppler machine prior to the fair, and that, therefore,

Nagle was not the inventor. This disposes of the first two claims of

the Nagle patent.

The third claim relates to an improved nail-carrier. The nail-carrier of Nagle is identical with that used in the Eppler machine, except its edge is smooth instead of serrated. It is said the nail passes through the carrier with less obstruction when the edge is smooth. Admitting this, there is nothing which can properly be termed invention in making the edge of the carrier smooth instead of corrugated, and the claim must be held to be void.

The fourth claim is not in controversy.

The bill must be dismissed, with costs; and it is so ordered.

McKAY, Trustee, v. Smith and others.

SAME v. TUCKER.

(Circuit Court, D. Massachusetts. November 27, 1886.)

PATENTS FOR INVENTIONS—BILL IN EQUITY AGAINST LICENSEE—INJUNCTION AND

A bill in equity which sets forth a license to defendants to use certain patents embodied in machines leased to them by plaintiff, the license, providing for payment of license fees, or purchase and use of license stamps, and for rendering accounts, and which alleges failure of defendants in their obligations under the license, and prays for discovery and account, and decree for payment of fees, and an injunction until such payment, shows a cause for equitable relief.

In Equity. Motions to dismiss bills.

J. J. Myers, for complainant.

C. A. Taber and P. E. Tucker, for defendants.

Colt, J. In these two cases the bills are substantially alike. The defendants have filed a motion to dismiss in each case on the ground that the plaintiff has a plain, adequate, and complete remedy at law. The bills set forth a license to the defendants to use certain patents embodied in machines leased to the defendants. The license provides, among other things, that the licensee shall pay the sum of 10 cents for every pair of shoes made by the aid of the machines, or by the use of the patents, or any of them, or instead thereof he shall purchase and affix to every pair of shoes a license stamp of a value to be determined by reference to a schedule attached to and forming part of the license. The licensee agrees to keep an account of the shoes made, and to render an account every six months to the licenser. It was also agreed that the license shall continue until the expiration of all the patents, or any extensions or renewals of the same. The bills allege that the defendants have continued to use the machines,

making many pairs of shoes monthly; and that since August or September, 1881, they have wholly neglected to purchase and affix stamps to the shoes made by the machines, and that they have refused to pay any license fees, neglected to render any accounts, and that they have removed from the machines the indicator registering the amount of work done. The prayer of the bills is for discovery and account; also that the defendants may be decreed to pay the license fees found due, and that they may be enjoined from using the machines until

they have paid the amount found due under the license.

The only question raised by these motions to dismiss

The only question raised by these motions to dismiss is whether, upon the allegations contained in the bills, the plaintiff has made a case cognizable in a court of equity, or whether his proper remedy is at law. I think the plaintiff has brought himself within recognized grounds of equitable jurisdiction, and that the motions should be denied. The bills not only pray for discovery and account, which of themselves might be deemed insufficient in this class of cases, but they also pray for an injunction against the use of machines embodying patents which are unexpired. Bills of this character have frequently been sustained by the courts. Goodyear v. Congress Rubber Co., 3 Blatchf. 449; Woodworth v. Weed, 1 Blatchf. 165; Wilson v. Sherman, Id. 536; Eureka Co. v. Bailey Co., 11 Wall. 488; Magic Ruffle Co. v. Elm City Co., 13 Blatchf. 151; White v. Lee, 3 Fed. Rep. 222; Nesmith v. Calvert, 1 Wood & M. 34. In Crandall v. Plano Co., 24 Fed. Rep. 738, and in Perkins v. Hendryx, 23 Fed. Rep. 418, no injunction was asked for.

Motions denied.

THE ZOUAVE.

McWilliams and another v. The Zouave.

(District Court, D. New Jersey. December 8, 1886.)

1 ADMIRALTY—RULE 58—COUNTER-CLAIM—CROSS-LIBEL.

The original libel was for repairs made to a boiler, which had been constructed by the libelants for the respondent under a contract which stipulated for the use of a certain well known brand of iron. A different quality of iron from that agreed on was used, with the consent of the respondent, on the representations of the libelants that it was equally as good and just as expensive as the other; and the boiler was, on delivery, accepted and paid for by the respondent. Subsequently the repairs now sued for were put on the boiler, and the respondent files a cross-libel for a counter-claim for damages for breach of the original contract. Held, that such counter-claim does not arise out of the same cause of action for which the original libel was brought, as contemplated by admiralty rule 53.

2. Set-Off and Counter-Claim—Unliquidated Damages.

To authorize a set-off, the debts must be between the same parties in their own right, and be of the same kind or quality, and be clearly ascertained or liquidated. Neither at law nor in equity can unliquidated damages be allowed under the defense of a set-off.

(Syllabus by the Court.)

In Admiralty.

Bedle, Muirheid & McGee, for libelants.

Griffin & Romeyn, for respondents and cross-libelants.

This is a libel for work done and materials furnished in WALES, J. making repairs to the boiler of the tug-boat Zouave. The boiler had been originally constructed by the libelants, under a contract between them and the owner of the tug, in which it was stipulated that the iron used in making the furnace and flue-heads should be of the best quality, known to the trade by the brand of "E. L. F. B.," which means "Extra Locomotive Fire-box Iron." The owner and respondent discovered, before the completion of the boiler, that the libelants were using another and different quality of iron from that agreed on, and complained of the change; but, on being assured by the libelants that the substituted iron was equally as good, and just as expensive, as the other, and not being himself a judge of the article, he waived further objections at the time. relying on the representations of the libelants, and notifying them that he would hold them responsible for any damage that might ensue from the change of material. The contract was entered into September 7, 1883, and the boiler was put in the tug about one year after that date, and was accepted and paid for by the respondent. From the schedules annexed to, and forming a part of, the libel, it appears that the first bill for repairs was contracted in March, 1885, and that further repairs were made at intervals, until January of the present year, amounting in all to the The cross-libel seeks to recover damages from the libelants for the breach of their contract in using an inferior quality of iron in building the boiler, whereby the repairs were made necessary, and the tug thrown out of employment for several days. It is also alleged that, in consequence of the leaky condition of the boiler, an extra quantity of coal was required to keep up steam, and that additional repairs will be needed to put it in good working order. These separate items of loss and damage amount by estimation to the sum of \$3,500.

The principal exception to the cross-libel is that it sets up a counterclaim which does not arise out of the same cause of action for which the original libel was filed, as contemplated by admiralty rule 53. The exception is well made; for it is evident that here are two distinct and different causes of action,—one action growing out of a breach of one contract, and the other action being for work and materials in making repairs under another and separate contract. The two causes of action are related to each other only in so far as the parties to them are the same, and that the thing built and subsequently repaired is the same. the simple fact that the article which was the subject-matter of the original contract is the same article on which the repairs were made, does not create such a connection or union of the claim and counter-claim that the two may be said to spring from the same cause of action, in the sense in which the words are used in the rule. Conceding that the libelants were in fault in making use of an inferior quality of iron in constructing the furnace and flue-heads, and different from that agreed on, there can be no presumption here of an implied undertaking that they would keep the boiler in repair after its delivery to and acceptance by the respondent. The libelants sue *in rem* to enforce a lien for repairs. The cross-libel is for damages growing out of another and former transaction between the parties. The claim of the libelant and the counter-claim of the respondent are only indirectly connected with each other, and the remedy of the latter is at common law.

In his answer the respondent pleads the damages as a set-off to the libelants' demand. But this defense cannot be sustained in the present case, on the principle, well recognized both at law and in equity, that unliquidated damages cannot be the subject of a set-off. To authorize a set-off the debts must be between the parties in their own right, and must be of the same kind or quality, and be clearly ascertained or liquidated. They must be certain and determinate debts. Duncan v. Lyon, 3 Johns. Ch. 359; Howe v. Sheppard, 2 Sum. 409. And by the civil law it was necessary that the debt or claim, to be compensated, should be certain and determinate, and actually due, and in the same right and of the same kind as that on the other side. Story, Eq. Jur. § 1441.

In The C, B. Sanford, 22 Fed. Rep. 863, the libel was for materials furnished and repairs made to a steam-tug. In that case the respondent admitted the libelant's claim, but filed a cross-libel and set up a counter-demand for services, not maritime in their nature, theretofore rendered to the libelants. The set-off, being for a fixed and ascertained amount, was allowed; but the cross-libel for the same was dismissed.

In the case at bar, for the reasons stated, neither can be sustained, and the exceptions must be allowed.

HREBRIK v. CARR.1

(District Court, E. D. New York. July 2, 1886.)

1. Carriers—Of Passengers—Fall from Gang-Plank of Steamer—Gangway without Ropes or Batters—Vessel's Liability for Loss of Life.

Libelant's husband, a passenger on the steam-ship Australia, while returning to the wharf from the steamer prior to her departure, fell from the gangplank, and was drowned. The evidence indicated that the gangway was a single narrow plank, without battens or ropes. Suit being brought by libelant under the statute of the state of New York to recover \$5,000 for the death of her husband, held, that the owners of the steam-ship were negligent in not maintaining a safer gang-plank, and libelant was entitled to recover the amount of the damage, which was fixed at \$2,500.

2. Same—Right of Passenger to Return from Vessel to Pier—Duty of Vessel to Provide Safe Means of Passage.

A passenger on board a vessel, before her departure from the wharf, has the right to go ashore even to buy tobacco, and it is the vessel's duty to provide a safe means of passage from the steamer to the pier.

In Admiralty.

Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

Alexander Cameron, for libelant. Ullo, Ruebsamen & Hubbe, for claimant.

Benedict, J. The libelant's action is to recover of the owner of the steam-ship Australia for the death of her husband, who, while passing from the steamer to the pier, fell from the gang-plank, and was drowned. The decedent and the libelant, then husband and wife, had taken passage in that steamer, and, in pursuance of notice that she would sail early in the morning, went on board her the evening before. After they had been on board some little time the husband left the wife to go ashore, as she says, to buy some tobacco. While passing down the plank from the gangway to the pier he fell off the plank into the water, sank, and never rose again. She now brings this action, by virtue of a statute of the state of New York, to recover \$5,000 of the defendant, upon the ground that the gangplank provided as a means of egress from the steamer to the pier

formed an improper and unsafe passage-way.

The case presents, at the outset, an issue as to the character of the gang-plank from which the decedent fell. The libelant asserts that it was a single narrow plank, laid from the gangway to the pier, without battens or ropes. The defendant has called witnesses who say that the passage-way from the gangway to the pier was formed by placing a cargo-skid, six feet wide, from the steamer to the pier, and upon this a proper gang-plank, two or three feet wide, with battens on it, and having on one side a rope fastened to iron stanchions four feet high. Upon this question my conclusion is that no such passage-way as is described by the defendant's witnesses was in position at the gangway at the time the decedent fell. The testimony of the libelant, whose appearance and manner is in her favor, and who, with her husband, passed up the passage when she went on board the steamer, is positive to the effect that the passage was a single narrow plank; and she is greatly confirmed by the testimony of disinterested persons, who saw and measured the single plank found leading from the gangway, the next day after the accident. It is incredible that those in charge of the steamer, after a man had been drowned by falling off the gang-plank, and before the arrival of these witnesses the next day, removed a proper gang-plank, such as the officers of the steamer say was there, and placed in its stead the single plank found there when the libelant's witnesses visited the steamer. Such a gang-plank as the defendant's witnesses describe, upon a cargo-skid, may have been there at some time. At the time of the accident the taking of cargo on that side of the ship had been finished, and the last of the cargo was coming in on the other side, and such a passage-way as the defendant's witnesses describe may have been in position when the decedent fell, while the ship was working on that side. If so, it had been removed when the work on that side of the ship was finished.

What has been said disposes of another issue of fact made in the case by the assertion on the part of the defendants that the decedent was intoxicated; for the witnesses who testify to the intoxication are those whose testimony as to the cargo-skid I have felt obliged to reject.

The next question is one of law. In behalf of the defendant, it is said that if the decedent, as his wife says, attempted to go ashore to get tobacco, he placed himself outside his contract as a passenger, and the defendant was under no obligation to provide him a means of egress from the steamer for such a purpose. To this I cannot assent. In my opinion, the decedent, when on board as a passenger. had the right to go ashore when he did, and it was the duty of the defendant to provide a safe means of passage from the steamer to the pier. The necessity on the part of a passenger, who has taken his position as a passenger, to return to the pier is a common incident of travel. It is constantly done to find lost baggage, to speak to a friend, and may be done to purchase tobacco by any one addicted to the use of that weed. From this necessity arises the obligation on the part of the ship to keep and maintain for the passenger's use, at all proper times, a safe passage-way from the steamer to the pier. This duty was not in this instance discharged, and for that reason the defendant is liable in damages, which damages the libelant, by virtue of the statute of the state of New York, is entitled to recover. As to the amount of such damages, I am of the opinion that \$2,500 will be proper. For that sum, with costs, the libelant may have a decree.

THE DAISY.1

(District Court, D. Massachusetts. November 27, 1886.)

 Admiralty—Jurisdiction—Principal and Agent—Suit for Possession of Vessel.

A suit for possession will lie in the admiralty at the instance of the real owner of a vessel, whose agent has, by fraud or mistake, secured the insertion of his own name as part owner in the bill of sale. A court of admiralty is not bound to treat as a trust a title obtained by fraud or mistake, or one which the holder is estopped from setting up as against the party seeking relief. Vendees of the agent, buying with notice, stand in the shoes of the vendor.

2. ESTOPPEL—PRINCIPAL AND AGENT—TITLE TO VESSEL.

An agent who, by fraud or mistake, obtains the insertion of his own name as part owner of a vessel in the bill of sale, will be estopped from setting up this title as against his principal, in a suit for possession, if the latter is, in point of fact, the real owner.

Admiralty. Action in rem for possession. E. P. Carver and H. Dunham, for libelant.

¹ Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

C. T. Russell, Jr., for claimants.

Nelson, J. This was a cause of possession. The libelant, Allen Cameron, bought of T. L. Mayo & Co., in August, 1885, the fishing sloop Daisy, paid the agreed price, and took from them a writing acknowledging the receipt of the money in full payment, and promising to give a bill of sale at a subsequent date. He on the same day received from the vendors delivery and possession of the sloop, at South Boston. Cameron afterwards sent one James Howard to Mayo & Co. to receive the promised bill of sale. Howard went as directed, but took from Mayo & Co. a bill of sale made out to himself and Cameron jointly, conveying to each of them one-half of the sloop, and had it recorded at the custom-house. Cameron's purchase was made at the request of Howard, and it was agreed between them that Howard should employ the sloop in fishing, and divide the profits with Cam-Howard continued to use the sloop in his business of fishing until July, 1886, when he conveyed the half standing in his name to one Fallon, and on September 24, 1886, Fallon conveyed it to the respondent, Michael Bradshaw.

The respondent denies the jurisdiction of the court to decree possession to Cameron, and insists that his only remedy is in a court of equity. Whether the bill of sale was given in the joint names of the parties, through a mistake of Mayo & Co., or, as the libelant maintains, was procured in that form by the fraudulent representations of Howard, is immaterial to the question. It was not made in that form with the knowledge or consent of Cameron, the real purchaser. He had a right to expect a conveyance to himself alone, and supposed he had one until he learned to the contrary, about the time of the sale to Fallon. The property in the vessel undoubtedly passed to him on its delivery, before the bill of sale was made; and though perhaps Howard acquired, by the conveyance, a title which he might have transferred to a purchaser without notice of Cameron's interest, he certainly got none as against his employer, Cameron. It does not lie in Howard's mouth to set up a title obtained either through his own fraud, or by a mere mistake of third parties, against the real owner, for whom he was acting as a mere servant or agent. In the case of The Taranto, 1 Spr. 170, Judge Sprague decreed possession to the owners against an agent, where the title had been taken in the agent's name with the owner's consent; and in the case of The Fannie, 8 Ben. 429, before Judge Benedict, the libelant recovered, though the record title was in the name of the respondent.

Neither Fallon nor Bradshaw got, by their conveyances, any better title than Howard had. It is apparent from the evidence that they both bought with notice of Cameron's claim, and that their connection with the transaction was merely to assist Howard in defrauding Cameron. Though a court of admiralty has not the jurisdiction of a court of equity, to enforce direct trusts relating to real or personal

property, it is not bound to treat as a trust a title obtained by fraud, or mistake, or one which the holder is estopped to set up against the party seeking relief.

The libelant is entitled to a decree for the possession of the vessel.

Ordered accordingly.

THE AMERICAN EAGLE.1

THE S. E. BABCOCK.

ATLAS STEAM-SHIP Co. v. THE AMERICAN EAGLE and another.

(District Court, E. D. New York. July 2, 1886.)

Collision — Tug and Tow and Steamer — Tug Close to Line of Piers— Steamer Moving Out—Inability of Tug to Avoid Steamer.

Where the tug A., with a tow astern, was coming down the North river, in the vicinity of Pier 1, and about 175 yards from the line of the piers, and saw another tug ahead moving a steamer out from along-side that pier, but was unable to avoid collision with her, it was held that a tug with a tow is bound, in this locality, to be under such control as to be able, by stopping, to avoid a steamer seen to be moving out from a pier half a mile ahead, and that the A. was consequently solely responsible for the collision.

In Admiralty.

Wheeler & Cortis, for the Atlas Steam-ship Co.

Carpenter & Mosher, for the American Eagle.

Hill, Wing & Shoudy, for the Babcock.

Benedict, J. The collision which gave rise to this action was, in my opinion, caused by the fault of the tug American Eagle, and not by any fault on the part of the injured vessel, or on the part of the tug engaged in moving that vessel out from Pier 1, North river. The fault of the American Eagle was in coming down the river with two barges lashed side by side, upon a hawser about 250 feet in length, in such a condition of wind and tide, and at such speed, that she could not by stopping avoid an object ahead and distant half a mile.

It is plain that if the tug had stopped when she saw the steamer moving out of the pier, no collision would have occurred. It was her duty, running by the pier as close as she was, to avoid a steamer so situated. A tug in this locality, undertaking to pass down the river with a tow astern, 175 yards off the pier, is bound to be under such control as will enable her to stop in time to avoid collision with a steamer seen to be moving out from along-side a pier. The necessity for such ability is made plain by the contention, on the part of the American Eagle, that she could not avoid the steamer by porting,

Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

sbecause such a movement would have brought her in collision with vessels on the outside of her. Such a state of facts might easily occur, and in such a case stopping would be the only method of avoiding collision with a vessel ahead coming out from the piers. Ability to stop within a reasonable distance is therefore a necessity to navigation, under such circumstances as are proved in this case. I entertain great doubt as to the truth of the assertion that there was no room for the American Eagle to avoid the steamer by porting; but, if she could not port, she was bound to stop. I find no fault on the part of the Babcock.

Let the libelant have a decree against the American Eagle, and let

the libel be dismissed as against the Babcock.

THE WM. N. BEACH.1

DRAKE v. THE WM. N. BEACH.

(District Court, E. D. New York, June 22, 1886.)

Collision—Floating Logs—Absence of Light—Passing Tug—Entangling
OF Schew.

Libelant allowed logs to remain floating in the water along-side his derrick, with no light upon them. In the night the propeller of a passing tug, whose pilot had no knowledge of the presence of the logs, caught in the logs, whereby libelant's property was damaged. On suit brought against the tug for the damage, held, that she was not liable.

In Admiralty.

De L. Berier, for libelant.

E. D. McCarthy, for claimants.

Benefict, J. In such a locality as this, in the Harlem river, it was not negligence in the pilot of the William N. Beach to allow the stern of his boat to approach within 16 feet of the libelant's derrick, then fast to the shore. As the tide was, and as the tug was handled, it is plain that no injury would have been done to the libelant's property there, if the screw of the tug had not caught in some piles which the libelant had placed and allowed to remain floating in the water along-side his derrick. It was negligence in the libelant to leave these piles where they were when the tug's propeller was caught and stopped by them, and this negligence was the cause of the damages complained of. There was no negligence on the part of the tug in failing to see the piles floating in the water. No light had been placed upon them. The pilot of the tug had no knowledge of their presence, nor any reason to suspect their presence there.

The libel must be dismissed, with costs.

Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

THE AMERICA.1

MORAN v. THE AMERICA.

(District Court, E. D. New York. June 22, 1886.)

 Collision—Two Tugs—One at Rest Near Line of Piers—Attempt to Pass Inside—Fault.

The tug M. was lying at rest in the East river, some 150 feet from the line of the piers, when the tug A., coming down the river, ported in an attempt to pass between the M. and the piers, and collided with the M. Held that, if the original course of the A. would have carried her outside of the M., the A. was in fault for porting. The A. insisted that her porting was when the vessels were close together, and collision was inevitable. Held, in that event, that the A. was in fault for not starboarding in time to pass outside of the M.; and, in either view, the A. was solely responsible for the collision.

2. Same—Vessel at Rest—Applicability of Rule 19.

Rule 19 does not apply where the vessel having the other on her starboard hand is at rest.

In Admiralty.

Carpenter & Mosher, for libelant.

Biddle & Ward, for claimants.

Benedict, J. Under the existing circumstances, clearly proved. it was the duty of the America to pass under the stern of the Ida Miller, and not across her bow. I incline to the opinion that the course of the America, when the Ida Miller was seen by her, would have carried her astern of the Ida Miller, and that the immediate cause of the collision was a change from this course, effected by porting the wheel in an effort to pass between the Ida Miller and Pier 4. If such be the fact, the fault of the America which caused the collision was porting her wheel. But if it is true, as insisted in behalf of the America, that the porting of her wheel was when the vessels were close together, and collision inevitable, then, in my opinion, the America was at fault for not starboarding her wheel so as to carry her further out into the river, and astern of the Ida Miller, seen by her to have backed off Pier 4, and to be at rest in the river. Rule 19 is not applicable in a case like this. The Ida Miller came to a rest. When seen to be so at rest, common prudence on the part of the America, as it appears to me, would have prevented an attempt to pass astern of the Ida Miller, when, by holding her course, or, at most, by a turn of her wheel to starboard, she would have passed astern of the Ida Miller, and at the same time assumed her proper course in the river.

Let a decree be entered in favor of the libelant, with an order of reference to ascertain damages.

Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

BALTIMORE & O. R. Co. v. County of Jefferson.

(Circuit Court, D. West Virginia, 1886.)

1. Constitutional Law-Statutes - One Object - Const. W. Va. 1863, Art.

An act which confers power upon an existing railroad corporation to extend its road through a certain county in the state, and also authorizes that county to subscribe to the capital stock of said railroad, is not repugnant to the article in the state constitution providing that no law shall embrace more than one object, which shall be expressed in the title.

2. Taxation—Constitutional Rules—Aid to Railroad.

An act to submit the question of subscription to the stock of a railroad company to all the male tax-payers of the county is not contrary to any inhibition of the constitution, nor is the power thus improperly delegated to a class of the people instead of the whole people, the class named being those who would be affected by the act.

8. Same—One Railroad Taxed to Aid Another — Repeal of Exemption Law.

A railroad company is liable to be taxed to furnish the aid voted for another company, although, when the statute authorizing such aid was passed, railroad property was, by a law then existing, exempt from taxation for such purpose; such law being afterwards repealed, and not having been enacted when the company sought to be taxed first obtained a license to do business in the state.

In Chancery. Bill to enjoin the collection of a tax levied to aid the construction of a railroad. Demurrer to bill.

Caleb Boggess and J. A. Hutchinson, for Baltimore & O. R. Co.

C. C. Watts and Forrest Brown, for the County of Jefferson.

Jackson. J. The Baltimore & Ohio Railroad Company, a corporation of the state of Maryland, files its bill against the county of Jefferson, as a corporation of the state of West Virginia, and Eugene Baker, late sheriff, and A. G. Hurst, acting sheriff, of the county, and citizens of this state, to enjoin and restrain the defendant from collecting taxes, which, as the bill alleges, were levied for the purpose of aiding the construction of the Shenandoah Valley Railroad, passing through the county of Jefferson, a rival corporation to that of the plaintiff. To this bill the defendant demurs, and the case is now heard upon the issue presented by the demurrer. It appears from the bill that the legislature of West Virginia, on the twenty-fifth of Feb. ruary, 1870, passed "An act to authorize the Shenandoah Valley Railroad Company to construct their road through the state of West Virginia, to the Potomac river, and also to authorize the board of supervisors of Jefferson county to submit to a vote of the people, at a special election, the question of the subscription to the capital stock of the company." The power of the court is invoked to protect the plaintiff from what it alleges to be "the unjust and illegal claim of the county of Jefferson to charge it with the payment of taxes to discharge the principal and interest of bonds, amounting to \$250,000,

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issued by said county to pay for its subscription to the capital stock of the defendant corporation."

An examination of the act justifies the conclusion that it was the intention of the legislature to confer power upon an existing corporation, created by the laws of a sister state, to extend her road through the county of Jefferson, in this state. It was not the creation of an original corporation, but was a grant, in the nature of a license, to an existing one, to construct its road, which appears to be the main

purpose of the act.

The first question presented for the consideration of the court is the validity of the act under which the subscription was made. It is claimed that this act embraces more than one object, and more than one object is expressed in the title, and is for that reason void, because it is in conflict with the thirty-sixth section of the fourth article of the constitution of West Virginia, adopted in 1863, which provides "that no law shall embrace more than one object, which shall be expressed in the title." In this connection we are informed that the fifth and sixth sections of the act provide for a subscription to the capital stock of the road by Jefferson county, which is an object different from the main purpose of the law, and is for this reason obnoxious to the constitution. To support this position the court is referred to Cooley on Constitutional Limitations, 78, 79, 150, 151, and Cutlip v. Sheriff, 3 W. Va. 589.

We cannot concur with counsel that either of the authorities cited sustains their view of the law. Mr. Cooley, in discussing this question, under the head of "The Title to a Statute," remarks that the general purpose of constitutional provisions of this character are accomplished when a law has but one general object, which is fairly indicated by the title. This view of the text writer is well supported by judicial decisions. The case in 3 W. Va. so strongly relied on to support the position that the act of 1870 is unconstitutional, we think, does not sustain it. The title of the act in that case was "An act locating the county-seat of Calboun." But the law, as passed, contained a section which authorized the board of supervisors of said county to sell any property at Arnoldsburg, in the county. The court held this act void, for the reason that the third section contained an object other than the one expressed in the title. It authorized the board of supervisors to sell any county property at Arnoldsburg, at that time the county-seat, without describing it, or restricting their action to the sale of the property which was properly connected with the proposed change in the county-seat. This purpose was not expressed in the title, and for this reason it was held to be repugnant to the constitution.

Conceding that decision to be right, does it apply to the case under consideration? We think not. In this case, the act had but one main object; that was to authorize the construction of a railroad through the territory of West Virginia. All other provisions of the

bill are auxiliary to that object, and have a necessary or natural connection. The power conferred by the act upon the board of supervisors of Jefferson county to submit to a vote of the people the question of a subscription to the capital stock of the company, although it was not expressed in the title, yet was an incident to the main object, and in no sense that we can perceive was it a different and distinct object from the main purpose of the law.

The object of this constitutional provision is to prevent the union of incongruous matters, having no relation to each other. It is to be found in the constitution of a number of the states, and has received judicial construction. We think, upon a close examination of the cases decided in Indiana, Michigan, New York, and Illinois, upon similar constitutional provisions, that it will be found that the courts hold that, where the law embraces several objects, all of which are matters properly connected with its chief object, that it is unnecessary that the title of the act should contain every purpose of the law.

The constitution of Texas contains a provision similar to the one under consideration. It declares that "every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title." This provision has received judicial interpretation in the case of City of San Antonio v. Mehaffy, 96 U.S. 312. The legislature of that state passed "An act to incorporate the San Antonio Railroad Company." Like the law we have under consideration, it had other provisions, one of which was "to authorize the city of San Antonio to take stock in the company, and issue bonds to pay for the same." The supreme court of the United States in that case held the law to be constitutional, and that it had but one object, and that was expressed in the title. In the case of Unity v. Burrage, 103 U. S. 458, the supreme court was again called upon to pass upon a clause of the constitution of Illinois similar, if not almost identical, in phraseology to the one we have under consideration; and the court again affirmed its ruling in the case of San Antonio v. Mehaffy, citing with approbation the case of Belleville, etc., R. Co. v. Gregory. 15 Ill. 20. Still later, the supreme court of Illinois maintained this doctrine in Ross v. Chicago R. R., 77 Ill. 127. This long line of decisions was recently reviewed by the supreme court of the United States in the case of Mahomet v. Quackenbush, 117 U.S. 508, S.C. 6 Sup. Ct. Rep. 858, and the chief justice, speaking for the court, again sustained their previous rulings upon this question. The decisions of the highest tribunals in the states of Indiana, Michigan, and Wisconsin are to the same effect, upon a similar provision in their respective constitutions. In some other states,—California, and possibly Missouri,—the courts hold differently; but not only is the weight of authority in the highest tribunals in the states against them, but the law is, we think, well settled otherwise. Montclair v. Ramsdell. 107 U. S. 147; S. C. 2 Sup. Ct. Rep. 391; Jonesboro City v. Cairo & St. L. R. Co., 110 U.S. 192; S. C. 3 Sup. Ct. Rep. 67; Otoe Co.

v. Baldwin, 111 U. S. 1; S. C. 4 Sup. Ct. Rep. 265; Ackley Schooldist, v. Hall, 113 U. S. 135; S. C. 5 Sup. Ct. Rep. 371.

Independent of the express adjudications we have noticed upon this question, it would be clearly the duty of the court to adopt a liberal rule of interpretation, so as to give effect to the legislative intention, unless its action was clearly so repugnant to the constitution as to violate well-known principles of construction. This liberal rule of construction should always prevail, before courts annul a statute by judicial action. We are therefore of opinion that the third section of the act of February, 1870, is not in conflict with the constitution of this state, and must therefore be held valid. This conclusion, we think, is not only founded in reason, but, as we have seen, is sanc-

tioned by authority.

It is next suggested that the authority conferred upon the supervisors by this act is, at least, questionable, if in fact there is any warrant in the constitution for its exercise. By the terms of the fifth section of the act in question, power was delegated by the legislature to the supervisors of Jefferson county to submit the question of a subscription to the capital stock of the said railroad to all the male taxpayers of the county, at a special election, above the age of 21 years, not under any of the disabilities mentioned in the act. It is urged that the power thus conferred by the legislature is not warranted by the constitution. This is a delegation of power to local authorities. for local purposes. There is nothing in the constitution which inhibits the legislature from the exercise of such a power. In the absence of such a restriction upon the legislative power, the exercise of it cannot be questioned. It has been frequently done by the legislatures of various states upon similar provisions in their constitution, and, in almost every instance where the power has been questioned, the courts have sustained the legislative view of its exercise. The power of taxation for local and municipal purposes has most always been delegated. The reason for it is founded in necessity, and the exercise of the power cannot now be questioned.

The next objection taken to the validity of the act is that the legislature did not provide for the submission of the question of making a subscription "to a vote of the people," but only to a portion or class of them, to-wit, "the male tax-payers of the county over 21 years of age," etc. This provision of the constitution is similar to the constitutions of several of our sister states. The present constitution of Virginia, as well as the one in force before the war, both contain similar provisions to the one under consideration. A similar question to the one now raised was presented under the old constitution of Virginia in the case of Bull v. Read, 13 Grat. 78. In that case the legislature of Virginia passed an act establishing a system of free schools in a particular district in the county of Accomack, but provided that the act "shall [should] not be carried into effect until the people of the district shall, [should,] by a vote taken for the pur-

pose, approve it." Under this constitution every white citizen, 21 years old, etc., was qualified to vote. It will be observed, however, that the act required the vote to be submitted to the people of the district for the purpose of their approval, instead of white male citizens, who were the qualified voters under the constitution. In that case it was claimed that the question of submission to the people of the district was a clear violation of that clause of the constitution which defines the qualifications of voters. But the court overruled this objection, maintaining the validity of the act, and referred to the case of Slack v. Maysville & L. R. Co., 13 B. Mon. 1, in support of its conclusion, in which it was held to be no objection to the mode of exercising the power of imposing local taxation for local purposes that it was referred to a vote of a majority of those to be affected by Such was the course pursued in the case before us. The question of submission was referred to a vote of all the male tax-payers, whom the legislature supposed to be the majority of the people to be affected by the act, and we must therefore conclude that this objection cannot be sustained.

It is further suggested that, by the terms of the constitution, taxation must be equal and uniform, and that in this instance such is not the case. We concede that such is the fundamental law, but we fail to find any discrimination against complainant's property, or any violation of the constitution in the law as passed, which would subject its property to illegal or unjust taxation. There is, in fact, no allegation in the bill that the property of complainant is not taxed at the uniform rate and upon a basis of equality with other property taxed for the same purpose in the county and state. Such an allegation in the bill, if sustained by proof, would entitle the complainant to such a revision of the assessment of its property as would secure to it both equality and uniformity of taxation, as required by the constitution; but, in the absence of such an allegation in the bill, sustained by proof, the court is unable to see how it can pass upon a question not raised by the pleadings, but only presented in the brief filed by complainant's counsel.

Another contention of the plaintiff is that at the time of the passage of the act of 1870, and the election held under it, there was no authority to charge it with any part of the county levies, to pay any subscription voted to the capital stock of the Shenandoah Valley Railroad Company, for the reason that by the statute law then in force, and which continued to be the law of the state until the session of the legislature in 1879, "all railroad property was exempted from taxation to pay subscription of counties to other railroads." It is conceded that when the act of 1870 was passed, that, by the laws then in force, exemption of the plaintiff's property was secured from taxation for the purpose of paying subscriptions to other railroads. The law, however, was a general one, passed long subsequent to that which granted the plaintiff a license to do business as a corporation in this

state. It applied alike to all railroad corporations. There was no such exemption to this corporation in the original act which gave it power to do business here. The repeal of the act which secured the exemption did not divest it of any right secured by its charter. By its repeal the corporation was placed upon the same footing it stood when the law was enacted that secured the exemption. Exemptions are always matters of expediency, and not of right, granted on consideration of public policy, which the law-making power can recall at its pleasure. In this instance the legislative power asserted what we must hold to be an undisputed right, which, in its elemency to this class of corporations, it had not before enforced, and which was clearly within its power under the constitution. This is the view, we think, the legislature entertained when it passed the act; and our respect for its intention forces this conclusion upon us, from which we see no escape.

It is true that the plaintiff had, without any aid from either the county or state, constructed its road, and it would seem to be unjust to require it to aid in the construction of a rival road. But this is a question which addressed itself alone to the legislature, and is, we think, outside of judicial domain. It was for that power to determine whether the act, when proposed, "was in derogation of natural rights" or not. It has passed upon the question, and we think the plaintiff is concluded by its action. The demurrer must therefore be sustained to the bill as it now stands.

Bond, J. I concur in the above opinion.

LEONARD v. LOVELL.

(Circuit Court. W. D. Michigan, S. D. December 8, 1886.)

PATENTS—IMPROVEMENT IN THE CONSTRUCTION OF REFRIGERATORS—INFRINGE-MENT—WANT OF NOVELTY.

A suit was brought to enjoin the infringement of letters patent No. 261,736, for improvements in the construction of refrigerators, the particular feature being this: The ice-floor being in the usual position, two sets of cleats are attached to the inside of the refrigerator case, at each end of the ice-floor, and extending perpendicularly from the ice-floor to the top of the case, and are in pairs. These cleats are arranged by twos, and parallel to each other, but a little distance apart, so as to form a groove. Into these grooves, and from the top, is slid the partition wall, which descends so as to touch the ice-floor; but, being narrower than the height of the chamber, leaves the necessary opening for the warm air to pass over at the top, the advantage claimed being that the wall is thus made "removable," whereby cleaning the walls of the flue is facilitated. Held, invalid for want of novelty, and not infringed by defendant's patent, No. 295,259.

In Equity.

Edward Taggart, for complainant. Louis S. Lovell and Joyce & Spear, for defendant.

Sevenens, J. The bill in this cause was filed in behalf of the complainant, Leonard, who is the patentee in letters patent No. 261,736 for improvements in the construction of refrigerators. He alleges that the defendant, Lovell, professing to be engaged in the manufacture of refrigerators under letters patent No. 295,259, is constructing and selling what is, in substance and effect, an infringement upon the first-mentioned patent, and he prays for an injunction and an accounting. The defendant's answer admits the issuance of the patent to complainant as stated in the bill, and also admits that he, the defendant, is manufacturing refrigerators under the Lovell patent, No. 295,259; but he denies that the complainant was the original inventor of the devices claimed to be infringed, denies that they constitute a patentable invention, and designates several prior patents which the defendant insists anticipated the specific features in refrigerators which the complainant claims are covered by his patent.

Testimony has been taken, but the substance of it consists in the specifications, claims, and letters for the Leonard and Lovell refrigerators, and the specifications, claims, and illustrations of the following patents: No. 201,713, to D. S. Stevens, of date March 26, 1878; No. 8,463, reissue to G. F. Smith, October 22, 1878; No. 175,143, to C. B. Page, March 21, 1876; No. 225,595, to Hale & Ramsey, March 16, 1880; No. 222,604, to S. Scott, December 16, 1879; No. 204,216, to R. T. Hambrock, May 28, 1878; No. 62,643, to W. Lane, March 5, 1867; No. 133,147, to J. H. Fisher, November 19, 1872; and No. 207,356, to W. Horn, Jr., and others, August 27, 1878. The application for the Leonard patent was filed June 13, 1882, and that for the Lovell patent, January 23, 1884.

Various claims covered by the complainant's patent, were in the beginning of the present controversy, alleged by him to be infringed by the defendant; but in the end the contest has been brought upon the limits of a single ground, which will be indicated after some prelim-

inary suggestions.

The first and principal inquiry in the case arises out of the claim put forward in defense that the patent of the complainant is void because—First, the invention is not original; second, it is not patentable for the reason that such invention, so far as the claim alleged to be infringed is concerned, was only that of ordinary mechanical skill, and does not rise to the quality of invention intended to be provided by the patent laws.

Refrigerators of different sorts have been in use for a considerable period, differently classed because constructed upon different principles. The present controversy relates to the class constructed upon the principle of a box or case divided into two main compartments;

an upper one for an ice receptacle, and the lower for a chamber in which to store provisions or other material to be refrigerated, with an opening from the upper or ice compartment downwards into the provision chamber, and another opening from thence into the upper part of the ice chamber. Thus, by utilizing the natural law that the colder air descends and the warmer rises, a constant circulation is kept up until the ice is dissolved, and the motive power is dissipated. In carrying this principle into execution, the general plan on which prior patents have gone is to create an opening or openings, either by slots covered by projecting shelves or by round apertures protected in the same or some similar way, through the bottom of the ice-box, through which the cold air from the ice descends into the lower chamber, and to construct flues along the outer walls of the refrigerator. from the lower chamber to the upper part of the upper chamber, from which the warm air ascending from the lower chamber is drawn through an opening made for that purpose, again cooled by the ice, and forwarded through the same route in repeated circulation. several patents issued anterior to either of these in question, and illustrations of which are put in evidence, were designed on this principle, and adopted such a method of construction. In this method the wall of the refrigerator was generally used as one wall of the ascending flue, and either a fixed inner wall or the side of the ice-box served the double purpose of retaining the ice in place, away from the refrigerator wall, and of forming an inner wall for the warm air In some of the patents the inner wall of the flue was not carried to the top of the upper chamber, but a space was left between the top of this inner wall and the top of the box, for the circuit of air above mentioned.

In the case of the Stevens patent, the side of the ice-box constitutes the inner wall of the warm-air flue. The specifications indicate that the ice-box is made so as to be removable, ("detachable" is the term used, but this, I take it, is equivalent to "removable,") and preferably of open work. This box or cage rests upon the ice-floor, but whether it is removable by lifting out at the top, or drawing out through the door in front, is not quite clear; but I infer the latter, from the use of what are designated "guide-strips." In this arrangement the air would be admitted from the flue to the ice at different heights, through the open work of the side of the box, instead of being all admitted through one opening at the top.

Mr. Leonard's patent was designed to cover certain claimed improvements in the construction of the ice-rack, and the cold-air opening below, and its protections; which are features not now material, all controversy about any specific infringement of these having been abandoned. But the patent also covers a claim for an improvement in the construction of the inner wall of the warm-air flue, and which is also the end wall of the ice-box. The particular feature is this: The ice-floor being in the usual position, two sets of cleats are at-

tached to the inside of the refrigerator case at each end of the ice-floor, and extending perpendicularly from the ice-floor to the top of the case, and are in pairs. These cleats are arranged by twos, and parallel to each other, but a little distance apart, so as to form a groove. Into these grooves, and from the top, is slid the partition wall, which descends so as to touch the ice-floor, but, being narrower than the height of the chamber, leaves the necessary opening for the warm air to pass over at the top. The advantage claimed is that the wall is thus made "removable," whereby cleansing the walls of the flue is facilitated. It is said that at that point the condensation of the warm air is most rapid, and the depositions of impure matter on

the walls is greatest.

The Lovell patent is like this in this feature, except that this wall. instead of being run into grooves at the end of it, is attached, at its upper edge, by hinges, to the wall of the case, and, hanging in towards the ice-floor, rests upon the upper edge thereof. So, of course, this partition wall could be lifted in and up, upon its hinges. and its own weight carries it back to its place, so that its lower edge rests upon the end of the ice-floor, as above stated, and it is perforated to permit the passage of air. But this partition is not removable in the sense that it can be taken out of the refrigerator. The defendant, however, uses a different method of construction; and, instead of the hinges and the lateral fall of the partition, he brings the partition to a perpendicular position, from the end of the ice-floor, and runs a rod from front to rear of the refrigerator, a little below the top, to which rod the upper edge of the partition is attached. The lower edge is prevented from going back into the flue by the turning up, like a flange, of the edge of the ice-floor. Thus, it will be seen, the position of the partition is the same as in the complainant's patent, but the attachment is different, and, while it is movable, it is not removable in the sense of being susceptible of being readily taken out. It serves the same purpose, however, in affording facility for cleansing the walls, that the complainant claims for his device.

With this description of the elements of fact in the present controversy, and which is as definite and clear as I am able to make it without the use of diagrams, we are brought to the substantial question whether this device of the complainants of a removable partition wall is such a new and useful improvement as to constitute a patentable invention; and it seems to me that I cannot hold it to be so without disregarding the plain doctrine on this subject towards which the supreme court has been verging for 30 or 40 years, and on which the law is now quite securely anchored. It appears to me, from as careful a study of the decisions of the court of highest authority on this subject as I am able to make, that the settled interpretation of the true spirit and meaning of the patent laws is that they were enacted for the purpose of stimulating the activity of inventive genius in the production of new and useful contrivances and products for

the public advantage: and that it was not the purpose of those laws to protect as a monopoly, for the advantage of any individual, the product of the exercise of that common skill and mechanism which are the proper and expected work of artisans trained in the dexterities and science of their trade to the higher standard of its art. Not every trifling device, nor any obvious improvement in the material already possessed, is intended to be rewarded. The decisions to which I have referred are to be found in the following cases, and others occurring between, in the reports of the supreme court: Hotchkiss v. Greenwood. 11 How. 248; Phillips v. Page, 24 How. 164; Stimpson v. Woodman. 10 Wall. 117; Hailes v. Van Wormer, 20 Wall. 353; Smith v. Nichols. 21 Wall. 112; Brown v. Piper, 91 U.S. 37; Reckendorfer v. Faber, 92 U.S. 347; Dunbar v. Myers, 94 U.S. 187; Pearce v. Mulford, 102 U.S. 112; Heald v. Rice, 104 U.S. 737; Vinton v. Hamilton, Id. 485; Hall v. Macneale, 107 U. S. 90; S. C. 2 Sup. Ct. Rep. 73; Atlantic Works v. Brady, 107 U.S. 192; S. C. 2 Sup. Ct. Rep. 225, which is an especially valuable and prominent case, where Mr. Justice Bradley explained, in clear and admirable language, the intent and purpose of the statutes. Another valuable case in the same volume, and quite illustrative of the present, is Slawson v. Grand-street R. Co., 107 U. S. 649; S. C. 2 Sup. Ct. Rep. 663. Following these, and fortifying and solidifying the doctrine, are Estey v. Burdett, 109 U.S. 633; S. C. 3 Sup. Ct. Rep. 531; Double-pointed Tack Co. v. Two Rivers Manuf'g Co., 109 U. S. 117; S. C. 3 Sup. Ct. Rep. 105; King v. Gallun, 109 U. S. 99; S. C. 3 Sup. Ct. Rep. 85; Bussey v. Excelsion Manuf'a Co., 110 U. S. 131: S. C. 4 Sup. Ct. Rep. 38: Pennsylvania R. Co. v. Locomotive E. S. T. Co., 110 U. S. 490; S. C. 4 Sup. Ct. Rep. 220; Phillips v. Detroit, 111 U. S. 604; S. C. 4 Sup. Ct. Rep. 580; Morris v. McMillan, 112 U.S. 244; S. C. 5 Sup. Ct. Rep. 218; Hollister v. Benedict, etc., Manuf g Co., 113 U.S. 59; S. C. 5 Sup. Ct. Rep. 717; Blake v. San Francisco, 113 U. S. 679; S. C. 5 Sup. Ct. Rep. 692; Thompson v. Boisselier, 114 U. S. 1; S. C. 5 Sup. Ct. Rep. 1042; Stephenson v. Brooklyn, etc., R. Co., 114 U. S. 156; S. C. 5 Sup. Ct. Rep. 777.

It is true that language apparently implying a less stringent interpretation is found in the expressions of early authorities of high character, among them Chancellor Kent and Mr. Justice Story. These and other authorities are referred to in the dissenting opinion of Mr. Justice Woodbury in Hotchkiss v. Greenwood, 11 How. 248. With the veneration due from one in this place, it would not become me to do more than to say of their interpretation that I am resistlessly borne in another direction by my construction of the recent and authoritative cases. It may be that the constantly increasing multiplicity of patents in every branch of industry and manufacture has indicated the necessity, from public policy, of a more stringent rule,—one which should relieve those engaged in the common trades and avocations of life from tribute to those who drop down upon their tables in swarms, under

pretense of having the warrant of monopoly too often based on trivial grounds. And it may be that the increased facilities for education afforded by the public, and the quickened intelligence of the people, has carried the plane of patentable invention higher than where it once was. Of course, no reflection is intended in these suggestions

upon the patents involved in the present suit.

But notwithstanding the presumption arising from the granting of the patent, upon which the complainant's solicitor lays much stress, and which is prima facie undoubtedly entitled to some weight, I cannot think that either of these patents, in respect to the feature in question, covers any patentable invention. The flues at the side of the refrigerator for conducting the warm air upward, and over into the ice chamber, are nothing new. The use of the wall of the ice box for the inner wall of the flue is not new. In some of the previous patents this was rigid, but it served the same purposes of containing the ice and making a wall of the flue. In the Stevens pattent, however, this side wall was removable. The cage or box for the ice was made either entire, part way up, or "preferably of open work." I do not see that it could be very material whether the air should be admitted to the ice box in one opening through the wall or many; the two purposes above alluded to are both subserved. The method of securing the partition wall in the complainant's refrigerator by a pair of cleats at each end is an old and very common device, resorted to for the purpose of making a movable wall or par-The instances of such use are too common to require men-Now, is there anything new in the feature that the wall is removable? It is claimed that this makes it easier to clean the parts most liable to become soiled by impurities, and this I can easily understand and believe. But the corresponding wall of the Stevens patent was removable for the same purpose. It is true that Stevens did not in the claims appended to his specification allude to this feature of utility as promoted by making his ice-box removable, but the facts contained in his specifications disclose this feature for all there is of utility in it; and the authorities are clear that a patent is avoided for the want of novelty, although the advantages of the device were neither claimed nor seen by the prior inventor, provided his specifications disclose it. Tucker v. Spalding, 13 Wall. 453; Stow v. Chicago, 104 U.S. 547, 550.

The adoption by the complainant of the old device of securing the ends by a pair of cleats, whereby it was removable, to serve the same purpose and no other than those accomplished by a former patent, and in no respect in any substantially different way, was not invention; at least, not of anything patentable. It appears that all the sides of the ice-box in the Stevens patent came out together. Whether the one afforded more convenience in this respect than the other I cannot say; but it could have no substantial effect upon the feature of removability that, whereas in the case of the complain-

ant's wall it could be taken out by itself, in the Stevens patent the same proceeding which would take one wall would also take out the other three. This wall in the defendant's refrigerator, neither as patented nor made, is removable from the case; and it seems to me that the difference between it and the complainant's, in the principle covered by complainant's claim, is greater than that between the complainant's and the Stevens patent. However that may be, I am of the opinion that the variations from what was already accomplished in the design and construction of refrigerators at the time when the patents in question were applied for were not, in respect to this peculiarity, at least, the result of such original invention as is intended by the statute.

Upon his specifications, Mr. Leonard also claimed the results from a combination of his ice-floor and his partition wall; but, as this is not much dwelt upon in the argument, I notice it only to say that, both the elements of the combination being old, and the constituents not qualifying each other in any way, the combination is not patentable. Pickering v. McCullough, 104 U.S. 310.

It follows from these views that the bill must be dismissed.

WATERMAN v. MACKENZIE and another.

(Circuit Court, S. D. New York. December 22, 1886.)

PATENTS FOR INVENTIONS—SUIT FOR INFRINGEMENT—TITLE OF COMPLAINANT—ASSIGNMENT—LICENSE.

February 13, 1884, A., the owner of a patent, assigned it to B. November 20, 1884, B. granted to A. a license to manufacture and sell the patented article. November 25, 1884, B. assigned the patent to C., who assigned to D. April 16, 1886, B. assigned to A. all her right, title, and interest in and to the patent. April 24, 1886, A. filed a bill against E. to restrain him from infringing the patent; the assignment to C., which was made to secure payment of a joint note executed by B. and A., being still in full force. Held, that A. had not the legal title to the patent, and could not maintain the suit.

In Equity. Suit for infringement.

The bill, based upon letters patent No. 293,545, was filed April 24, 1886. In July, 1886, the defendants filed a plea, alleging that the complainant, when he commenced the action, did not hold the legal title to the patent. Issue was joined on the plea. It appears from the record that on the thirteenth of February, 1884, the complainant assigned the patent to Sarah E. Waterman. On the twentieth of November, 1884, Sarah E. Waterman granted to the complainant a license to manufacture and sell the patented article. On the twenty-fifth of November, 1884, she assigned the patent to Asa L. Shipman's Sons, and on the same day they transferred it to Asa L. Shipman. On the sixteenth of April, 1886, Sarah E. Waterman assigned to the complainant all her right, title, and

interest in and to the patent. The assignment to Asa L. Shipman's Sons contains the following language:

"I hereby sell, assign, transfer, and set over unto the said Asa L. Shipman's Sons, their successors and assigns, all the right, title, and interest, claim or demand, of any character or description, legal or equitable, which I have, in, to, under, or by virtue of the said invention, and in, to, under, or by virtue of the letters patent therefor aforesaid, the same being the entire interest in said letters patent."

It then recites that complainant and Sarah E. Waterman have made a joint note for \$6,500, payable in three years, and provides as follows:

"If the said Lewis E. Waterman and myself, or either of us, shall well and truly pay the said note according to its tenor, then this assignment and transfer shall be null and void; otherwise to be and to remain in full force and effect."

Walter S. Logan, for complainant. Philip J. O'Reilly, for defendants.

I have carefully examined the additional suggestions sent me by counsel, and see no reason to change the opinion expressed at the argument. To what was then said but a word need be added. transfer to Asa L. Shipman is in language so emphatic and exact that there is little opportunity for misapprehension. It matters not what the instrument is called. It matters not that it may be defeated by the payment of \$6,500 on the twenty-fifth of November, 1887. The fact remains that, by virtue of this assignment or mortgage, the title to the patent was, on the twenty-fourth of April, 1886, when this action was commenced, outstanding in Asa L. Shipman. If it was not absolute, it was a present, existing title, defeasible upon a condition subsequent. On the sixteenth of April, therefore, when Sarah E. Waterman assigned all her right, title, and interest to the complainant, she had nothing to assign which could at all change the legal status of the parties. She could not vest a clear title to the patent in the complainant, for the obvious reason that she had previously disposed of it, and did not own it. The agreement of the twentieth of November, 1884, being a license, and nothing more, does not enable the complainant to maintain this action without joining the holder of the legal title. The suggestion that, irrespective of the Shipman assignment, the complainant is entitled to prosecute for infringements alleged to have occurred between February 12 and November 25, 1884, is equally unavailing; for, assuming such a right of action to exist, it could only be maintained on the law, and not in the equity, side of the court.

The plea is allowed. The complainant may amend upon payment of

costs within 10 days.

HASSELMAN v. GAAR and others.1

(Circuit Court, D. Indiana. November 18, 1886.)

1. Patents for Inventions—Straw-Stackers.

The sixth and eighth claims of reissued letters patent No. 10,347, (original No. 274,940.) issued November 22, 1883, to Lewis W. Hasselman, for a straw-stacker, held anticipated by patent No. 152,760, of July 7, 1874, to Morey, for hay and grain elevator.

2. SAME

Claim 3 of letters patent No. 290,050, issued December 11, 1883, to Lewis W. Hasselman, for a straw-stacker, does not cover a new combination, and, as added to a straw-stacker, is nothing but an aggregation of well-known devices, which in their new relation perform no new office, and such claim is therefore void.

In Chancery.

C. P. Jacobs, for plaintiff.

Wood & Boyd, for defendants.

Woods, J. The complainant is the patentee and owner of letters patent No. 10,347, reissue of No. 274,940, and of original patent No. 290,050, and charges that the defendants have infringed the sixth and eighth claims of the reissue, and the third claim of the lastnamed patent, by manufacturing and putting upon the market a straw-stacker embodying the combinations set forth in those claims, respectively. The claims in question read as follows:

"(6) In a straw-stacker, the folding straw-carrier, A, B, the supporting frame, F, F, the revolving plate, b, and the straw-carrier braces, G, G, adapted to rotate upon the axis, E, when the carrier frame is tilted, in combination with the axis, E, the windlass, L, and a rope connecting the windlass with the carrier, substantially as and for the purpose described."

"(8) In a straw-stacker, the folding and tilting carrier, A, B, adapted to revolve on the fifth wheel, b, in combination with such wheel, a supporting frame, the stay-rope, l, brace, l^1 , windlass, L, and its crank, e, located and

operated below the carrier frame, substantially as described."

"(3) In a straw-stacking machine, the windlass, sp, mounted on a shaft, s^s , the cogged gearing, cg, cg^1 , shaft, s^2 , and crank, cr; the shaft, s^3 , being provided with a ratchet, engaging a pawl on the frame, as set forth, in combination with the chain, ch, and carrier arm, P, substantially as described, and for the purpose set forth."

The defendants deny novelty and invention in each of these claims, and make the following references to the prior art, to-wit, letters patent of the United States granted D. Morey, July 7, 1874, No. 152, 760; W. R. Maloy, September 12, 1882, No. 264,311; J. D. Edward, February 20, 1877, No. 187,607; J. W. Perkinson et al., April 17, 1883, No. 275,941; H. Cortelyou, December 26, 1882, No. 269,561; J. Q. Adams, May 2, 1876, No. 176,916; M. T. Reeves, reissue, September 26, 1882, No. 10,208; C. E. Merrifield, March 20, 1883, No. 274,134; J. C. Lindley, March 20, 1883, No. 274,205; C. E.

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

Merrifield, February 20, 1883, No. 272,572; D. Sherry, February 20, 1883. No. 272,487: M. T. Reeves et al., February 13, 1883, No. 272,155; H. D. Sprague et al., July 25, 1882, No. 261,770; H. S. Stone and J. M. F. Shepler, February 6, 1883, No. 271,943; J. M. Crawford, March 6, 1883, No. 272,470; H. Cortelyou, May 9, 1882, No. 257,556; No. 25,540, granted to T. F. Christman, June 28, 1859; No. 24,912, granted to J. Y. Parce, July 26, 1859; No. 263,151, granted to J. P. Edwards, August 22, 1882; No. 265,775, granted to G. B. Allis, December 12, 1882; also English letters patent dated October 25, 1872, No. 3,169, granted to Thomas Perkins, and English letters patent, No. 700, dated February 29, 1868, granted to William Barford and William Perkins.

There is a close resemblance, if not a mechanical identity, between the model in evidence of defendant's machine and that of complainant in respect to the claims in question; but, in view of these references, it seems to me quite clear that the bill must be dismissed. There is certainly nothing new in the combination described in the third claim of No. 290,050, and, as added to a straw-stacker, it is nothing but an aggregation of well-known devices, which in their new relation, if it can be called new, perform no new office.

In respect to the other claims,—sixth and eighth of No. 10,347. their respective parts or equivalents, substantially in the same combination, and performing like functions, are all found in the drawings and model exhibited in evidence of the Morey "Hay and Grain Elevator," patent No. 152,760, issued July 7, 1874; the complainant's patent bearing date as late as 1883. Other earlier patents show many, but not all, of the parts of complainant's combinations, and are therefore not complete anticipations; but, in connection with Morey's patent, exclude all reasonable pretense of invention on the part of the complainant.

In order to convert the Morey machine into substantial identity of mechanism and use with that of the complainant, in so far as the sixth and eighth claims are concerned, there was needed, as is shown by a comparison of the models and by the testimony of experts on either side, no addition, nor essentially new combination, of parts, but only a reversal of the direction of motion of the carrier, an elimination of some parts, and other slight changes, within the ready scope

of ordinary mechanical skill.

It follows that the bill must be dismissed. So ordered.

Curran and others v. St. Louis Refrigerator & Wooden Gutter Co. and others.¹

(Circuit Court, E. D. Missouri. December 13, 1886.)

1. Patents for Inventions—Reissues—Broadened Claims—Delay.

The right to a reissue with a broadened claim is lost by a delay of four years in making application therefor.

2. Same—Reissued Letters Patent No. 9,309 for an Improvement on Lum-

BER DRIERS.

The second clause of the claim of reissued letters patent No. 9,309 makes said claim broader than the claim of the original patent.

8. SAME—REISSUED LETTERS PATENT No. 8,846.

The second clause of the claim of reissued letters patent No. 8,846 makes said claim broader than the claim of the original patent. The fifth and sixth clauses introduce no new element.

4. SAME—REISSUED LETTERS PATENT No. 8,840.

The claim of reissued letters patent No. 8,840 is no broader than the claim of the original patent.

In Equity. Demurrer to Bill.

This is a bill for injunction and damages for the alleged infringement of three reissued letters patent, all for improvements in lumber driers, viz.: (1) Reissued letters patent No. 9,309, issued July 20, 1880, to E. J. Sumner's assignees, being reissue of original letters patent No. 125,098, dated March 26, 1872; (2) reissued letters patent No. 8,846, issued August 12, 1879, to J. J. Curran and C. Wilcox, originally granted March 30, 1875, and numbered 161,490; (3) reissued letters patent No. 8,840, issued to J. J. Curran and C. Wilcox August 12, 1879, originally granted April 10, 1877, and numbered 189,432.

The defendants demur upon the following grounds, viz.:

"(1) That the complainants have not made or stated such a case as entitles them in this honorable court to any discovery or relief in respect to the infringement charged of the second clause of the claim of said letters patent reissue No. 8,309, for that it appears by the said bill of complaint that letters patent No. 125,098, whereof profert is made in the said bill, were issued and granted March 26, 1872; that the reissue thereof, No. 9,309, whereof profert is also made, was granted and issued July 20, 1880, upon the application of the patentee made October 28, 1879; that the said letters patent reissue No. 9,309 contain a clause in the claim thereof not contained in the claim of the said original letters patent No, 125,098, to-wit: the clause numbered 2 therein, which is an enlargement of the scope of the claim of said original letters patent, whereby the said reissue letters patent are made to claim new subjectmatters of invention not contained in or covered by the claim of said original letters patent; that, inasmuch as the said patentee delayed and neglected for more than seven years to apply for the said reissue letters patent No. 9,309, the grant thereof with said second clause of its claim was contrary to the provisions of the Revised Statutes of the United States, tit. 60, c. 1.

"(2) That the complainants have not made or stated such a case as entitles them in this honorable court to any discovery or relief in respect to the infringement charged of the second, fifth, and sixth clauses, or either of them, of the claim of said letters patent reissue No. 8,846, for that it appears by the

^{&#}x27;Edited by Benj. F. Rex, Esq., of the St. Louis bar.

said bill of complaint that letters patent No. 161,490, whereof profert is made in the said bill, were granted and issued March 30, 1875; that the reissue thereof, No. 8,846, whereof profert is also made, was granted and issued August 12, 1879, upon the application of the patentee therefor, made July 2, 1879; that the said letters patent reissue No. 8,846 contain three clauses in the claim thereof not contained in the claim of the said original letters patent No. 161,490, to-wit: the clauses numbered 2, 5, and 6 therein, each of which said clauses enlarges the scope of the claim of said original letters patent, whereby the said reissue letters patent are made to claim new subject-matters of invention not contained in or covered by the claim of the said original letters patent; that, inasmuch as the said patentee delayed and neglected for more than four years to apply for the said reissue letters patent No. 8,846, the grant thereof with said second, fifth, and sixth clauses of its claim was contrary to the provisions of the Revised Statutes of the United States, tit. 60, c. 1.

"(3) That the complainants have not made or stated such a case as entitles them in this honorable court to any discovery or relief in respect to the infringement charged of the fifth and seventh clauses, or either of them, of the claim of said letters patent reissue No. 8,840, for that it appears by the said bill of complaint that letters patent No. 189,432, whereof profert is made in said bill, were granted and issued April 10, 1877; that the reissue thereof, No. 8,840, whereof profert is also made, was granted and issued August 12, 1879, upon the application of the patentee therefor made July 2, 1879; that the said letters patent reissue No. 8,840 contain two clauses in the claim thereof not contained in the claim of the said original letters patent No. 189,-432, to-wit: the clauses numbered 5 and 7 therein, each of which said clauses enlarges the scope of the claim of said original letters patent, whereby the said reissue letters patent are made to claim new subject-matters of invention not contained in or covered by the claim of the said original letters patent; that, inasmuch as the said patentee delayed and neglected for more than four years to apply for the said reissue letters patent No. 8,840, the grant thereof with said fifth and seventh clauses of its claim was contrary to the provisions of the Revised Statutes of the United States, tit. 60, c. 1."

Krum & Jonas and Jesse Cox, for complainants. Hyde, Dickinson & Howe and Elmer P. Howe, for defendants.

TREAT, J. As to reissue No. 9,809, the same not having been made for more than seven years after the original patent was issued, the said second claim in the reissue cannot be upheld; therefore demurrer thereto is sustained.

Reissue No. 8,846, as to the claims referred to in the demurrer, the court holds that the demurrer is well taken as to the second claim, but not as to the fifth and sixth.

As to reissue No. 8,840, the demurrer is overruled as to the fifth and seventh claims therein.

v.29f.no.8-21

NEWARK MACHINE Co. v. GAAR and others.1

(Circuit Court, D. Indiana. November 18, 1886.)

1. Patents for Inventions—Clover-Hullers—Seed-Cleaners. On the same record and evidence as in Newark Machine Co. v. Hargett. 28 Fed. Rep. 567, the decision in that case followed.

2. Same—Construction of Claims—Infringement.

If the patentability of the devices claimed in letters patent No. 822,465, of July 21, 1885, to Miller, for recleaner for grain-separators, be conceded, the claims must, in view of the prior art, be construed strictly; and, not being found in defendants' machine, held, there was no infringement.

In Chancery.

Wells W. Leggett, M. D. Leggett, Wm. & Lew Wallace, for plaintiff. Wood & Boyd, for defendants.

- Woods, J. The questions presented here, excepting one, are the same which were recently considered and decided, and as I think correctly decided, in the case of Newark Machine Co. v. Hargett, 28 Fed. The record and evidence in the two cases, it is conceded, Rep. 567. are the same; but it is insisted that these defendants are shown to have infringed the device covered by patent No. 322,465, issued July 21, 1885, to Miller. The claims of that patent are two, and read as follows:
- "(1) A recleaning attachment for grain-separators, consisting, essentially, of a hopper, a screen for receiving the grain from the hopper, an elevator having a chamber at its lower end, and its upper end arranged to deliver the grain to the hopper, and an inclined conductor having one end connected directly with the chamber of the elevator, and its upper end formed into a mouth, arranged under the discharge mouth of the screen to convey the tailings to the chamber of the elevator, substantially as set forth.

(2) The combination, with a separator, of a recleaning device, consisting, essentially, of a screen, an elevator for elevating the tailings to the screen, and a spout arranged directly between the screen and elevator for receiving the tailings from the screen, and discharging them into the elevator frame or casing."

If the patentability of the device described in each claim be conceded, it is clear, in the light of the earlier art, that these claims must be construed strictly,—and, so construed, were not infringed by the defendants, whose recleaning attachments have not had "a spout arranged directly between the screen and elevator," nor "an inclined conductor having one end connected directly with the chamber of the elevator." Besides, the evidence shows, as I view it, that these devices or claims had been anticipated by the Shively recleaner.

Bill dismissed for want of equity.

¹Edited by Charles C. Linthicum, Esq., of the Chicago bar.

THOMPSON v. HALL and others.

(Circuit Court, E. D. New York. July 24, 1885.)

PATENTS FOR INVENTIONS—PATENTEE AN EMPLOYE—LETTERS PATENT No. 232,-

975—IMPROVEMENT IN CUTTING-PLIERS.

A patent was issued to plaintiff, Henry G. Thompson, as assignee of Moses C. Johnson, for an improvement in cutting-pliers, and he filed a bill for damages and an injunction against one Hall. It appeared that Hall was president of a company engaged in making cutting-pliers under a patent issued to Hall. The writ turned on the question whether a certain model was made by Laboratoria and the company engaged in the company of the patent is the patent is the company of the patent is the pa Johnson while he was in the employ of the company, or after he had been discharged by Hall. Held that, on the evidence, it was not made till after the discharge; that Johnson was not the first inventor; and that the bill must be dismissed.

In Equity. Horace Barnard, for plaintiff. Amos Broadnax, for defendants.

Benedict, J. This action is founded upon letters patent No. 232,-975, dated October 5, 1880, issued to Henry G. Thompson, assignee of Moses C. Johnson, for an improvement in cutting-pliers. The bill charges infringement, and prays for damages and an injunction. The question at issue is whether the combination described in the plaintiff's patent was invented by Moses C. Johnson while an employe of a corporation styled the Interchangeable Tool Company, which corporation was engaged in the manufacture of cutting-pliers under a patent issued to the defendant Thos. G. Hall, then the president of the corporation. In support of the averment that Moses C. Johnson was the first inventor of the combination in question, the plaintiff produces a model known in the case as defendant's Exhibit C, which model embodies the invention in question, and was made, as the plaintiff has sought to prove, while Johnson was in the employ of the Interchangeable Tool Company. On the other hand, the defendants assert, and have sought to prove, that this model was not made by Johnson while employed by the Interchangeable Tool Company, but after Johnson had been discharged from that employment, and for the purpose of supporting a fraudulent claim to an invention really discovered by the defendant Hall, put forth for the first time by Johnson after he had been discharged from the service of the Interchangeable Tool Company.

In one aspect, the decision of the case depends upon a question of time; that is to say, whether this model, (Exhibit C.) composed of brass and iron, was made when Johnson says it was, while he was a workman for Hall's company, or at a date subsequent to Hall's discharge of Johnson. Upon this question much testimony has been taken on both sides. Upon a full consideration of all the evidence,

Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

my conclusion is that Exhibit C was not made when Johnson says it was, but subsequent to Johnson's leaving the employment of the Interchangeable Tool Company, and that Moses C. Johnson was not the first inventor of the combination described in the patent issued to the plaintiff as assignee of Johnson. There must therefore be a decree dismissing the bill, with costs.

THE MARGARETTA.1

GREGORY and others v. THE MARGARETTA and THOS. F. LUBY.

(District Court, E. D. New York. July 31, 1886.)

Admiralty — Wreces — Forcible Taking and Wrongful Sale by Wreck-Master—Action to Recover—Necessary Parties.

On November 8, 1888, the bark Margaretta took fire, and was towed to the

On November 8, 1883, the bark Margaretta took fire, and was towed to the Kill von Kull, where she was scuttled and sunk. The place where she sank was within Richmond county, New York. Her owners sold her, as she lay, to G., the libelant, who began operations to raise her. On November 23 the person occupied in raising her received notice from Luby, the wreck-master of Richmond county, to desist from work on the vessel, and, this notice being disregarded, Luby took possession of the wreck by force. A statute of the state of New York authorizes wreck-masters to take possession of wrecked property within their counties, when no owners shall appear, and, if the property is perishable, to obtain an order from the county judge, and sell the wreck at auction. Luby, having taken forcible possession of the wreck, obtained an order of sale from the county judge, and sold her to the claimant, and this action was brought by G. to recover possession. Held, that it is only of property abandoned by the owner, and upon such abandonment, taken possession of by the wreck-master, that a county judge has the power to direct a sale. Here there had been no abandonment by the owners. Held, therefore, that Luby's possession was unlawful; that the order of sale was void, and the sale itself invalid; and that libelant was entitled to the possession of the bark. Held, also, that Luby was improperly made a party to this action.

In Admiralty.

T. C. Campbell, for libelants.

Edwin G. Davis, for claimants.

Benedict, J. This is an action for the possession of the bark Margaretta. That vessel, on the eighth day of November, 1883, while being loaded with petroleum oil at a wharf in New Jersey, took fire. While on fire she was towed to a point in the Kill von Kull, opposite Sailors' Snug Harbor, in the county of Richmond, New York, and there, in 35 feet of water, she was scuttled, and sunk some 800 feet from shore. She had on board cargo that was insured, and on November 14th the insurance company made a contract with one William E. Chapman to save the cargo on board. On November 15th Chapman

Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

took possession of the vessel for the purpose of saving the cargo. November 15th the owners of the vessel advertised the vessel for sale, and on November 19th she was sold at public auction, as she lay, to Matthew Gregory. On the same day Gregory took possession of her, placed a man in a scow along-side of the vessel to take care of the same. Gregory, also, on the same day, sold one-half of his interest in the vessel to Isaac Chapman. On the same day Gregory and Isaac Chapman agreed with William E. Chapman, then at the vessel with a derrick, to raise the vessel, and remove it to some proper place. On November 23d William E. Chapman, while engaged at the vessel, in pursuance of his contract, was notified by Thomas Luby, wreckmaster of Richmond county, to desist from work on the vessel. The notice being disregarded, Luby, on November 27th, took the vessel by force from the possession of Chapman. Thereafter, Luby, as wreck-master, the vessel having meanwhile been raised by Luby at the expense of the county of Richmond, by virtue of a statue of the state of New York, (Rev. St. pt. 1, c. 20, tit. 12,) presented to the county judge of Richmond county a petition, setting forth, among other things, that the bark had caught fire in the Kill von Kull, in the state of New Jersey, and had been "towed down, abandoned, and sunk in the waters and territorial jurisdiction of the county of Richmond;" that on or about the twelfth day of November, 1883, he, by virtue of his powers as wreck-master, and pursuant to the resolutions of the board of supervisors of Richmond county, took possession of the said wreck, and had since continued in possession thereof, as wreck-master of Richmond county; that the wreck was, at the time of presenting the petition, attached to the shores of Richmond county, and in a perishable condition.

Upon such petition the county judge on the same day made the following order:

RICHMOND COUNTY.

In the Matter of the Application of Thomas Luby, Wreck-master of the County of Richmond.

On reading and filing the petition of Thomas Luby, wreck-master of the county of Richmond, verified May 7, 1884, and it appearing that a sale of the bark Margaretta, therein described as perishable, and [sic] that it would be beneficial to all concerned that the same be sold, and on motion of W.S. Hornfager, of counsel for said petitioner, ordered that the said Thomas Luby, such wreck-master, be, and he is hereby, authorized to sell at public auction, to the highest bidder, the wreck of the Margaretta; that said sale shall be held at Pelton's cove, West Brighton, village of New Brighton, Richmond county, on the twenty-second day of May, 1884, at 2 P. M. of that day.

STEPHEN D. STEPHENS, County Judge.

Thomas Luby, on the fifth day of June, 1884, sold the vessel to Seguin, the present claimant, for the sum of \$400. Seguin has no other title to the vessel than that derived from the sale made by the wreck-master, as above described. Upon the proofs, the libelants

are the owners of the vessel, and entitled to the possession thereof, unless their ownership was terminated by the said sale to Seguin.

The proceedings of the board of supervisors in regard to this vessel do not appear to require attention. No sale of the vessel was directed by the supervisors, nor was the vessel sold by order of the supervisors. Nothing done by the supervisors can therefore affect the validity of the claimants' title. That must stand or fall by the wreck-master's sale, made under the authority derived from the order of the county judge above set forth.

The provisions of statute under which the wreck-master acted are found in Rev. St., pt. 1, c. 20, tit. 12. The following provisions only

require notice:

"Section I. No ship, vessel, or boat, nor any goods, wares, and merchandise, that shall be cast by the sea, or any inland lake or river, upon the land, shall be deemed to belong to the people of this state, as wrecked property, but may be recovered by the owner, consignee, or person having the charge thereof, at the time of the happening of the disaster by which the wreck was occasioned, upon the payment of a reasonable salvage, and necessary expenses.

"Sec. 2. The sheriff, coroners, and wreck-masters of every county in which any wrecked property shall be found, when no owner, or other person entitled to the possession of such property, shall appear, shall severally have power, and it shall be their duty, to pursue all necessary measures for saving and securing such property; to take possession thereof, in whose hands soever the same may be, in the name of the people of this state; to cause the value thereof to be appraised by indifferent persons; and to keep the same in some safe place, to answer the claims of such persons as may thereafter appear entitled thereto.

"Sec. 3. If the property so saved shall be in a perishable state, so as to render the sale thereof expedient, it shall be the duty of the officer in whose custody the same shall be, to apply to the county judge of the county, by a petition supported by an affidavit of the facts, for an order authorizing such sale; and if the judge to whom such application shall be made, shall be satisfied that a sale of the property would be most beneficial to the parties interested, it shall be his duty to make the order so applied for.

"Sec. 4. If such order be made, the officer having custody of the property directed to be sold, shall sell the same at public auction, at the time and in the manner that shall be specified in the order; and the proceeds of such sale, deducting the expenses thereof, as the same shall be settled and allowed by the judge making the order, shall be paid to the treasurer of the county in

which the property shall have been found."

Upon these provisions of statute it has been argued in behalf of the libelants that the bark Margaretta was not wrecked property, within the meaning of the statute, because, having been towed afloat to the place where she sank, and then scuttled to make her sink, in a tideway, and some 800 feet from shore, she was not "cast by the sea upon the land," within the meaning of the statute. This point may doubtless be argued, and something said against the right of the owners of ships to make their vessels a charge upon the county of Richmond by voluntarily removing them from the wharves of New Jersey, and sinking them in the waters of Richmond county. A decision upon this point is, however, unnecessary in this case, for the

reason that, assuming the vessel to have been wrecked property within the meaning of the statute, the wreck-master has not such a possession of the vessel as the act makes necessary, to clothe the county judge with authority to direct her sale. By section 2, above quoted, the power of the wreck-master to take possession of wrecked property is limited to a case when "no owner, or other person entitled to the possession of such property, shall appear." An abandonment by the owner is a fact necessary to be shown in order to justify a taking possession of wrecked property by the wreck-master, and it is only of property abandoned by the owner, and, upon such abandonment, taken possession of by the wreck-master, that the county judge has jurisdiction to direct a sale.

In the present case it has been sought to be shown that the wreckmaster acquired possession of the wreck, by putting a light on it, on or about November 12, 1883, and when no one was on board. It is by no means clear that the mere fact of absence of any person from a vessel, situated as this one was, would show such an abandonment as the statute requires; and it is very plain that Luby took no possession of the vessel until after the owners had their agents in actual custody of the vessel, and at work. When, therefore, Luby first asserted his claim to the vessel as a wreck, his claim was without foundation in law, for the property was not then abandoned prop-On the contrary, the owners thereof had appeared, and were in actual custody thereof. The possession of the property afterwards acquired by Luby, through force, was unlawful, and supplied no foundation for an application to the county judge, nor did it clothe the county judge with any authority to direct the sale of the vessel. For this reason, therefore, I am of the opinion that the order of said sale referred to was void: that the sale afterwards made by the wreckmaster was invalid; and that the claimants acquired no title thereby.

In' regard to the position of Luby as a party defendant in this case, it is sufficient to say that he was improperly joined. The action is for possession. It is an action in rem. Luby was not in possession of the vessel when this suit was brought, nor did he then claim any right of possession and control over her. He had sold her to the claimant James Seguin, and Seguin alone had the possession. An action of trespass against Luby cannot be joined with an action in rem for possession. The exception to the libel, therefore, which was argued at the hearing on the minutes, must be allowed, and Luby be discharged from this action, with his costs to be taxed.

As against the vessel, the libelants must have a decree awarding the possession thereof to them, and they must recover their costs.

THE WILLIAM MARSHALL.

CAIN and others, Owners, etc., v. Church and others.

(District Court, D. Maryland. 1886.)

1. Demurrage—Consignee and Shipper One Person—Liability—Action in

The respondents, ice-dealers in Baltimore, purchased ice to be delivered free on board, in the Kennebec river, the sellers agreeing to procure the vessel, the respondents to pay the freight. Held, that the respondents, being both consignees and shippers, were liable in an action in personam for damages for unreasonable detention of the vessel upon arrival in Baltimore, before the discharging of the ice was commenced.

2. SAME—DISPATCHING TOO MANY VESSELS—PRINCIPAL AND AGENT.

The detention was caused by the accumulation of vessels in Baltimore consigned to respondents, and resulted from the sellers of the ice dispatching too many vessels at about the same date. *Held*, that the dispatching of so many vessels, even though contrary to respondents' instructions, was the act of persons acting in their behalf, and was no defense to libelants' demurrage for damages for detention.

(Syllabus by the Court.)

In Admiralty.

Robert H. Smith, for libelants.

R. M. Venable, for respondents.

Morris, J. This is a libel in personam to recover compensation for the detention of the schooner William Marshall in discharging a cargo of ice in the port of Baltimore. The schooner, with a cargo of 540 tons of ice, consigned to the respondents, Church, Lara & Co., sailed from the Kennebec river, August 12, 1886. She arrived in Baltimore early on the morning of the 20th, and reported to the consignees. On the 28th, discharging not having yet commenced, the master notified Church, Lara & Co. that from the 30th he would expect and require compensation for delay. On September 2d discharging was commenced, and was completed in two days. The libelants claim compensation for five days' detention from August 30th to September 3d.

There was no formal charter-party, and no agreement for demurrage; the only contract being that expressed in the bill of lading, which provides that the ice is to be discharged by the consignees, with the assistance of the crew. The legal implication, therefore, was that the ice was to be discharged in a reasonable time, having regard to all the circumstances proper to be considered. Bacon v. Erie & Western Transp. Co., 3 Fed. Rep. 344. It is not disputed that the detention was far beyond the time actually required for discharging the ice. After a voyage consuming only eight days, the schooner lay in port for 13 days before she was taken to respondents' wharf, and the discharging which was then commenced was completed in two days.

Respondents put their defense upon two grounds: First, that they were merely consignees of the ice, and as such, there being no agreement for demurrage expressed in the bill of lading, there can be no implied liability on their part to pay for detention of the vessel which occurred before they began to receive the cargo; second, that an action against them as consignees, if maintainable at all, can only be sustained upon proof of culpable negligence on their part, and that they were not in fact guilty of negligence, because they were prevented from sooner receiving the ice, although their facilities were ample for the ordinary requirements of their business, by circumstances for which they are not responsible. The circumstances relied upon in the answer are that the respondents having, as was well known to libelants, but one wharf in the port of Baltimore at which ice could be discharged, there arrived an unusual number of vessels loaded with ice, consigned to them, just before the arrival of libelants' schooner, so that they were obliged to discharge four other vessels before libelants' schooner could have her turn; that the arrival of so many vessels about the same time was not through any fault of respondents, but was because the persons from whom they had purchased the ice had not complied with respondents' instructions with regard to the dates for dispatching the vessels.

The first ground of defense is not sustained by the proof. spondents were not merely consignees, but were owners of the ice when it was put on board, and, in fact, the vessel was procured for They had contracted for the ice with ice dealers in their account. Maine, at a certain price per ton, free on board in the Kennebec river; the vendors agreeing to procure the vessel, and deliver the ice on board, from time to time during the season, as respondents might direct, the respondents to pay the freight. The bill of lading states that the ice is shipped for account and at the risk of the respond-Under an ordinary bill of lading there is an implied agreement by the shipper that the goods shall be received within reasonable time after tender at the port of destination, and in admiralty there is a lien given upon the cargo for damages caused the ship by unreasonable delay in receiving them. The Hyperion, 2 Low. 93: S. C., on appeal, 1 Holmes, 290; Fulton v. Blake, 5 Biss. 371; Hawgood v. Tons of Coal, 21 Fed. Rep. 681. The shipper is a party to the contract of affreightment, and is accountable for any obligation implied by it. Bacon v. Erie & Western Transp. Co., 3 Fed. Rep. 345; Sprague v. West, 1 Abb. Adm. 548. The goods being subject to a lien for the damages resulting from detention of the vessel, and having been the property of the consignee from the inception of the voyage, if he receives them with notice of the claim, there can be no good reason suggested why he should not be held personally answerable.

The responsibility cannot be placed upon the ice-dealers in Maine who put the cargo on board, for they might well defend themselves

by showing that the contract of affreightment was made on behalf of the consignees, and that they acted as agents, as indicated by the language of the bill of lading. Stafford v. Watson, 1 Biss. 437.

Assuming that respondents, being the owners and shippers as well as the consignees of the cargo, may be held to answer in personam for an unreasonable detention of the schooner, it remains to consider whether they were without fault in having such an accumulation of vessels arrive that they were prevented from sooner discharging her. In Cross v. Beard, 26 N. Y. 89, which was also a case of goods shipped by consignees' agents, it was held, at common law, that evidence going to show that an accidental break in a canal and a storm on one of the lakes had combined to cause a fleet of vessels to come into port together, which otherwise would have come singly, at intervals, was proper to go to the jury; and that from it they might find that the consignees had been without fault, under all the circumstances, in suffering such an accumulation of vessels as had caused the detention complained of. This rule has not been uniformly followed in admiralty, (Esseltyne v. Elmore, 7 Biss. 69;) but, assuming it to be applicable to this case, there is no proof whatever of any unexpected or unforeseen accidental occurrence, beyond the control of the respondents, which occasioned the accumulation of vessels which detained respondents' schooner. There was no storm, no interruption of navigation, no exceptional circumstances of any kind. The accumulation was occasioned by the fact that the parties from whom respondents had purchased ice, acting on respondents' behalf in shipping it, had dispatched too great a number of vessels about the same date. spondents contend that this was contrary to their instructions, but it was the act of agents selected by themselves, and for which they are answerable to the libelants. It certainly was not a matter beyond ordinary human foresight, and is no answer to libelants' claim.

The counter-claim of the respondents for loss from melting of the ice, because of alleged neglect of the officers of the schooner to have her kept pumped free of water, is not sustained by the weight of evidence. No mention of this demand was made until after this libel was filed. There is direct testimony that the schooner was kept pumped free of water, and there is enough in the fact that the ice was in the vessel during the hot weather, from August 12th to September 2d, to account for the loss of weight.

The libelants are entitled to a decree for freight, and demurrage for five days.

JOLIET STEAM-SHIP CO. v. YEATON.

(District Court, E. D. New York. July 8, 1886.

1. Carriers of Goods—Damage to Cargo—Duty of Ship Where Cargo Requires Extraordinary Protection.

Where cargo about to be shipped needs extraordinary protection, it is the duty of the ship-owner to provide the stevedore with the means for such pro-

2. Same—Improper Stowage—Owner's Knowledge of Method of Stowage—

LIABILITY OF STEVEDORE.

Certain hogsheads of molasses were sent to a vessel for shipment. The vessel was already stowed with bacon. With the knowledge, and by the implied direction, of the agent of the vessel, the molasses was stowed above the bacon, no tarpaulins or other means of protection for the bacon being furnished to the stevedore. On the voyage the leakage from the molasses injured the bacon, and the ship-owner, having made good the loss, brought this suit against the stevedore to recover the money so paid. Held, that the stevedore was not liable.

In Admiralty.

E. B. Convers and Charles Stewart Davison, for libelant. John H. Kemble, for claimants.

Benedict, J. I am of the opinion that the damage described in the libel, being damage to bacon in boxes caused by molasses, arose from molasses leaking out of the holes, and running upon the bacon during the voyage. It is true that in discharging the cargo one hogshead of molasses slipped from the hooks, and of its contents 100 gallons, perhaps, fell upon the boxes of bacon in the hold below; but I do not think it is possible that such damage to 450 out of 580 boxes as is proved in this case could have arisen from the molasses which ran from the single hogshead which broke while discharging. injury as the proofs show to have been sustained by this bacon must. as it seems to me, have been caused by leakage from the 50 puncheons of molasses which were during the voyage stowed above the bacon. No doubt it was bad stowage to put half of such a shipment of molasses over the boxes of bacon. Leakage is a necessary incident to the transportation of hogsheads of molasses, and damage from that cause to the bacon stowed below molasses would be a natural result of such stowage.

If, then, the defendant, as being the stevedore who undertook the stowing of the cargo, is responsible for the placing of those hogsheads of molasses over the bacon, I am unable to see any way of escape for him from liability for the damage that resulted. But I am of the opinion that, under the circumstances, the stevedore cannot be held responsible for placing the molasses where he did, because of the fact that, when the molasses came down to the ship, the ship was full, the bacon already stowed, and there was no other place to put the molasses

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

other than the place where it was put. The agent of the ship knew, when the molasses came to the ship, that the ship was full. When, therefore, as the evidence shows, he told the stevedore that this molasses would finish her, without indicating any desire that the bacon should be broken out, that was equivalent, under the circumstances, to a direction to the stevedore to put the molasses over the bacon, and relieves the stevedore from responsibility for damage arising from the selection of the improper place for the stowage of the molasses.

It is said that the stevedore made no attempt to protect the bacon from leakage of the molasses by tarpaulins or otherwise. This is also true, but there is no proof that the ship-owner furnished the stevedore with tarpaulin, or any other means, for protecting the bacon from the leakage of the molasses, which he knew was most liable to arise. It is not proved to be, nor do I understand it to be, a part of a stevedore's contract, to furnish such protection from molasses as the stowage of the bacon required. The ship's owner knew where the molasses must go, and it was incumbent on him, if he desired tarpaulins or other extraordinary preventives used, to furnish the same to the stevedore. Nor can responsibility to the ship-owner for the result of the owner's failure to provide tarpaulins, or the like, result from the stevedore's omission to ask for tarpaulins. Extraordinary protection was necessary, and it was as well known to the ship-owner as to the stevedore. It was therefore the duty of the ship-owner to provide the stevedore with the means of protection to the bacon, if extraordinary protection was desired. My conclusion, therefore, is that the ship-owner cannot recover of the stevedore the money he was compelled to pay the owner of the bacon for the damage the bacon received from molasses during the voyage of importation.

The libel is dismissed, with costs.

THE CEPHALONIA.1

FOOTE v. THE CEPHALONIA. SPARES v. SAME. EASEMAN v. SAME. FELTY v. Cunard Steam-Ship Co. Green v. Same.

(District Court, E. D. New York. July 9, 1886.)

Collision—Steamer and Tug—Overtaking Vessel—Loss of Life and Property—Liability.

The tug Glen Island, while proceeding down the bay of New York, was overtaken and run down by the steam-ship Cephalonia, of the Cunard line. The tug was sunk, and several lives were lost. Prior to the collision the tug did not alter her course. On suit brought against the steam-ship to recover for the loss of life and property, held, that the Cephalonia, as the overtaking

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

vessel, was bound to have avoided the tug; that the fact that she blew whistles in time to enable the tug to get out of her way did not furnish her any excuse for the collision; and that she was solely responsible for the collision.

In Admiralty.

Butler, Stillman & Hubbard, for William H. Foote. Hyland & Zabriskie, for William Sparks and Mary E. Felty. Carpenter & Mosher, for Oliver Green. Owen & Gray, for the Cephalonia and the Cunard Steam-ship Co.

Benedict, J. These actions, which were tried together, present the question whether the sinking of the tug Glen Island by the steamer Cephalonia, on the morning of February 27, 1884, and the consequent loss of life and of property, arose from faulty management of the steamer, or by faulty management of the tug. The accident occurred in broad daylight. Both vessels were bound down the bay of New The tug was proceeding down the bay. The steamer was behind and overtaking the tug. The tug was seen by those in charge of the steamer. When about half way between Oyster island and Robbins Reef light, and in plain sight, she was run over and sunk by the steamer's stem striking the stern of the tug, and capsizing her. Of course, the burden is upon the steam-ship to excuse herself. The excuse she makes is that the tug suddenly attempted to cross the course of the steamer, and in so doing threw herself so suddenly under the steamer's bow that it was impossible for the steamer to avoid her. The testimony fails to prove this defense. It is, no doubt, true that, at the moment of capsizing, the tug lay partly across the steam-That was caused by the fact that, when the steamer struck the tug's stern, the weight of the steamer turned the tug around in the water, and so brought part of her under the steamer's bow. But it is not proved that there was any change in the direction of the tug's course which brought her under the steamer's bow. That the tug had, before the steamer appeared, deviated from a straight course, avails not to excuse the steamer. That fact is entitled to consideration in determining whether, when the steamer approached near to her, the tug changed her course; but it is not sufficient, in the face of the testimony to the contrary, to justify the conclusion that the tug changed her course at the moment of the collision.

The cause of the collision doubtless was the wrongful assumption on the part of those in charge of the steamer that the tug would be aware of the approach of the steamer from behind, and, when the steamer drew near, get out of her way. As it happened, the tug had no knowledge of the presence of the steamer behind her until collision was inevitable. The assumption upon which the steamer was navigated accordingly failed, and the collision was the result.

If, as proved, the steamer gave the tug whistles in time to enable the tug to get out of the steamer's way, the case of the steamer is not helped. The duty of the tug, whistles or no whistles, was to hold her course. It was no part of her duty to get out of the way of the steamer. If, as the steamer approached the tug from behind, the tug held her course, she discharged all her duty; and that was what she did. While in performance of that duty, she was run over and sunk by the steamer. No doubt can be entertained as to the liability of the steam-ship for the damages that resulted.

Decrees must therefore be entered in the several cases in favor of

the libelants, with an order of reference to ascertain damages.

THE AUGUSTO.1

GUDEWILL v. THE AUGUSTO.

(District Court, E. D. New York. July 13, 1886.)

CARRIERS—OF GOODS — SHIPS — STOWAGE — OPENING BALES FOR PURPOSES OF STOWAGE—CONSEQUENT REDUCTION IN VALUE—LIABILITY.

Certain bales of cork-wood were shipped in good order, on board of the bark Augusto. While on board, some of the bales were opened, apparently for the sake of stowage. In rebaling, woods of different sizes and quality were so mixed as to reduce their market value. The consignee refused to give a receipt for the same in good order, whereupon the ship-owner sold the goods. On suit brought by the consignee to recover the sound value of the goods, less the freight on the whole shipment, held, that libelant should recover that value. value.

In Admiralty. Hill, Wing & Shoudy, for libelants. Ullo, Ruebsamen & Hubbe, for claimants.

Benedict, J. Certain bales of cork-wood and cork were shipped in good order on the bark Augusto. While on board ship 62 bales were opened by cutting or otherwise, apparently for the sake of stowage. In rebaling these 62, woods of different sizes and quality were so mixed as to cause a serious reduction in the market value of the goods so mixed. The ship refused to deliver these 62 bales except upon receiving a receipt for the same in good order. The consignees refused to give such a receipt, and thereupon the ship-owner sold the goods. The consignee now, by this action, seeks to recover the sound value of these 62 bales, less the freight on the whole ship-The ship rests her defense upon the fact proved that, subsequent to the original demand of a receipt in good order, she offered to deliver these bales, subject to the ship's lien for freight. In reply, the libelants claim that, upon sending the receiving clerk, O'Brien, to the ship for the goods, in accordance with the offer to deliver sub-

Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

ject to the ship's lien for freight, the goods were again refused, unless a receipt in good order was given. The evidence is not as clear as it might be as to the time of O'Brien's demand, but I think the testimony justifies the opinion that the visit of O'Brien to the ship was in consequence of the offer to deliver the goods, and, if so, it was of course subsequent to the offer. The testimony of O'Brien shows, therefore, that the offer to deliver was not adhered to; and, as the condition of the goods did not justify the ship in asking for a receipt in good order, a breach of the contract is proved. There seems to be no doubt as to the value of the goods in the 62 bales, and that value is the measure of the libelants' damages resulting from the breach. The libelant must recover that value, viz., \$1,368.20, less, of course, the freight on the whole shipment, which was \$379.49.

Let a decree be entered in favor of the libelant for \$988.49, with

interest from August 19, 1881.

THE WIER v. THE PADRE.1

(District Court, E. D. Pennsylvania. December 8, 1886.)

Collision—Vessel not at Anchor—Storm.

Failure to see that a vessel is securely fastened when a storm arises will render her responsible in damages if, during the storm, the vessel breaks loose, and collides with another.

In Admiralty. Henry R. Edmunds, for libelant. Charles Gibbons, Jr., for respondent.

BUTLER, J. It seems quite clear that the respondent is liable. Conceding that the bark was fastened with sufficient security for fair weather, it certainly was not for the tempestuous weather which prevailed for many hours before the accident. The respondent's duty required him to see to the fastenings when the storm arose. The post to which the chain was attached was rotten, and insufficient to resist any strain, while the bowline was weak, and easily parted. These fastenings, I think, could scarcely be regarded as secure, even in ordinary weather.

A decree must be entered for the libelant accordingly.

Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

THE SYLVAN GROVE. THE DR. J. P. WITBECK.

WALL v. THE SYLVAN GROVE and another.

(District Court, E. D. New York. July 16, 1886.)

1. Collision—Steam-Boat and Small Boat Astern of Tug—Overtaking Vessel—Liability for Personal Injury.

Libelant's small boat, which was being towed astern of the tug W., was run down by the steamer S., which was on a course overtaking the tug. Libelant's arm was thereby broken, and his boat damaged, for which injuries he brought suit against both the steam-boat and the tug. Held, that the steamer, healing the overtaking reseal was bound to have kent of the way, and was being the overtaking vessel, was bound to have kept out of the way, and was in consequence solely liable for the collision.

2. Same—False Testimony—Allowance for Injury to Proferty—For In-

JURY TO PERSON.

Libelant swore falsely that his boat was wholly destroyed. Held, that nothing should be allowed for the injury to property. Held, also, that he should recover \$500 for the breaking of his arm.

In Admiralty.

Thomas D. Cottman and Biddle & Ward, for libelant.

A. P. & W. Man, for the Sylvan Grove.

Benedict, Taft & Benedict, for the Dr. J. P. Witbeck.

Benedict, J. It is plain enough that the libelant cannot recover against the Dr. J. P. Witbeck, at whose stern he was towing in his It is equally plain that he can recover against the Sylvan The Sylvan Grove was overtaking the Witbeck, and the Witbeck, with the libelant's boat astern, was in plain sight. The duty of the Sylvan Grove was to avoid collision with the libelant's boat. she contends, there was a change of course on the part of the Witbeck, which brought her on a course crossing the course of the Sylvan Grove, then it was the duty of the Sylvan Grove to stop, on seeing such change, and, by porting her wheel, avoid running over the libelant in his boat. If she was at a proper distance from the Witbeck, there was no difficulty in doing this. If, however, as is more probable, the Sylvan Grove approached so near to the Witbeck, holding her course, that a shift of the Witbeck's wheel, made to allow the Sylvan Grove to pass her to port, threw the Witbeck's stern a little off shore, and thereby pulled the libelant a little off shore, and under the paddlewheel of the Sylvan Grove, then the Sylvan Grove was in fault for approaching so near the Witbeck. The libel must therefore be dismissed as to the Witbeck, with costs, and the libelant must recover his damages of the Sylvan Grove. He had one of his arms broken, and he swore falsely that his boat was wholly destroyed. I give him nothing for the injury to his property. For his broken arm I give him \$500.

Let a decree be entered for the libelant against the Sylvan Grove for \$500, and costs.

Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

CHICAGO, I. & N. P. R. Co. v. MINNESOTA & N. W. R. Co.

(Circuit Court, N. D. Iowa, E. D. November Term, 1886.)

1. REMOVAL OF CAUSE—CITIZENSHIP—FILING OF ARTICLES BY FOREIGN CORPORATION.

The filing by a foreign corporation of its articles of incorporation with the secretary of state of lowa, as required by 18 lowa Gen. Assem. c. 128, does not alter its status as a foreign corporation; and, in an action brought against such a corporation by an lowa corporation, the defendant may have the cause removed from a state court to a United States circuit court.

2. SAME—CONSOLIDATION AFTER SUIT BROUGHT.

Where a consolidation of a foreign with a domestic railroad has not taken place till after suit brought against the foreign corporation by a domestic corporation, and the filing of petition for removal, the consolidation does not alter the foreign corporation's right to a removal of the cause.

3. SAME-APPEAL TO STATE SUPREME COURT.

An appeal to a state supreme court, from an order allowing a temporary injunction, where the same is allowed upon the petition and an affidavit, bars the right of defendant to remove the cause to a United States circuit court.

4. SAME—TIME OF FILING PETITION.

It is no objection to the application of the foregoing rule that the petition for removal was filed promptly on the opening day of the term, being the day on which it could be presented to the court, since the statute provides that the party desiring to remove shall file his petition before or at the term at which the case could first be tried.

In Equity. On plea in abatement. Lake & Harmon, for complainant. Fouke & Lyon, for defendant.

Shiras, J. On the seventh day of July, 1886, the complainant filed a bill in equity in the district court of Howard county, Iowa, averring that the defendant had wrongfully taken possession of complainant's located and partly completed road-bed, over certain described parts of sections of lands in Howard county; and the bill prayed that a writ of injunction might be issued restraining defendant from interfering with said road-bed and grade; and also asked judgment for the damages alleged to have been caused by such action on part of defendant. On the tenth day of July, 1886, an original notice in said cause was served upon the defendant, citing the defendant to appear in said cause at the coming November term of said court; and also notifying defendant that on the thirteenth day of July, 1886, an application for a temporary writ of injunction would be made before the Hon. L. O. HATCH, judge of said district court of Howard county. On the day named the application for the temporary writ was heard before the judge, both parties appearing by their counsel, and an order was made directing the issuance of the writ as asked. The writ was thereupon issued and served, and on the fourteenth day of July the defendant gave notice of an appeal from the order granting the writ to the supreme court of Iowa, and filed a supersedeas bond.

On the finth day of November, 1886, the defendant filed in the district court of Howard county a petition and bond for the removal of the v.29r.no.9—22

cause to the federal court, on the ground that the parties were citizens of different states, and the amount in controversy exceeded \$500. The state court approved the bond, but made no order on the petition for removal. A transcript of the record having been filed in this court, the complainant pleads to the jurisdiction; averring that, in fact, the defendant corporation, which was originally created and organized under the laws of the state of Minnesota, has since become an Iowa corporation, and is therefore a citizen of the same state as the complainant. In support of this averment, it is shown that the defendant, in pursuance of the provisions of chapter 128 of the Acts of the Eighteenth General Assembly of the state of Iowa, filed with the secretary of state a copy of its articles of incorporation, whereby it became empowered to extend its road into Iowa, and to possess all the powers, franchises, rights, privileges, and liabilities of corporations organized in Iowa.

This act clothes foreign corporations with the named powers, rights, and liabilities, but it still leaves them foreign corporations. It does not change their status in this particular, but only defines the powers and rights of the foreign corporation as such. The fact, therefore, that the defendant company, under the authority of this act, filed its articles of incorporation with the secretary of state in Iowa, and extended its road into Iowa, does not constitute it an Iowa corporation, and does not,

therefore, defeat the right of removal.

It is also urged, in support of the plea to the jurisdiction, that there has been, in fact, a consolidation between the Minnesota & Northwestern Company and the Dubuque & Northwestern Company, the latter being an Iowa corporation; and that this consolidation makes but one company, existing under the laws of the state of Iowa and of the state of Minnesota, thus bringing the case within the rule recognized in Colglazier v. Louisville, N. A. & C. Ry. Co., 22 Fed. Rep. 568; Pacific R. Co. v. Missouri

Pac. Ry. Co., 23 Fed. Rep. 565, and cases therein cited.

Whether the transactions had between the companies named amounts to a consolidation of the two former corporations into a new corporation, owing its existence to the laws of Iowa and Minnesota, or only amounts to a consolidation of the lines of railroad, by the sale of the property and stock of the Dubuque & Northwestern to the Minnesota & Northwestern, it is not material to determine. Whatever the result of the consolidation was, it did not take place until after the filing of the petition for removal in this cause, and therefore it has no effect upon the rights of the parties to this litigation. The suit was brought against the Minnesota & Northwestern Company, a corporation organized under the laws of the state of Minnesota, and there has been no substitution of any other corporation as defendant in this cause. As the complainant and defendant, when the suit was brought, and when the petition for removal was filed, were corporations created under the laws of different states, the right of removal existed, so far as the same is dependent upon the diverse citizenship of the parties.

A more serious ground of objection to the jurisdiction of this court arises from the fact that the defendant appeared to the motion for a temporary injunction, was heard in opposition thereto, and took an appeal and supersedeas to the supreme court of the state from the order granting

the temporary writ.

In the Removal Cases, 100 U. S. 457, it was said that it is "clear that congress did not intend by the expression before trial, to allow a party to experiment on his case in the state court, and, if he met with unexpected difficulties, stop the proceedings, and take the suit to another tribunal."

In Alley v. Nott, 111 U. S. 472; S. C. 4 Sup. Ct. Rep. 495; Scharff v. Levy, 112 U. S. 711; S. C. 5 Sup. Ct. Rep. 360; and Gregory v. Hartley, 113 U. S. 742; S. C. 5 Sup. Ct. Rep. 743,—it is ruled that, after a hearing in the state court upon a demurrer, which attacks the bill or petition on the ground that the facts therein stated do not constitute a cause of action, it is too late to apply for a removal, under the act of 1875, for the reason that, by such a demurrer, a decision deciding or affecting the merits of the controversy may be had.

In the case now under consideration the hearing was upon an application for a temporary writ of injunction. The writ was applied for and granted under the provisions of section 3388 of the Code of Iowa, which enacts that "where it appears by the petition therefor, which must be supported by affidavit, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act which would produce great or irreparable injury to the plaintiff, * * * a temporary injunction may be granted to restrain such act."

If, upon notice of the application for the temporary writ, the opposing party appears, and contests the issuance of the writ, is it not clear that the court or judge is required to examine the petition, and, upon the facts therein averred, determine whether the petitioner is entitled to the relief demanded? Unless the facts averred in the petition set forth a cause of action, there could be no ground or right shown for issuing an injunction, and it should be refused. Zorger v. Township of Rapids, 36 Iowa, 175.

In effect, therefore, the application for a writ of injunction requires the court or judge to determine whether the allegations in the petition set forth a cause of action,—that is to say, grounds upon which the petitioner may be entitled to relief against the defendant, and where, as in this case, notice of the application for the writ is given to the defendant, and the defendant appears, and opposes the application, it is difficult to see wherein such a hearing differs from a hearing upon a demurrer to the sufficiency of the petition. Certainly, either proceeding may be used as a means of ascertaining the views of the court or judge upon the questions of law involved, and just as much reason exists why a party should not be permitted to experiment in the state court upon a hearing for an injunction as upon a demurrer.

Furthermore, it appears from the record in this cause that, upon the decision on the application for the writ of injunction, the defendant took an appeal thereon to the supreme court of the state, and filed a super-

sedeas bond, and has thus carried the question whether the petition on its face shows facts authorizing the issuance of a writ of injunction into the supreme court. After this action on part of defendant, and without withdrawing or abandoning the appeal, the defendant, by filing a petition for removal in the district court, claims that the jurisdiction of the The defendant, by its own act, invoked the jurisstate court is ended. diction of the state supreme court; and, if I understand the position of counsel, it is claimed that defendant may still prosecute the appeal before the state supreme court, for the purpose of reversing the ruling authorizing the issuance of the writ of injunction, and at the same time may have the case pending in this court, to be proceeded with as though such appeal had not been taken. In effect, the case would, in such event, be pending in two courts at one and the same time. This is not permissible. The cause must be wholly in one court or in the other. It cannot be split up into parts. To be removable, the case, as an entirety, must be brought into this court. By its own act, the defendant had, before petitioning for removal, carried, by appeal, the case into the supreme court, and no action has been taken which has lawfully terminated the jurisdiction of that court. Under these circumstances, it must be held that the right of removal did not exist when the petition for removal was filed, and that the filing thereof in the district court could not have the effect of terminating the jurisdiction of the supreme court of the state over the case.

On behalf of defendant, it is argued that the petition for removal was filed promptly on the opening day of the November term of the district court of Howard county, and that this was the first day on which it could be presented to the court for action, and that, therefore, filing it on that day preserves the right of the defendant to remove the cause. The statute provides that the party desiring to remove a suit shall "file a petition in such suit in such state court before or at the term at which said cause could be first tried, and before trial," etc. In this case, therefore, there was no reason why defendant was compelled to wait until the first day of the term before filing his petition for removal. When notice of the pendency of the suit, and of the fact that an application for a temporary injunction was about to be made, was served upon defendant, the latter could at once have filed its petition for removal, and could have objected to the judge acting upon the application for the injunction, on the ground that the jurisdiction of the state court was ended by the filing of the proper petition for removal. If that had been done, the complainant would have proceeded at its own risk, knowing that, if the cause was removable in fact, the filing of the petition and bond had terminated the jurisdiction of the state court. Instead, however, of pursuing this course, the defendant submitted to the jurisdiction of the state court; submitted the question whether the petition set forth a state of facts entitling complainant to relief, by way of injunction, to the judgment of the district judge; and, the decision being adverse to it, the defendant then carried the question by appeal to the supreme court of the state, in which court this appeal is now pending. Having thus experimented upon the merits of the cause in the district court, and proposing, by persisting in the appeal, to further experiment upon the merits of the cause in the supreme court of the state, it is not open to defendant to also experiment in this court upon the merits of the same cause. Under the facts disclosed upon the record, therefore, it must be held that this court has not jurisdiction of this cause, but that the same continues in the courts of the state. The plea to the jurisdiction is therefore sustained.

BISCHOFFSHEIM v. Brown and others.

(Circuit Court, S. D. New York. December 23, 1886.)

1. DISCOVERY—PRODUCTION OF DOCUMENTS—Rev. St. U. S. § 724.

Rev. St. U. S. § 724, relative to the production of documents, does not apply to suits in equity. In equity such production, by one not summoned as a witness, can ordinarily be compelled only by appropriate allegations in bill or cross-bill, upon the answer to which allegations a motion for production is based, and upon such motion the materialty of the evidence sought for can be controverted.

2. SAME-WHEN MATERIAL.

The only issue between plaintiff and defendants in a suit in equity was whether a trust fund, received by defendants under certain agreements made between plaintiff and some of the defendants and between plaintiff and a third party, was appropriated by them pursuant to the agreements. Held, that the production by plaintiff of books and documents relating to transactions prior to the date of the agreements would not be compelled.

In Equity.

Joseph H. Choate and Benjamin H. Bristow, for plaintiff.

Wayne McVeagh, for defendants.

Wallace, J. This is a motion on behalf of the defendants Seligman & Brown to compel production by the plaintiff for inspection of books, papers, and documents described in Exhibit A, annexed to moving papers. The proofs in the cause are being taken orally before an examiner, and certain witnesses for the plaintiff have testified that the papers and documents are under the control of the plaintiff. The papers specified in Exhibit A are not any particular book, document, or writing, but comprise all or a great number of several classes of papers, some of which may possibly be found when examined to contain evidence advantageous to the defendant in controverting the plaintiff's case or supporting their own case. The motion seems to have been made and has been argued upon the theory that either party to a suit in equity may call upon his adversary to exhibit for inspection anything and everything in writing under the latter's control which may assist the party who makes the call. The case of Coit v. North Carolina Gold Amalgamating Co., 9 Fed. Rep. 577, is cited as an authority in this direction. withstanding this authority it must be held that such practice cannot be sanctioned. Courts of equity and courts of law have always been solicitous to protect parties and witnesses against any unnecessary inquisition into the contents of their private papers by those who have no interest in them, and exercise the power of assisting parties in obtaining a compulsory production of written evidence from their adversaries or from witnesses only under well-established restrictions.

In courts of equity a bill or a cross-bill alleging that the defendant has in his possession or power documents or papers relating to the matters of the bill which if produced will establish their truth is the foundation of the proceeding. The defendant is required by the bill to admit or deny the truth of these allegations. If he admits having possession or power over any of the documents or papers he is required by the bill, and is prima facie bound, to describe them either in the body of his answer or in a schedule to it. The plaintiff then moves the court that the defendant may be ordered to produce and leave in the hands of the proper officer the documents and papers, with liberty to the plaintiff to take copies thereof. Upon this application the defendant may controvert the materialty of the evidence sought for, and he can in any event be required to produce only such documents and papers as are referred to in his answer to the bill. This is the ordinary and the only practice to compel the production of documents except under special circumstances, as where deeds or other papers contested as false or forged are ordered to be brought into court for inspection.

In actions at law in the courts of the United States the proceeding is regulated by section 724 of the Revised Statutes. This section originated in the judiciary act of 1789. The provision of this act was framed in order to confer power which did not theretofore exist at common law in compelling the production of documents by parties upon motion. Sixty-two years later the provisions of this act were copied and adopted in England by section 6, c. 99, Act 14 & 15 Vict. Referring to this act, it is said by Mr. Pollock, (Power of the Courts of Common Law to compel Production of Documents, page 10:)

"An order to inspect documents could hitherto, according to the practice of the courts, be obtained only in a very limited number of cases; as where one party could be considered as holding a document as agent or trustee of the party seeking inspection, or where the applicant was a party to a written contract of which but one part was executed, or where one part had been lost or destroyed; and it was also in general considered necessary that the party applying should be a party to the instrument which he sought to inspect, and although a trial was sometimes postponed for the purpose of enabling a party to take proceedings in equity, yet wherever an application to the courts of law was in the nature of a bill for discovery, they invariably refused to grant inspection. The insufficiency of both these methods of obtaining inspection has long been acknowledged, and has at length been supplied."

As the present suit is one in equity the procedure authorized by section 724 does not apply. Its convenience may be admitted, but congress restricted the practice to actions at law and to cases and under circumstances where the party might be compelled to produce by the ordinary rules of procedure in chancery, thus manifesting in the plain-

est terms the legislative understanding that the established practice in equity was adequate on that side of the court, and should not be enlarged beyond the limits which that court had always maintained.

Parties to suits in equity as well as in suits at law are now competent witnesses in the courts of the United States by statute, and may now be examined at the instance of their adversary. As a witness a party can be compelled by a subpæna duces tecum to produce books, documents, and papers in his possession the same as any other witness. Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 201. He is bound to obey the writ and be ready to produce the papers in obedience to the summons. Like any other witness, it is his duty to make reasonable search for the papers and documents required if they are in his possession, (3 Chit. Pr. 829;) but before he can be required to exhibit their contents, he is entitled to appeal to the discretion of the court, if any sufficient reason exists to protect him from a disclosure.

If the case were now here upon a motion to compel the plaintiff, as a witness for the defendant, to produce the books, papers, and writings described in Exhibit A, it would seem that he should not be required to exhibit them. The voluminous pleadings in the case when analyzed present a comparatively narrow controversy between the parties. The plaintiff's case rests upon the agreement entered into between Bischoffsheim & Goldschmidt and the railroad company, of the date of September 30, 1873, and the agreement between Bischoffsheim & Goldschmidt and the defendants Seligman & Brown evidenced by the letter of the date of September 29, 1873. By force of these agreements Bischoffsheim & Goldschmidt advanced, and the defendants Seligman & Brown received, certain moneys which were to be appropriated by the latter to specified purposes, and which became a trust fund in their hands for such application. The only issue between these defendants and the plaintiff is whether this trust fund was appropriated by them in whole or in part pursuant to the agreement. As to the other defendants the bill alleges that they received certain of the moneys which were a trust fund in the hands of Seligman & Brown with notice of the trust, and applied them for other purposes; and as to these defendants the only issue is whether they did so receive a part of the trust fund, and how much if any of it was not devoted to the purposes of the trust by them. All transactions between the firm of Bischoffsheim & Goldschmidt and the railroad company, or between them and third persons, which took place before the execution of the two agreements referred to, are wholly foreign to any issue which can be litigated in the present controversy. For this reason the books, papers, and documents specified in Exhibit A, annexed to the moving papers, and which it is now sought to compel the plaintiff to produce, are not material or relevant. The motion is denied.

BILL v. CITY OF DENVER.

(Circuit Court, D. Colorado. December 3, 1886.)

MUNICIPAL CORPORATIONS—LIABILITY ON CONTRACT FOR WORK TO BE PAID FOR BY SPECIAL ASSESSMENT, WHERE NO ASSESSMENT WAS LEVIED.

BY SPECIAL ASSESSMENT, WHERE NO ASSESSMENT WAS LEVIED.

A city directed the making of a sewer by an ordinance reciting that it was in accordance with a petition of a majority of the property owners, and employed therefor an inspector, who duly performed his services. The cost of the sewer was to be paid by a special assessment. It afterwards transpiring that the petition was not signed by a majority of the property owners, the work was discontinued, and no assessment made. Held, that the city was liable on an implied guaranty that the petition was sufficient, and that the assessment would be levied.

On Trial by the Court without a Jury. Sam P. Rose, for plaintiff. J. H. Brown, for defendant.

Brewer, J. This is an action for services. The plaintiff was employed by the city of Denver to act as inspector of sewers, at a stipulated salary. He performed the services, and now brings this action to recover therefor. As I said when this question was before me on demurrer, I have no doubt that the city had the power, under the general provisions of its ordinances, to make a direct contract with this plaintiff for his services, by which contract the city would primarily have been bound.

The contract which in fact was made was for services to be paid out of the assessments for the Twentieth-street sewer; and it is insisted that the city has incurred no general liability by making that contract. The ordinances provide for district sewers, and that the city council shall cause sewers to be constructed in any district whenever a majority of the property holders thereof shall petition therefor, or whenever the board of health recommend the same as necessary for sanitary reasons. It passed an ordinance creating the Twentiethstreet sewer district, reciting that it was in accordance with the petition of a majority of the property owners therein. Then, in the second section, the council directed that the sewer be constructed, further provided an appropriation, etc. It went on in pursuance of that ordinance, and did a good deal of work. It seems to have been ascertained thereafter that a majority of the property owners or holders did not petition, and the city abandoned further work. The plaintiff received sewer warrants as the work progressed, which were not paid, there having been no assessment or levy therefor. He brings these warrants into court, and tenders them to the city.

It is insisted, on the part of the city, that its sole liability was the making of an assessment and levy upon this sewer district; and that, if it has failed to discharge that duty, the plaintiff's sole remedy is by mandamus proceedings to compel it to proceed therewith. And

familiar cases are cited, in which a party takes a warrant drawn on a particular fund, or makes a contract for services payable out of a particular fund, and his remedy is uniformly limited to that fund; as, for instance, if he takes a warrant from the county payable out of the poor fund, he cannot thereafter insist that the county's general revenues shall be appropriated to that warrant. But I do not think that rule is applicable in this case. The city made the contract, and impliedly it guarantied that it would make a levy upon certain property for the payment of these warrants. It is true that its power to proceed in the premises depended upon the petition of a majority of the property owners; but no tribunal is in terms provided to determine whether such petition has been filed; and, there being no statutory provision for a tribunal to so determine, when the city council, as the general representative of the city, with power to act thereon, determines by its action that such a petition has been filed, third parties have a right to rely upon that, and say that the city is estopped thereafter to deny that such petition was filed.

The city ordered this sewer to be built, and employed the plaintiff to do work on it, and it cannot now turn round and say: "Though I made this contract, I did not have authority, because there was not a petition of a sufficient number of citizens to justify my action." There is no other tribunal, no other body, to pass upon that, so that the action of the council is conclusive upon the city. The plaintiff therefore had a right to rely upon the fact that the city had power to proceed and make this levy; and it comes within those familiar cases in which a city, having contracted for improvements along the line of a street, guarantying impliedly that it will levy and collect taxes upon the abutting lot-owners for the purpose of paying for those improvements, by failing thereafter, when the work is done, to make the levy, becomes personally liable. It stands in the position of an implied guarantor contracting that it will do certain things in order to bring about the payment for those services. Failing to carry out its contract, it renders itself personally liable on the same principle that, when a private individual or a private corporation gives an obligation payable at a certain time in material or services, if, at the time named, it fails to so pay in the material or in the services, the right of the other party becomes then a mere money demand. Here the city contracted it would levy taxes in this district for the purpose of paying him for services. If it had made the levy, a different question might arise. But it did not. It did not perform its contract. and this becomes its personal obligation because it has failed to perform its contract. I have no doubt but that the city is liable.

Judgment for plaintiff.

COOKE and others v. NAVARRO and others.

(Circuit Court, S. D. New York. December 28, 1886.)

NEW TRIAL—VERDICT—EVIDENCE EQUALLY BALANCED.

Where the testimony of plaintiff contradicts that of defendant, and each is corroborated by other evidence, the court will not disturb the verdict.

The plaintiffs sue to recover for goods sold and delivered. The defense is that the goods were sold to one Pedro Garay, and not to the defendants. The cause was tried at the December circuit, and the plaintiffs had a verdict. The defendants now move for a new trial.

Preston Stevenson, for plaintiffs.

Emmet R. Olcott and William Q. Judge, for defendants.

COXE, J. The conclusion is reached, after a full examination of the papers submitted on this motion, that the court will not be justified in disturbing the verdict of the jury. The question now is, not what opinion the court entertains upon the facts, but was there sufficient evidence of a sale to the defendants to require a submission of the cause to the jury? The plaintiff Cooke testified positively to an agreement by the defendant Munoz, representing the firm, to pay for the goods. This was an original promise. The plaintiffs' version of the transaction is corroborated by the fact that the bills were uniformly made out to the defendants, and accepted by them without objection. The defendants flatly contradicted the plaintiffs' testimony as to what took place when the bargain was consummated, and their theory that the sale was made to Garay is sustained by several collateral facts and circumstances. was, then, a positive assertion by the plaintiffs, and an equally positive denial by the defendants, each being corroborated, to some extent, by presumptions drawn from the undisputed testimony. In such circumstances the jury, and not the court, must determine the controversy. The verdict is not so clearly against the weight of evidence as to warrant the court in setting it aside, and the motion at the close of the testimony to direct a verdict for the defendants was, of course, properly denied. No exception was taken to the charge, and no exception to the admission or rejection of evidence is argued on the briefs.

The motion is denied.

HYMAN v. WHEELER and others.

(Circuit Court, D. Colorado. December 23, 1886.)

1. MINES AND MINING-LODE-WHAT IS.

An impregnation, to the extent to which it may be traced as a body of ore, is a vein, lode, or ledge, under section 2322, Rev. St. U. S., giving to the owner of a mineral claim, containing the top or apex of a vein, lode, or ledge, the right to follow the same beyond the vertical side lines, but between the vertical end lines, whether the ore is separated from the country rock by planes or strata of that rock visible to the eye, or is determinable in other ways, as by assay and analysis.

2. SAME-LODE-BODY OF ORE.

A body of mineral, or mineral bearing rock, in the general mass of country rock, so far as it may continue unbroken, and without interruption, is a lode, whatever the boundaries may be.

 Same-Lode-Boundaries.
 With well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode.

4. Same-Lode-Casual Concentration.

If the entire mass of limestone in which a body of ore lies has been mineralized in the same way as the body of ore, and to some extent, and the body of ore is a casual concentration of unusual richness, the body of ore is not a lode.

5. Same—Lode—Mineralized Strata along a Plane of Contact. Strata lying along the plane of contact between blue and brown limestone, if mineralized to the extent of showing valuable minerals, and distinguishable from other parts of the country rock by carrying ore, and by association with the plane of contact, constitute a lode, as far as the strata lying on or near the contact may show ore in appreciable quantities.

6. Same-Identity of Lodes-Persistence of Ore.

In determining whether a lode extends from defendants' claim to plaintiff's location, and has its apex therein, the persistence of the ore through these and the intervening claims is of little weight, unless there is evidence in plaintiff's claim tending to show a crevice or continuous ore or mineralized rock; with such evidence it is of considerable weight.

7. Same—Apex—Extent.

Plaintiff's location and defendants' location are some distance apart, and they overlap so that the north end of plaintiff's location is nearly parallel to defendants' location for about the distance of 750 feet. In asserting a right to follow a vein or lode on its dip without his own location and into defendants' location, plaintiff must show the outcrop or apex of such vein or lode to be in his own location throughout the ground in controversy, being the extent of the locations parallel to each other.

8. EVIDENCE—ADMISSIONS—RECORD OF ANOTHER ACTION ADMISSIBLE AS AGAINST A PARTY.

Where one of the defendants in action has been a plaintiff in another action in which his claim was opposed to his claim in the case at bar, the complaint, order of court, and affidavits offered on behalf of plaintiff, are admissible as admissions of said defendant, as against him, but against none of his co-defendants.

9. WITNESS—CREDIBILITY—INSTRUCTION OF COURT.

In regard to a certain witness, the court instructed the jury as follows: "I can scarcely believe that any jury would be willing to accept the testimony of a witness who would declare, upon the stand, that he had made statements in a general way, and for business purposes, outside of the court-room, and with a view to defraud people with whom he was carrying on negotiations, in opposition to his testimony on the stand."

This was an action of ejectment, brought by David M. Hyman, of Cincinnati, Ohio, as the owner of the Durant mining claim, situate on

Aspen mountain, near the town of Aspen, Pitkin county, Colorado, against J. B. Wheeler, of New York city, and his co-defendants, as claimants of the Emma mining claim, situate on the west slope of the same mountain, on the ground that the defendant had sunk a shaft from the surface, and, by means of drifts, levels, and under-ground workings, had broken into, and unlawfully taken possession of, that portion of the Durant vein which, having its outcrop and apex within the Durant surface boundaries, extended downward vertically, passes out of the Durant side lines on the west, and into and through that portion of the Emma claim lying between vertical planes extended downwards through the Durant end lines, produced westerly, in their own direction, across said Emma claim.

The Durant claim was discovered and located by W. S. Clark, Charles Bennett, A. C. Fellows, et al., August, 1879. The Emma claim was located in August, 1880. July 9, 1879, Phil. Pratt and Smith Steele discovered the Spar claim, which adjoins the Durant upon the north, and is situated upon the same mountain and ledge; made their discovery workings upon an outcrop of copper-stained heavy spar, carrying silver ore; and pointed out to the Durant locators a similar heavy spar outcrop upon that ledge as a point at which the Durant locators should do their discovery work, and, for that purpose, withdrew the Spar stakes 50 feet down the hill. Lying to the west of the Spar and Durant claims, and upon the slope of West Aspen mountain, and partly below the Durant and partly below the Spar, are the Washington No. 2, Emma, Aspen, and Vallejo mining claims.

The workings on the Spar claim, which are run from the surface at the point of discovery, upon the contact between blue limestone (a carbonate of lime) and brown limestone, called "dolomite," (a carbonate of lime and carbonate of magnesia,) extend in ore from the surface in the Spar mine to the lowest workings in the Aspen, and are connected with all the under-ground workings in the Vallejo, Washington No. 2, Aspen, and Emma claims. At a point 750 feet south of the Spar discovery, upon the Durant claim, an incline called the "Durant Incline," has been run a distance of 600 feet, and is connected with the under-ground workings in the Spar, Washington No. 2, Vallejo, Emma, and Aspen claims by means of the Washington No. 2 side-line drift, run on the line between the Emma and Washington No. 2, the Emma Central, or No. 6 drift, run about the center of the Emma claim, and the Compromise drift, run on the line made by compromise, as a boundary between the west side line of the Emma claim and the east side line of the Aspen All these workings are run along the line of contact between what is known as the blue lime and the brown lime or dolomite, and which is called by the plaintiff the "vein." The Spar and Durant claims are so located that their east side lines fall to the east of the crest of Spar ridge, and of the contact between the blue and brown lime which outcrops immediately east of and along said crest, and their west side lines fall to the west of the crest of said Spar ridge.

In November, 1883, the defendant Wheeler brought a suit in chancery

against the claimants of the Washington No. 2 lode, being John Jordan and others, which suit is No. 1,386 on the United States circuit court docket, in which he applied for an injunction; claiming that there was a vein having its apex in the Spar claim, and so far departing from a perpendicular in its downward course as to pass beyond the west side line of the Spar, into and through the territory lying below known as the Washington No. 2 claim, and that the owners of said Washington No. 2 claim had sunk to and were removing ore from said Spar vein.

On the hearing of the application for an injunction the defendants in that case contested the existence of the apex of the vein within the Spar claim above the point where they were working, and asserted that the apex which existed for some distance in the Spar claim passed out of its side lines, and ran across the Washington No. 2 claim. plaintiff in said case, filed a large number of affidavits in support of his position, among them those of W. B. Devereaux, W. J. H. Miller, George W. Lloyd, Phil. Pratt, and James Lyon, in which he showed the existence of a fissure or contact fissure vein, with selvage, slickensides, and other characteristics, with well-defined walls,—the hanging wall being carbonate of lime or calcite, the lower and impure magnesian limestone or dolomite; and that the apex extended from the 1,001 claim on the north end of the Spar, through the said Spar, into, through, and beyond the Durant on the south; and that the same vein was disclosed in the Durant incline that was shown in the Spar and Washington No. 2 claims. On the hearing in this suit Wheeler obtained an injunction, and in the present case the bill, affidavits, and injunction were admitted in evidence on behalf of the plaintiff as declarations of Wheeler.

In the trial of the present case the plaintiff's witnesses testified to the existence of a vein extending from the Spar discovery into and through the Washington No. 2 claim, the Vallejo and Emma, with the outcrop and apex thereof extending from the Spar discovery southward to the mouth of the Durant incline, and thence south to the Visino tunnel and incline, being works upon the Durant claim; thus covering all that portion of the Emma mining claim in controversy in the case. They also testified that the same vein was disclosed in the Durant incline from where it was started upon the Spar outcrop, through its entire extent, to the point where it entered the Compromise drift, and in various small drifts run for short distances from the side of said incline, at numerous points; also in the Visino workings; in certain apex cuts or openings made by the plaintiff along the surface of the Durant claim for the purpose of disclosing and proving up the apex or outcrop of the vein, as well as in drifts and levels in the Durant claim, and in the under-ground workings of the Spar, Washington No. 2, Vallejo, Emma, and Aspen claims, and in the drifts connecting them with the Durant incline; that the ore body or vein was found on the plane of contact between the brown and blue lime, the gangue consisting of heavy spar, occurring at all points in the workings as a nucleus of the vein, associated with disintegrated, ground up, or crushed and mineralized portions of the brown lime, called "short lime," and also copper, iron, silica, lead, and silver ore, having a clay

selvage and slickensides, and portions of the walls striated, with the ore occurring at places in such a manner as to disclose a banded structure characteristic of fissure veins; and that while, in a considerable portion of the workings, ore remained, this was ore which had not been removed, because at the time said work was done it was not commercially valuable; and that this ore was found both upon the foot and hanging walls, with these walls, however, clearly defined and distinctly disclosed at numerous points.

Numerous lines of assays and analyses were made and introduced in evidence, showing the composition of the vein matter and the walls, supporting the position maintained by the plaintiff. Models, maps, photographs, and samples were also introduced as a portion of the plaintiff's The defendants contended, and many of their witnesses testified, that there was no vein; that the ore occurred in the general mass of the mountain, all of which had been mineralized, and was in the form of impregnations, which occurred without regularity or defined boundaries, gradually fading out into the surrounding rock or limestone, its presence only being detected by means of assays; that silver could be found on the surface, and almost anywhere in the mountain, and that the heavy spar found at the line of contact, and in the mineral claimed by the plaintiff to be the vein, was without significance, being indiscriminately scattered over the mountain, and through it, embedded in brown and blue lime; that the Durant incline did not always follow the contact, and was for a distance of almost 100 feet run through barren rock; that for a considerable distance in said incline the contact was tight or blended, with nothing in the nature of ore in it; that the apex cuts did not disclose the outcrop of a vein, and only showed a contact between brown and blue lime, and sometimes not even that; that the Visino workings and Durant incline were not run upon the same contact. They further contended that, in order to fall within the provisions of section 2322 of the Revised Statutes of the United States, a vein must be a fissure in the earth's crust, filled with mineral matter foreign to the walls, and that the walls must be well defined and easily distinguished, and that the vein filling could not be of the same material or character as the walls, or a part of them. They also claimed that the ore in the workings connected with the Durant incline was not confined to the contact between the brown and blue lime, but was found indiscriminately in each of these limes, and at considerable distances from the plane of contact, and, save by assay and analysis, was in no way distinguishable from the pure brown and blue lime; and in support of this claim instanced drifts claimed to be run in the brown and blue lime. Plaintiff, in rebuttal, claimed that the drifts followed stringers or spurs of ore from the vein, and were therefore only the usual accompaniments of fissure veins.

The witness Thompson, for the defendants, was confronted on his cross-examination with two reports made and circulated by him in an effort to sell the Camp Bird mine, situated upon the same mountain, to a considerable distance south thereof, in which he had asserted the existence

of a vein upon the same contact which was found in the Spar, Durant, Emma, and other claims. He had sworn in his examination in chief that there was no vein on the mountain. The last of these two reports was signed December 10, 1886; the first was issued early in the year. Upon cross-examination he said that these reports were made for the purpose of deceiving people into putting their money into the Camp Bird; that he knew they were false when he issued them; that he was not in this country for his health, and that such things had to be done in mining business, although known to be false.

The case was called December 6, 1886, and the jury returned a ver-

dict December 23, 1886.

H. M. Teller, C. Reed, J. W. Taylor, and C. J. Hughes, Jr., for plaintiff.

Patterson & Thomas, Downing & Franklin, and A. W. Rucker, for defendants.

HALLETT, J., (charging jury.) The part which I have to perform in this extended discussion is very brief. I will read to you first section 2322 of the Revised Statutes of the United States, upon which the controversy in this suit is founded:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, 1872, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction, that such planes will intersect such exterior parts of such veins or ledges."

The proposition asserted by the plaintiff under that statute is well stated in an instruction asked by the defendants, which I will read to you:

"The proposition asserted by the plaintiff in his complaint is that there is a vein or lode within the limits of the Durant mining claim, which commences at the north end line, near the center of the claim, the top or apex of which extends thence, in a southerly direction, approximately through the center of the claim; that this vein or lode, as shown by the workings of the Durant claim, extends on its dip in a westerly direction, through the Durant claim, and to and beyond the west side line of said claim, thence into the Emma claim, and that the said vein or lode is the part of the vein or lode which they allege exists in the said Emma claim; that the plaintiff may recover, it is essential that every one of his propositions be maintained by a preponderance of evidence in the case. Unless it shall appear to you, by a preponderance of the evidence, that what is asserted by the plaintiff to be his vein extends to and across the west side line of the Durant claim, he cannot

recover; and unless it shall be made to appear by a preponderance of the evidence that the alleged Durant vein or lode extends into and is a part of the vein or lode existing in the Emma claim, then he cannot recover; and unless it shall appear to you that the alleged vein has its apex extending from the Durant incline, in a southerly direction, through the Durant claim, at least so far as the so-called apex cuts have been excavated, then he cannot recover."

The last clause is modified by a statement in what I have written to the effect that it is necessary that the existence of the outcrop and apex should be co-extensive with the Emma location; that is, it should appear as far south as the Emma location goes.

Upon the general propositions contained in that instruction, I have the

following to say:

Within the limits to which the investigation of facts before a jury is necessarily confined, this case has been fully and elaborately presented for your consideration. Every fact which may aid you in the decision of the matters in issue is brought to your attention as fully and completely as possible. With models and views of the mountain, and maps of all openings in the mine, with ores from the mine and rocks of the different strata, and assays and analyses showing their value and composition, and by the testimony of many witnesses, the parties have done all in their power to enlighten you in respect to the nature of the contro-The number of witnesses called by the parties was governed by rule of court, so that one could have no advantage over the other in that respect; and the witnesses are arrayed in point of numbers on party lines, half on one side and half on the other, so as to produce an embarrassing conflict of testimony. Such conflict is not an unusual feature of testimony in a mining suit. They have become so common and general that many thoughtful men entertain doubts as to the value and efficiency of trial by jury in such cases. If a given number of witnesses of fair character and intelligence can be produced at the will of the parties for or against any proposition that may arise in a mining controversy, without reference to the truth of the matter, of course the result of such an investigation cannot be very satisfactory. But if we look to the circumstances upon which such conflicts arise, we shall find that they are not wholly due to partisan zeal. To determine the contents of a mountain from what may be seen on the surface, and in some slight explorations underground, is a matter of such difficulty that differences of opinion, even as to facts open to observation, are to be expected. Openings underground, however extensive, when considered in their relation to the great recesses of a mountain, are scarcely more than a vestibule or point of entrance to the unexplored interior. And in openings under-ground, investigation proceeds slowly and laboriously, with many tests which often fall short of the truth. Every one understands the liability to error and mistake in inspecting under-ground works, and how the rock or ore which appears to one to be of a certain class may to another present a different aspect; so that, in the field of observation, there is ample scope for differences of opinion which in themselves do not impeach the candor and fairness of witnesses. These conflicts of testimony, and the possibility or probability of error in the testimony of any witness, are worthy of attention in any effort that may be made to harmonize the testimony, and determine the controlling facts.

In the books, and among miners, veins and lodes are invested with many characteristics,—as that they lie in fissures or other openings in the country rock; that they contain materials differing, or in some respects corresponding, with the country rock; that they are of tabular form, and of a banded structure; that some one or several things are commonly associated with the valuable ores; that they have selvages and slickensides in the fissures and openings, and the like. It is not necessary to enumerate all the features by which they are known. these characteristics are said to be common to all lodes and veins, and others of rare occurrence; but, in general, witnesses will take up one or more of them as essential features of a lode or vein, and declare the fact upon the presence or absence of such elements. A party seeking to prove the existence of a lode or vein will naturally rely on any such characteristic that he can find in the ground in dispute, and call witnesses, who will accept that feature as establishing the fact. The party opposed will seek to disprove the proposition advanced against him, and, in addition. to show that all other characteristics of a lode or vein are in the case under consideration entirely wanting. In this way a fierce conflict of testimony is waged as to the existence of one or another distinguishing feature of a lode or vein, and the jury is asked to return a verdict upon the issue thus made. It is apparent, however, that, upon any issue touching the existence of a lode or vein in a place designated, a question whether it has one characteristic or another is a part only of the main question, and, in the presence of other unquestioned elements establishing the existence of a lode or vein, an issue of that kind becomes imma-To illustrate that matter, it may be said that, with ore in mass and position in the body of a mountain, no other fact is required to prove the existence of a lode of the dimensions of the ore. As far as it prevails, the ore is a lode, whatever its form or structure may be, and it is not at all necessary to decide any question of fissures, contacts, selvages, slickensides, or other marks of distinction, in order to establish its char-As was said in another case in this court:

"A body of mineral or mineral-bearing rock, in the general mass of the mountain, so far as it may continue unbroken, and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied."

If, therefore, we look only to the body of ore developed in the Emma location, the existence of which is not denied, and assume it to be of the form and extent developed in the works, there is no difficulty in recognizing it as a lode. Whether it is in the form of a broken mass of blue and brown lime, between regular walls of the same rocks, or a part of such strata in solid formation, mineralized by replacement of some of their constituents with valuable metals, the result is the same, and the name which science may apply to it is of no importance. An impregnation, to the extent to which it may be traced as a body of ore, is as

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fully within the broad terms of the act of congress as any other form of deposit. In discussions at the bar, and in the opinions of witnesses, it was assumed that the character of a body of ore, as coming within or falling without the act of congress, could be determined by classifying it as a segregated or contact fissure vein, or as a bed or impregnation of ore; and that it was a matter of importance to ascertain whether the ore was separated from the country rock by planes or strata of that rock visible to the eye. I see no reason for such distinctions. It is true that a lode must have boundaries, but there seems to be no reason for saying that they must be such as can be seen. There may be other means of determining their existence, and continuance, as by assay and analysis; and certainly the form and mode of occurrence of valuable ore, however controlling and influential in determining its geological character, is not a matter upon which it can be excluded from the terms of the act of congress. All that is said on this point proceeds on the theory that the ore developed in the Emma location is of the form and extent there appearing, as distinguished from the mass of limestone in which it is found; that it is upon the line of contact between blue and brown lime, and that such line of contact marks its presence and continuance throughout the works. There is much in the testimony to support that view. That, however, is for your consideration, to be decided upon the weight of evidence.

If, as contended by defendants, the ore of that mountain is distributed throughout the blue and brown limestones somewhat unequally, but nevertheless generally, and the occurrence of rich ore in the Emma works is fortuitous and accidental, other considerations arise of which it is not necessary to speak at length. In that case the entire body of blue and brown limestone is taken to be ore-bearing rock, and the plaintiff can assert no claim to it outside his own location. If you accept that view, your verdict should be for defendants. Bearing in mind what has been said, if you decide on the evidence that there is a lode in the Emma ground, you have then to consider whether it is practically continuous from thence to and into the Durant location, with an apex or outcrop in that location. That the body of ore, as shown by the works, whatever its character may be, extends through the Washington No. 2 to an outcrop on the Spar location, seems to be clearly established. Some witnesses expressed doubt on the subject, but the weight of testimony supports that conclusion. Testimony as to the appearance and extent of the ore in the Washington and Spar claims was received to explain its general character, and as having some bearing upon the question of its existence and extension into the territory of the Durant location to the south.

The character of a vein or lode, and the country adjoining, can be better and more satisfactorily shown through extensive works than in a small area. What weight shall be given to the fact of the persistence of the ore throughout these claims is to be determined by the jury. Without something in the plaintiff's claim to show a crevice or continuous ore or mineralized rock, it would be of little value. In connection with ev-

idence showing, or tending to show, some such fact, it may be of considerable value. If you find from the evidence that the ore in the several works is in the form of a brecciated vein in a fissure between walls, the extension and continuance of such fissure throughout the territory mentioned by the witnesses may be more readily predicated than the same fact as to the ore or mineralized rock only. Upon that point a part of the charge in the case before mentioned is fully applicable to this case:

"To determine whether a lode or vein exists, it is necessary to define those terms; and as to that it is enough to say that a lode or vein is a body of mineral or mineral bearing rock, within defined boundaries, in the general mass of the mountain. In this definition the elements are the body of mineral or mineral bearing rock, and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if, in such fissure, ore is found, although at considerable intervals and in small quantities, it is called a lode or vein."

In that view of the evidence, it may be important to consider and determine whether there is a fissure exposed in the several openings of the mine as asserted by the plaintiff; and, if you find that such fissure exists, whether it is practically continuous and unbroken between strata of blue and brown lime from an outcrop in the Durant claim to the Emma ground below. With such a fissure extending in that way, even if it be narrow, and carry ore only slight in quantity, and at considerable intervals, the case of the plaintiff may be regarded as established. If, however, you find that the body of ore developed in the several works constitutes a lode, as already defined, but without a fissure inclosing it, your only guide in ascertaining its extent will be the mineralized rock, which in that view of the testimony is taken to be ore. I have explained to you fully that the strata lying along the plane of contact between the blue and brown lime, if mineralized to the extent of showing value in silver, and distinguishable from other parts of the mountain by carrying ore, and by association with the plane of contact, may constitute a mineralized zone. In that state of facts, the contact of blue and brown lime furnishes a guide for the miner in his search for ore, in so far as the strata forming the contact are mineralized. Such a zone is clearly a lode, within the meaning of the law, extending as far as the strata lying on and near the contact may show ore in appreciable quantities.

If the evidence proves the existence of such a lode, the question will be whether it extends throughout the Durant incline, manifested by ore in appreciable amounts in the strata of the contact. A barren contact between blue and brown lime will not suffice to establish a lode in that incline; it must carry ore to some extent, and of some value. To sum up briefly the matters before you, the body of ore exposed in the works of the mine is to be regarded as a lode, within the meaning of the law,

unless the whole mass of limestone in which it is found has been mineralized in the same way as the body of ore, and to some extent, and this is a casual concentration of unusual richness.

If it is a "lode," under this definition, its existence in the Durant claim, and extension therefrom to the Emma ground, is the next question in order. That question may be considered, in the first instance, with reference to the existence or absence of a fissure in the Durant incline and elsewhere, marking the course and continuance of the lode. Secondly, if there is no fissure, is the contact between blue and brown lime mineralized in the manner and to the extent before explained? The affirmative of the first and second or third of these propositions establishes the plaintiff's case. The negative of the first, or of the second and third, determines the case for defendants.

Much comment has been made at the bar on the testimony relating to an outcrop or apex of a lode in the Durant location. The plaintiff must show an apex or outcrop within his claim as far south as the Emma claim extends, which is, I believe, about 750 feet. Upon the testimony of the defendants' witnesses alone, there is scarcely room for doubt as to the presence of an outcrop or apex in the mouth of the Durant incline; and it is said that the ore extends down the incline for a distance of 50 or 60 feet. Whether the apex and outcrop extends further south in the Durant claim is for your consideration, upon all the evidence.

There are certain propositions offered by defendants touching the previous suit of Wheeler v. Markell and others which appear to be correct. The court has admitted, for the consideration of the jury, the bill of complaint, the order of the court, and certain affidavits offered in behalf of the plaintiff, in the case of J. B. Wheeler (one of these defendants) v. C. Markell (one of these defendants) et al. That controversy was one between the Spar and the Washington No. 2 mining claims, adjoining the Durant mining claim upon the north, and they were admitted as giving evidence of some admissions upon the part of the defendant Wheeler of the existence of a vein within the Spar lode mining claim. You are specially instructed that the same cannot be considered by you, nor can they have any weight against any of the defendants, except defendant Wheeler, and therefore can be admitted only as admissions against him. In order to construe them correctly, you should consider the character of the ground, and the amount of openings, at the time of the filing of these affidavits, and the much larger amount of ground opened at the present time; and you will also consider that said Wheeler did not prosecute the suit to a final termination, but dismissed the same of his own volition.

In the matter of the admission of the bill of complaint, the order of the court, and the affidavits of W. B. Devereux and others in behalf of the plaintiff herein, the same were admitted as admissions made by J. B. Wheeler, in 1883, upon the subject of the existence of a vein in the Spar claim and in the Durant. These affidavits are not to be taken as evidence given in this case by those who made the affidavits in support of the claim of the plaintiff that there is a vein in the Durant ground

which extends into, and is a part of, the body of mineral in the Emma claim; but, grouping them all together, they amount simply to the admission by J. B. Wheeler himself of the existence of a vein in the parts of the territory mentioned in the bill of complaint and affidavits, and this admission is not at all conclusive of the proposition contained in the bill of complaint and affidavits, but they are to be taken as evidence so far as such an admission may be considered important in determining the affirmative or the negative of the question in dispute in this suit, and in determining whether or not a vein exists in the Durant as claimed by the plaintiff, and extends into the Emma ground, and is part of the lode or vein claimed to exist there. The said admissions of the defendant Wheeler can only be considered in connection with all the other evidence in the case, and, unless the plaintiff shall establish everything essential to his recovery by a preponderance of the evidence, the said admissions being a part of the evidence in his behalf, it will be your duty to render a verdict for the defendants.

Upon the testimony, gentlemen, I do not intend to make any observa-It has been fully discussed by counsel before you. But the position of the witness Thompson in this controversy which he assumed when on the stand seems to call for some notice in a public way. most extraordinary that any witness of fair intelligence and ability should put himself in the position which he assumed on the stand, and, had it appeared to me to be a case in which the act was criminal, I certainly should have taken steps to cause him to be punished for it. But, under the circumstances of this case, and so far as it may affect the issues in this case, you will know how to apply the remedy. I can scarcely believe that any jury would be willing to accept the testimony of a witness who would declare upon the stand that he had made statements in a general way, and for business purposes, outside of the court-room, and with a view to defraud people with whom he was carrying on negotiations, in opposition to his testimony upon the stand. It certainly is a very remarkable instance of the impudence and courage of a man who is destitute of principle.

Upon the other testimony in the case I have, as I said before, no observations to make. You have given patient attention and consideration to it so far, and I trust that in the decision of the case it will receive the consideration to which the importance of the case entitles it.

The verdict was for the plaintiff.

ROYER and others v. Coupe.

(Circuit Court, D. Massachusetts. October Term, 1886.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—No. 77,920—MACHINE FOR TREATING HIDES.

In action for infringement of letters patent No. 77,920, issued to Herman and Louis Royer, May 12, 1868, for a machine for treating hides, plaintiffs' machine softened the hide by fastening it to a vertical shaft, revolving in a crib, in which the hide was revolved under the pressure of a weight in the upper part of the crib, through which the shaft passed. Defendant's machine softened hides in the same way, except that his shaft was horizontal, and the pressure on the hides was applied through the head of the crib by screws. Held an infringement, the principle and method of the plaintiffs being used in the design of the defendant.

2. Same — Misstatement in Patent as to Inventor—Joint Invention.

If a patent is issued to two persons as inventors, when in fact it was invented by only one, the patent is void.

8. SAME—IMPROVEMENTS—RIGHT OF PATENTEES.

Where an improvement is made and patented in a patented machine, the first patentee cannot use the improved machine without the consent of the second, and the second cannot use his machine without the consent of the first.

4. SAME-PATENT NOT OPERATIVE.

If the first patentee's machine is not operative, and the second patentee's is operative, the first patentee must be confined to his own particular application of his principle, and there is no infringement by the second patentee.

5. SAME—Test Whether A PATENT IS OPERATIVE.

In determining the question whether a patent is operative, the workings, not of a machine made as a literal copy of the drawings of the patent, but of one made with the mechanical devices which will tend to make a machine practical and operative, and which are within the duty of the mechanic, are to be considered.

6. SAME—INFRINGEMENT—MEASURE OF DAMAGES.

The value of an invention to the party using it is competent evidence on the question of damages for the infringement of a patent.

Action at Law for the infringement of letters patent No. 77,920, issued to the plaintiffs, May 12, 1868, for a machine for treating hides.

The machine described in the patent consists of a vertical shaft, surrounded by a vertical circle of pins or rollers, constituting a crib. shaft contains slots, and set-screws projecting into the slots. shaped weight, grooved on its edges to fit the vertical pins or rollers, and having a hole through its center through which the vertical shaft projects upward, is shown and described as filling the entire cavity at the upper end of the crib. The hide having been unhaired, its end is inserted in the slot in the vertical shaft, and is made fast there by setting the set-screws up against it. The vertical shaft is then made to revolve so as to wind the hide around it, and fill up the crib, and is then made to revolve in the opposite direction, so as to wind the hide up the other way, from the inside, and is again reversed, winding it the other way; and this operation is repeated until the hide, by the repeated foldings under pressure of the crib, and of the weight which is pressed down upon it, has its fibres so loosened as to soften it, and make it fit for belt lacing. Stuffing is applied to the hide during the operation.

The claims of the patent are as follows:

- (1) The vertical shaft, B, with a slot B', and set-screws b, b, b, said shaft having a forward and back motion, substantially as and for the purpose described.
- (2) The pins or rollers, C, C, set in the rings, D and D', together with the grooved weight, I, substantially as and for the purposes described.

It appeared in evidence that the only methods for softening raw hides known before the plaintiffs' invention was by beating or boarding them by hand, or, as was practiced in Russia, by hanging them in strips on a bar, attaching weights to the lower ends of the strips, and then spinning or twisting them, first in one direction and then the other; although it appeared in evidence that it was possible to soften them by what was called a "stuffing-wheel," or with what was known as "fulling-stocks," which were known before the patented invention, but it did not appear that they were used for that purpose. It further appeared that the first fulled raw-hide lacing put upon the market in this country was that which was produced in the patented machine.

There was testimony tending to show that Louis Royer, one of the plaintiffs, several years prior to the patented invention, had constructed a machine for softening raw hides, in which there was a horizontal revolving shaft, surrounded by a circular row of pins, which were held in place by a chain passed around them, but that it was not a practical machine; and that subsequently Herman Royer, the other plaintiff, taking up the ideas of Louis Royer which had been embodied in this first machine, and advising with him, contrived the patented machine. It also appears that, in 1876, Herman Royer, having fallen out with Louis Royer, the other plaintiff, had written a letter in which he stated, among other things, that Louis Royer had "never invented anything in this raw-hide business."

On behalf of the plaintiffs there was evidence to the effect that raw hides could be softened in the patented machine at an expense approaching four or five dollars a hide less than by other means known before the patented invention, and one of the plaintiffs testified that he knew that the difference would be more than a dollar a hide. One of the defendants testified that the old fulling-stocks would be preferable to the patented machine for softening raw hides, because the patented machine could not be made to practically soften them at all.

The machine used by the defendants which was alleged to be an infringement consisted of a horizontal shaft, surrounded by a circle of pins or rollers, constituting a crib, and two false heads, one in each end of the crib, having central holes through which a horizontal shaft was run, which heads were pressed up against the hides by screws. The hides were fastened in this machine to the horizontal shaft by screws in slots, and they were wound and unwound upon the shaft, first in one direction and then in the other, as above described. The defendants introduced evidence that they had tried a machine built according to the patent, and that it could not be made to work. It appeared that this was mainly, if not wholly, due to one of the set screws projecting out so that the

weight could not descend far enough to compress the hides. Evidence on behalf of the plaintiffs tended to show that although the head of this set-screw was shown projecting out in the drawings of the patent, yet that an ordinary mechanic, building a machine from the patent, would have known how to correct this defect without invention. The defendants also introduced evidence tending to show that vertical machines could not be made to soften hides. The plaintiffs introduced evidence tending to show that such machines had been used for years. The jury found for plaintiffs.

Thomas L. Livermore and Milton A. Wheaton, for plaintiffs. B. F. Thurston and W. H. Thurston, for defendants.

CARPENTER, J., (charging jury.) It may be useful for you to understand, in a general way, what is the nature of these rights that are called patent-rights, and of which this claim which is brought here is one. You know to how large an extent the progress of the country has depended upon new and useful inventions in the mechanical and other useful arts, and the attention of the congress was early turned, in pursuance of the constitution, to the consideration of what methods ought to be adopted, in the first place, to protect the rights of inventors, and, in the second place,—which is equally important,—to protect the rights of the In order to accomplish these two results, the patent laws have been enacted, which provide, in general terms, as follows: He who has invented a new and improved process or machine may, if he sees fit, retain within his own breast the knowledge of the thing; or, if he constructs machinery for the purpose of illustrating his invention, and puts it into use, or, if he carries on the process which he has invented, he may choose to carry it on secretly, and, if he is able to preserve the secret from the depredations of others, he may thus retain a perpetual monopoly,—a perpetual, exclusive use of the invention,—and may thus, as it were, perpetually levy tribute upon the public for the use of it. The provision of the law, however, is that if he will make public the machine or the process which he has invented,—if he will put down upon paper a clear, distinct, and intelligible description of it,—then the government will give him the exclusive right, for a definite number of years, (under the present condition of the law, for 17 years,) to use that improvement; the consideration for that grant being, of course, that he has made it known to the public, so that when the 17 years shall have expired the public will not only have the right, but they will also be able, to exercise this art for their own profit and advantage. So that you see on one side is a special grant made by the government to the inventor, that he shall have the exclusive use of his invention for a certain time; and there is, on the other hand, a consideration given for it by the inventor; that is to say, the disclosure of his invention, so that the public may afterwards have the benefit of it.

Now, this grant which is thus made to an inventor constitutes property to which he is entitled, and, as in the case of all other property, the law forbids any encroachment or infringement upon this right. That is to

say, just as the law forbids any man to take and carry off the physical property, as the book, or the knife, or the tool, employed by another in his work, so it prohibits any person from using or practicing the invention in respect of which this patent has been issued; and, in case any such infraction of the law should occur, the patentee has a right to bring his action against the person who has so interfered with his rights, and recover from him such reasonable damages, or such other relief, as the forms of law permit. He is allowed, and for a long number of years in the past he has been allowed, to bring his action either on the law side, as it is phrased, or on the equity side, of the court. That is to say, he may cause his dispute to be brought for determination before a jury, as in this case, or before the court, as in an equity case; and he is allowed free liberty of choice between these different remedies, choosing, of course, that one which, according to his judgment and the best advice that he can get, will be the most advantageous to him. If the patent has expired, as in this case, he is compelled by the law to bring his action before a jury, and the attitude in which he stands is this: He has no longer an exclusive right to this invention. That is to say, it is competent for any person in the community, notwithstanding the patent which we have here produced, at this present time, and to-day, to make the machine described in his patent. During the period of time, however, when the patent was in force, it was not lawful for any person to make such a machine. Therefore, if during that time, as is here alleged, the defendants have made a machine which contains the invention patented by him, supposing you find that to be a practical and valid invention, then his right now to recover such damages as he may have suffered is perfect and complete.

The provision of law that no person shall take, or use, or infringe the rights of a patentee does not depend upon the knowledge on the part of the public of the patent itself; that is to say, an actual knowledge. patent is public, and is accessible to any person who may conceive that his business interests will be subserved by his finding out what his rights are and what they are not; but, whether he reads the patent or not, he is nevertheless bound by it. He cannot excuse himself by alleging, or by proving even, if he can prove it, that he was not aware of the rights of the patentee. A patentee's rights are derived from the grant of the government, and are complete from the time when the patent is sealed and delivered to him, and it is the business of every person in the community to avoid infringements, at his own risk. Nor is it necessary, gentlemen, before bringing the action, that the patentee should notify or inform the defendant that he conceives there is an infringement of his patent. If it were necessary, for example, that notice should be given, then the conversation which took place between one of the plaintiffs. Herman Royer, and one of the defendants, Coupe, at the shop of the defendants, in Attleboro, in 1880, as that conversation is detailed by Coupe himself, throwing out of the account the statements made by Royer, would have been sufficient to put the defendants on their guard, and to notify them that a claim was or might be made against them.

But in this case it is not necessary to show any notice. The plaintiff may produce his patent, which is the evidence of his right, and if he shows that it has, in point of fact, been infringed, then it will be no defense to his action if the defendant either prove that he did not know of the existence of the patent, or that the plaintiff neglected to notify him. was bound to know, and the plaintiff was not bound to assist his information or knowledge by notifying him.

I shall now give you, gentlemen, as briefly as may be, a statement of the different defenses which are set up against this action, and a statement of the principles by which you must be guided in determining You will understand that it is undisputed that here is a patent issued in regular form of law, after the proper application, accompanied by the proper affidavits, and on the performance of all those acts and things which are required by the statute to the valid issue of a pat-If that were all, the right of the plaintiff would be clear beyond a question, because the patent itself, unaccompanied by other evidence, is to be taken by you as sufficient evidence of its own validity, and of the propriety of the act of the government in issuing it. There are certain defenses here made, however, all of which you must take into account, and I shall, as I have said, briefly state them to you.

In the first place, the defendants plead the statute of limitations. That is to say, they plead that, as to the claim which is brought against them, part of it is based upon actions performed by them more than six years before the date of the writ. That, gentlemen, is a defense which is given them by the law, and of which they are entitled to take advantage; and therefore, should you come to the computation of the damages in this matter, you will take into account only such unlawful acts of the defendants as you may find to have happened since the fourteenth day of July, 1879. All before that is out of the account on account of the lapse of time. Whatever has happened since that time you are to take into account, and determine its character, and, if you find it to be a violation of the law, you are to assess the damages for it. It is not a stale claim: it is not a claim as to which the lapse of time ought to be taken into account in any respect whatever, except, as I say, in regard to those actions of the defendant which occurred before the fourteenth of July, The acts of the defendants before that are outside of the limit of your inquiry; as to their acts since that time, it is your duty to determine their character, and, if you find them to be unlawful, to assess the

damages which have resulted. That is, up to the date of the assignment, I suppose, Mr. Wheaton.

your honor.

Carpenter, J. In addition to what I have said, I will state that in . computing the damages, and in considering the unlawful acts of the defendants, if you find they are such, you are to compute no damages, and consider no acts of theirs, which have occurred since the tenth of March, 1885; so that you will understand that the limit of your inquiry is from the fourteenth day of July, 1879, to the tenth day of March, 1885.

Now, gentlemen, in the first place, as to the defense which is made regarding the question of whether this machine was invented by Herman Royer and Louis Royer together, you will readily understand that it is one thing to say that the machine was invented by Louis Royer, for example, and quite another thing to say that it was invented by Herman and Louis Royer. If this machine was invented by Herman and Louis, then it would be untrue to say that it was invented by Louis or by Herman. If, on the other hand, it was invented solely by Louis or solely by Herman, then it would be equally untrue to say that it was invented by Herman and Louis; and you are to understand the law to be that if, in this respect, the patent contains a statement which is untrue, and not in accordance with the facts, then the penalty which the patentee pays is that his patent is absolutely void, and of no effect.

Now, the charge made here is that, whereas the patent describes Herman and Louis as the inventors, in point of fact the invention was made by Louis alone. Upon the testimony which you have heard here, two claims are made on the one side and on the other. The defendants claim that Louis Royer, before Herman Royer became interested in this transaction, had invented a machine which was substantially like the machine described here in the patent, and which contained such mechanism as that the machine invented by Louis Royer was as near an approach to an operative machine as is the machine here described, and that that part of the work which was done by Herman Royer after he came to San Francisco was simply to add some improvements to it. If you are satisfied that such was the case, you need not go any further in this investigation; you are to bring in a verdict for the defendants. other hand, the plaintiffs claim that this was the state of the facts: That Louis Royer had experimented upon the art of breaking hides by a machine of this general description; that he had constructed a machine which was not sufficient for the purpose, -which did not accomplish the work of breaking hides, or of breaking a single hide,—and that because of the absence of the controlling or containing head or plunger of the apparatus, and also because of the fact that the bars were loose, and only a few of them came into operation at a time, and those but imperfectly; and that afterwards, Herman Royer coming to San Francisco, and joining with his brother, they put together the investigations already made by Louis, and the subsequent investigations and experiments made by Herman, and that from the whole was developed the machine which is described in these letters patent. If that was so, gentlemen, then this defense falls to the ground, and, so far as that is concerned, the plaintiffs are entitled to your verdict.

Still, further, and perhaps at greater length, the defendants contend that they do not infringe the rights of the plaintiffs; that is to say, they claim that their machine does not contain the elements of the plaintiffs' machine, combined as those elements are combined by the plaintiffs. Upon that subject one preliminary observation will be useful to you. In order that the defendants, or any other person, should infringe the rights of the complainant in this machine, it is not necessary that they

should construct a machine which is exactly like the machine of the The machine which is shown in the drawings which are annexed to the plaintiffs' patent is one machine which might be made, and which would answer the description of the specification, and would be the machine of the plaintiffs; but it is not every machine which can be There may be variations from that structure which do not affect either the general structure of the machine, or the method of its operation. Such variations are included in the patent itself. I make that statement to you as being a full and technically correct statement of it, but I shall proceed to explain it still further in this way: These machines, gentlemen, (and I speak of them generally,) have a shaft in the center. It is represented as round in all the patents, I think, which you have seen. If it could be made four-sided or eight-sided, without interfering with its usefulness, such a change would not excuse a defendant from the charge of infringement. Such a change would be a change which, for our purposes, we should call an immaterial change. shaft in the patent is represented as containing two screws for the purpose of holding in one or more hides. Looking at the printed description, which you will find annexed also to the plaintiffs' patent, you find that in one place it speaks of the screws, referring to them as being three in number, and in another place as being four. You will understand that the number of screws is immaterial. You will understand, also, that the number of bars which form the circular or cylindrical crib is immaterial; there may be more, or there may be less, according to convenience. You will understand that the points of attachment of the hides to this shaft may be either one, as is shown in the patent, or perhaps two, the suggestion being made that the hides might be put on both sides of the slot, or there may be three or four or any other number of points of attachment. Such a variation as that is not a variation which excuses the defendants from the charge of infringement.

There are other illustrations which might be made, but I refer to those because they have been the subject of some controversy and debate here, and will not only serve as illustrations to your minds, but will also serve to enlighten you, perhaps, somewhat, in the consideration of this question of infringement. But the statement which covers all of it is this: that no change in the form or shape of the different parts of this machine is material, so long as you do not vary from the essential character of those parts as they exist in the description given in the patent. They may be thicker, they may be longer, they may be thinner, they may vary in their general external shape or conformation, but so long as they do not vary from the general purpose for which they are designed, so long as they still continue to serve that purpose, so long they are included within the description of the patent, they are within the meaning of the patent, and variations of that sort cannot be brought forward as an excuse against the charge of infringement.

That principle, I think, covers all the changes in the forms of this mechanism to which your attention has been called during this whole trial, so that, for a practical application of this principle, you may un-

derstand that there is no difference in the shape and form of the different parts of these two machines which is sufficient to make any distinction between them, such as the defendants claim. That is to say, so far as the shape and form of the different parts of those machines are concerned, this machine is exactly the same as that in point of law, and is covered by the description of it, and is an infringement of it against which the law denounces a penalty.

You will come, however, gentlemen, to another and further consideration which you must determine upon the testimony which is laid before you. In order to explain that, perhaps I ought to preface by saying what you are to take this patent to mean; what it is, in brief terms, that it covers. In order that I may bring my observations within the technical requirements of such a case, what is the interpretation which you are to put upon this patent? This, gentlemen, is a patent in which the invention of the plaintiffs is an invention which is to be described as follows: It consists of a shaft which contains, or has attached to it, means by which hides can be fastened to its periphery. Around that shaft, and leaving that shaft in the center, are arranged a number of bars, which shall contain the roll of hides after it has been wrapped around the central shaft. In the third place, there is a plunger or false head, or contracting device, whatsoever you may call it, -a piece of metal or of wood.—which so moves as to reduce the space within which the hides are contained, for the purpose of squeezing them sidewise. That is all there is in the machine, and any machine which contains these elements is an infringement of the plaintiffs' device, and is a violation of law. I need not say to you that the defendants' machine is such a machine. It contains a central shaft, and a device for fastening hides to it. It has other devices also for fastening other hides, but that constitutes no excuse for the use of the one single device for fastening the hides. It has the bars surrounding the central shaft, which confine the hides after they are wound about that shaft. Those bars also have conveniences and means for adjusting them inwardly and outwardly. also has a movable head, which operates to reduce the space in which the hides are, or, in more popular phrase, to squeeze the hides together; and it also has another corresponding head on the other side, -two instead of one. In view of those differences, there is an additional observation that I ought to make to you, perhaps. After an invention has been made and patented, and is described in a patent, it very frequently happens that there may be a radical and important improvement made upon that machine; that is to say, it may be possible for another inventor, or the same inventor, perhaps, taking the elements which are contained in that machine, and adding other elements to them, to make an apparatus which shall be even better for practical purposes than the original in-That, gentlemen, if you are interested in the history of great inventions, you have found to be not only common, but, as I believe, universal. I think there is no instance in which the machines made after the first class of machines were not better for practical purposes, and in many cases infinitely better, than the original machines, which

contained the fundamental devices by which the work was done. This improvement, or this improved machine, may be patented also, and then the situation of the two patentees is like this: The first patentee can prevent the second patentee from employing his own machine; that is to say, the second machine contains his invention, and something It is not proper, then, for the original patentee to use the second machine, because it contains, not only his own invention, but an additional improvement or invention which is not his property. competent or proper for the second inventor to use his own machine without the consent of the first, because it not only contains his own improvement, but also the original invention of the first patentee. Therefore, in the case of a valid original patent for a machine, and a valid patent for a useful improvement upon that machine, the parties are in this position: that the first patentee cannot use the second machine without the consent of the second inventor, and the second inventor cannot use his own machine without the consent of the first inventor; and, if either of them violates these rules, he violates the law, and is liable to an action in consequence.

Now, these differences to which I have made reference are in the nature of improvements. They purport to be such on the face of them; they are described as such in the patents which the defendants, or one of them, has taken out. They do not undertake to cover the use of a machine containing the central shaft, the crib, and the device for pressing the hides, but they undertake to describe and to claim improved methods of doing this. Without further describing, the position of the parties in this state of things is this: I have only to say to you that such differences between the machines used by the defendants and the machines used by the plaintiffs are not essential differences, and do not re-

lieve them from the charge of infringement.

There is one difference as to which there is other testimony, and to which I have not made reference. There is a difference in the position or the attitude of the machines. One of them is said to be vertical, and one of them is said to be horizontal; one of them, as it might be said, stands upright, and the other lies down on its side. Now, from that change which the defendant Coupe made, taking this machine, (for, as I say, we assume that he knew of the existence of it,) and conceiving it to be an advantage to lay it down on its side,—to make it horizontal instead of vertical,—it followed that there must be a change made in the operation of the head or plunger which pressed the hides; because when it stood upright it would remain in its place by its own weight; if it was laid down on its side, the weight would be likely to fall out of place, and the weight of the plunger itself might be an inconvenience instead of a convenience in the operation. It was therefore necessary, if this machine was to be changed into a horizontal machine, -or if, to speak more accurately, the attitude of the mechanism was to be changed, it was necessary to make a different device for the purpose of pressing the hides. That is done in a very simple and ingenious way here, by using a comparatively thin false head or plunger, and moving it by a screw which

moves it forward and back as may be required. Those two changes, therefore, go together, as it were. One is a consequence of the other, and they form the most obvious difference to the eve between the two ma-Regarding that change, this claim is made by the defendants: They claim that the change results in a radically different method of operation of the two machines. To state it in the language used in the patent law, they claim that there is a difference of function, which means simply that there is a difference in the manner and result of the operation of the two machines, caused by laying one of them on its side. not, gentlemen, to assume that that is not possible. The change is slight in its general aspect. There is no change in the structure of the machine; it is simply a change in the attitude of the machines in relation to the plane of the horizon. Nevertheless, you are to consider that changes smaller than that have sometimes resulted in very large differences in the method of operation. You must, therefore, with unprejudiced minds, enter upon the consideration of the question, when you retire to your room, whether there be any difference in the operation of these two machines,—the one standing vertical, or erect; the other standing horizontally, or lying upon its side.

Now, what is the nature of the difference which the defendants claim? They claim that the difference is this: that the machine, in a horizontal position, will break hides so that they can be used for useful purposes in the arts, and that the machine standing in a vertical position will not accomplish this work. To use his phrase,—the phrase of the patent law,—the machine is not "operative;" or, to use a phrase equally accurate, and perhaps more easily comprehended, that the vertical machine will not do the work which it is appointed to do. If that be so, gentlemen, there is not only a radical difference in operation, but there is evidently a defect in the original patent, so that, if that claim made by him is true, he has two defenses, either one of which is a sufficient answer to this case. That is to say, while the machine described by the plaintiff as being a vertical machine will include horizontal machines also, and while it is true that a horizontal machine will infringe this patent for a vertical machine, if it appears that the operation of the machine is substantially the same in the one position or the other, on the other hand, you will understand that if it appears that a horizontal machine will work, and is operative, and that a vertical machine will not work, and is not operative, then you must confine the plaintiff to that interpretation and meaning of his patent, which confines him to vertical machines alone. It is not necessary for me to elaborate the legal principle contained in this. It would not interest you, and perhaps would tend rather to confuse than to elucidate what I have to say; and I therefore make one statement which, for practical purposes—for your purposes—covers the whole question. If you find that a machine made with this shaft, crib, and weight, and standing so that the shaft is vertical,—that is to say, is upright,—will not break hides,—will not do the work which it is expected to do,—then, in that case, the defendant is entitled to your verdict. If you find that it will do that work, then the

plaintiff is entitled to your verdict, so far as this question is concerned. You are not to consider, gentlemen, which does it the best. You are not to choose between the two machines. You are not to consider whether one machine makes more trouble than the other; whether one makes work more uniform than the other, and more desirable in the market; whether one is better able to perform the work; whether one does it with a less amount of power; whether it is easier in one to load or unload than in the other; whether it is more under the control of the operator in one case than in the other; or whether the crib in one case is more adjustable than in the other. These considerations are of no consequence. To put it more shortly, the question to be determined by you is not which of these is the better machine, but simply and solely, will a machine made with a vertical shaft do the work at all?

Now, as to that, you must consider the large amount of testimony that has gone in here. I shall not do more than to point out to you, without undertaking to describe it, such parts of the testimony as apply to this question. Will a vertical machine break hides so that they can be useful? You will understand, of course, that it is not expected of a vertical machine that it shall do the whole business of transforming the skin on an animal's back into a piece of lace leather; it is to perform only one part of it. This machine is not expected to skin the animal, nor to take off the hair, nor to dry it, nor to soak it with water, nor to cover it with stuffing, nor to perform any other of the operations, except simply to corrugate it; or, as it might be expressed, to crumple it, squeeze it by crumpling,—so as to soften it, and adapt it for the purposes for which it is wanted, in connection with the other processes which are necessary in this important art of preparing leather. The question, therefore, is, will a vertical machine do the work of corrugating or crumpling leather so as to soften it? You have on that the testimony as to the machines that have been operated by Herman Royer, commencing, certainly, as early as the year 1873, because we then hear of the perfected machine, and some time, -I am not able at this time to state to you, from the testimony, the precise date, -some time back of that, and between that and 1868; because I think you will remember that it was reported by Royer that, for some little time after the machines were first made, he found some difficulty in operating them, owing to the fact that the stock was not properly prepared or properly stuffed, and some other considerations, so that for some time, which time is perhaps indefinite, there were practical difficulties in getting them into operation. finally, however, according to his description of it, were operated. will see from the testimony as to the machines used by the Messrs. Weatherhead & Thompson, in Pawtucket, which were vertical machines. There is said to be a difference between those machines and these, by reason of the fact that the rings are made in two parts, and are fastened together with hinges, and fastened or bolted together, if necessary, during the operation. That, you will understand, is entirely immaterial to this The testimony shows, if believed, that they are vertical question here. machines, and that the crib is closed when the operation is going on,

which is all we need to inquire about. On the other hand, you have the testimony of one of the defendants to the effect that he made one of these machines, and tried it, and it did not work. As to that, you will, of course, observe the testimony, which I think is not disputed, that, in the construction of that trial machine, the ordinary requirements of mechanical art were not observed. The machinist who constructed that machine was told to build one exactly like the drawings of the patent. He reported, as I remember the testimony, that there would be practical difficulties about working it, and the answer which he received from the defendant Coupe was not to regard that, but to construct it exactly as it was shown in the drawings. That is not the proper way to construct a machine, if you propose to try whether it be or be not an operative machine in the sense of the patent law. In building a machine for the purpose of testing it, or for the purpose of using it, if you are building it in accordance with the drawings of a patent, or with any other drawings, in fact, which are presented for that purpose, there are very many mechanical devices which will tend to make a machine practical and operative which are within the duty of a mechanic, and do not come within the limits of inventive art. Whether the screws were of the right length or not, whether they were of the right number to be convenient. whether they were put in the right place, for example, was immaterial. It was the business of the machinist who should undertake to construct and to try fairly a machine made after that patent, to put in the proper number of screws which experience and his knowledge of the art would show him, to put them in the proper places, and to make them of the proper and convenient length. So much intelligence is to be supposed in the public, and in all mechanics. It is not necessary that a patent, or the parties to it, should state such things as that, in order that they may bind the public. Such things are always understood.

You have also the opinion of Mr. Coupe, if I am not mistaken, that even if he had built this machine properly, according to the description of the patent, and even if he had employed proper mechanical skill in constructing it, even then it would not have worked, and he is of the opinion that no vertical machine ever can work. You must, therefore, consider these two classes of facts,—the opinion of Mr. Coupe, and the evidence which you have as to what has been done with these machines. Of course, I need not say to you that if you find that vertical machines have been operated, that is conclusive on the proposition that they can be operated. If you should find that it has been done; that leather has been softened and put into the market,—practical leather, salable leather,—it would, of course, be idle to say that such a thing cannot be done. Of course, what has been done can be done.

Mr. Thurston. In this connection, if your honor will pardon me, I desire to call attention to the fact that there is no machine like the patent which has been proved ever to have been used. Even Royer's machine is a machine without any lever attached to the weight.

Mr. Wheaton. The patent calls for pressure upon the top of that weight. A lever is the ordinary way of obtaining pressure in mechanics; and Mr. v.29r.no.9-24

Royer has testified that he used the machine without any change whatever, just as it is described in the patent.

Mr. Thurston. No, sir.

Mr. Wheaton. I will find it, if you dispute it.

Carpenter, J. I think you will find it is true that nobody ever made a literal copy of that patent drawing anywhere. The patentee did not make a literal copy of it; Coupe did not make a literal copy of it; Weatherhead did not make a literal copy of it. Nor is it necessary that anybody should make a literal copy in order to bring himself within the Royer patent. It is not necessary for Royer to follow the lines of that drawing with absolutely slavish and Chinese accuracy, as I have already said to you, in order to construct a machine under the patent; nor is it necessary for Coupe to copy every line of that drawing in order to make himself an infringer; nor does he give the patent a fair test by such a copy. Machines are to be constructed, as I have said before, with the admixture of intelligence. The patent is supposed to describe the machine with sufficient accuracy for the purposes of an ordinarily intelligent man who is acquainted with the art of machinery. It does not undertake to describe it to the mind of a person which is an absolute blank; which knows nothing either of machinery or any other subject. It does not undertake to describe a piece of mechanism which can be copied as a Chinese can copy, and still be operative; nor does it undertake to describe a piece of machinery in which you can make a variation, which would seem remarkable to a Chinese, and so escape infringement. So far as devices for operating this machine are concerned, they are not a part of the invention; they are notoriously the property of the whole world, and any of them may be used by either of these parties, or by the public, in driving these machines, or any other. There is no patent on the bevel-gears which run one of them, or on whatever device it is that runs the other. The device is not shown here. There is a crank put on there, as well as on there, [indicating models.] But whatever they use is the property of the public, and it is entirely immaterial to this controversy. So of whatever device may be used to press together the false head, or the false heads; any device may be used. The patentee does not describe any. He says it is pressed down. It is not necessary that he should describe any means. There are multitudinous means. A person might sit on it, and press it down. He might press on it with his hands. It might be pressed down with a lever; and it might be done, and is done, in a very economical and mechanically handsome way, as you will see by this device here, by means of a double screw there, which holds it exactly in the place where it is put, although one of the witnesses, I think, undertook to say that it was held there by yielding pressure. I think, perhaps, however, I do not overstep my duty when I say you will doubtless come to the conclusion that the false head, · when moved by the screw in that way, is moved forward by a positive motion, and is held where it is put rigidly, whatever the witnesses may say.

Gentlemen, in general, you ought to examine the testimony of the various witnesses in this case with a good deal of care, and with a consci-

entious determination to ascertain what the real facts are. less observe that this case, in point of the amount of money involved, is of considerable, perhaps I may say of great, consequence. We know not of how much consequence, comparatively, it may be to the parties, because we know nothing as to their means, or whether the sums here in controversy may be to them large or small sums. Fortunate it is for us that we do not know. It does not concern us. You sit there, gentlemen, under the same responsibility under which I sit here, as the ministers of justice, within the limits of our jurisdiction here, to do exact justice between these men, according as the testimony fairly and honestly appears to us, without any regard to the consequences which it may have upon either of them, or, even if such were the case, upon ourselves. We have no pressure except the pressure of our own consciences, and no duty except carefully and conscientiously to observe and weigh the testimony. Make up your minds, for your part, as to whether, upon this issue which is left to you, the testimony inclines to the one side or the other, and, upon whichever side you think the greater weight of testimony may be, give your verdict in that direction.

If you find that the defenses set up by the defendants are insufficient, it will be necessary for you to determine the question of how much damages ought to be paid. Now, it is the duty of the plaintiff to point out the damages to you, to satisfy you what they are, and to discriminate the damages done to the plaintiff by the use of this patented mechanism from the damages done to him, if any have been done to him, by the use of any other devices which the plaintiff may have patented, or which

the defendants might have used.

The course taken by the plaintiff to show the amount of damages is a He undertakes to show the value of this invention to any person using it, and the law deems it a fair inference that, whatever value has been received by the defendants through the use of this invention, so much has been taken away from the plaintiff, and he is entitled to have it restored to him. Upon the amount of those damages you have the testimony, if I remember right, of only one witness. Royer himself has made an estimation, as he states, of the amount of money which would be saved by the use of this particular mechanism for the performance of this particular operation in the course of the production of raw-hide leather. There is no evidence as to the amount of advantage or profit from the employment of other devices for other purposes, either for the preparation of the leather before it goes through this machine, or afterwards; but you heard his testimony to the effect that three or four dollars a hide is not an extravagant estimate of the amount of saving which would be made by the use of this mechanism of his, over and above any other device which was at the time of his invention in use, and which the public had a right to use. That estimation, if you are satisfied with the fairness of it, may be taken as the basis of your calculations. You ought, however, to observe the statement made by the plaintiff himself, that, for the purpose of certainty, or for other purposes, he chooses that you shall take a considerably smaller sum,

and which, according to his testimony, is clearly within the value of this invention; that is to say, the sum of one dollar for each hide. You will bear in mind that it is one dollar for a hide which is thus estimated, and not one dollar for a side of leather. If you believe his testimony to be sound, and in accordance with the truth, then you may make up your verdict on that basis; that being, I think, the only testimony in the case as to the amount of damages.

Now, gentlemen, if there is anything that I may have omitted, or that you think I have misstated, I will hear any suggestions you have to make.

Mr. Thurston. I will direct your honor's attention to one matter which has been omitted, as I suppose by inadvertence, and that is, that if the jury believe the letter of Herman Royer, and his testimony that the facts contained in the letter are true, then Herman Royer was the inventor of the machine, and Louis Royer had nothing to do with it, and the verdict must be for the defendants. Your honor was in error in supposing that I claimed that Louis Royer was the inventor. My position was that Louis Royer had made an invention, and built a machine to practice the invention that he had made, but never put it in practice, abandoned it, and Herman Royer took it up. Herman Royer wrote the letter which I have put in evidence, and upon that I base the request. With reference to damages, your honor remarked that there was only one witness upon that question. I beg to call your honor's attention to the testimony of Mr. Coupe that there was no saving or profit in the use of a vertical machine, made in accordance with the description in the patent, over and above the prior fulling-machines that were known to the art long previously; and also to the fact that the gross sum that he receives for the qualities of hides, to which his attention was drawn, is \$3.52 per dozen; and that there is a saving of only 52 cents over the Page process.

Carpenter, J. Where is that stated?

Mr. Thurston. It appears in Mr. Coupe's testimony.

Carpenter, J. Mr. Coupe says there is no saving at all, because he says

you cannot make it at all by the patented machine.

Mr. Thurston. He says it cannot be done by the patented machine, but he says that the machines put into the market, or, rather, the Weatherhead & Thompson machines, are not these machines; they are lace-leather machines. But, first, I desire to request the instruction upon that letter of Herman Royer.

Mr. Wheaton. The Page leather is another article.

Carpenter, J. That is argument. I do not care to have it argued, gentlemen. As to the meaning of the letter written by Herman Royer, as bearing upon the question of whether this was a joint invention or the invention of one or the other of the parties, I shall not undertake to tell you what that letter means, nor what any of the rest of the testimony means that bears upon that question. You are to consider the letter, and all the other testimony, and from that you are to determine who was the inventor of this mechanism,—whether it was Louis Royer, or

Herman Royer, or whether it was the two together, as I have already stated to you more at length. If you find that it was the invention of Herman Royer, or if you find that it was the invention of Louis Royer alone, then, in that case, you need not go any further, as I have already said, but must find your verdict for the defendants. If you find that it was invented by both of them, one man proposing or suggesting one part, and another one suggesting another part,—one suggesting a certain thing, and another suggesting modifications,—then the patent is valid, as far as that matter is concerned; all of which, as far as I can understand, is substantially what I have said to you before.

My attention is called to the fact that there is other testimony regarding the amount of damages besides that of Mr. Royer. It is true, no doubt, that the defendant Coupe has testified that there is no advantage in the use of this patented mechanism; that it is not worth anything to him who uses it. His testimony is that it is not worth anything by way of advantage to him who uses it, because it is not worth anything to anybody, and cannot be made to make leather, according to his understanding of it,—according to his testimony. Of course, if that be true, it not only reduces the damages to nothing, it is not only conclusive that there should not be any damages at all, but that there should be a verdict for the defendants. So that what I said before is strictly true, that, assuming that there are to be any damages at all,—assuming that the plaintiff is entitled to a verdict,—the only testimony upon the subject of the amount of the verdict is that of Herman Royer.

Mr. Wheaton. If your honor will allow me, to avoid any possible mistake of the figures that I made and handed to the jury, I desire to say, in the course of my argument, my associate added up the number of sides which the book-keeper had given between the fourteenth of July, 1879, and the tenth of March, 1885. We divided that by two, and it amounted to sixty-six and some odd thousand dollars, making it up at one dollar per hide.

Carpenter, J. The jury will understand, then, that the figures that were stated by the counsel for the plaintiff are the figures which he says are the result of a computation, and show the number of hides.

THE BRANTFORD CITY, etc.

HATHAWAY and another v. THE BRANTFORD CITY, etc.

(District Court, S. D. New York. December 2, 1886.)

1. CARRIERS—BY SEA—BILL OF LADING—STIPULATIONS EXEMPTING FROM NEGLIGENCE—FOREIGN SHIPS—CONFLICT OF LAWS—LAW OF THE FLAG.

The federal law of this country, by which stipulations of a common carrier exempting him from the consequences of his own negligence are held to be extorted without any real assent of the shipper, and to be against public

policy, and void, is controlling in suits brought here upon shipments made here on board foreign ships, under bills of lading signed by foreign masters, though such stipulations be valid by the law of the ship's flag.

2. CONFLICT OF LAWS—LAW OF THE FLAG—COMITY.

The "law of the flag," so called, expresses no principle of construction. So far as it differs from the general maritime law, it is but the mere municipal law of the ship's home, and has no authority abroad, except by comity, and will not be adopted in a different forum when against the policy, or prejudicial to the citizens, of the country of the forum.

8. Same—Intention of Parties—Torts.

Independently of the intent of the parties, the law of the flag has no application to cases of tort, as between ships or persons of different nationalities and conflicting laws; and as a matter of contract, under the bill of lading, no intent to be governed by the law of the ship's flag, as respects acts of negligence committed in this country, or on the high seas, is to be reasonably in-ferred from the mere fact of shipment here in a foreign bottom.

4. Same—Ship Supplies—Master's Powers—Personal Liability of Owners. Whether the mere municipal law of the ship's home contrary to the general maritime law should be held, in foreign forums, to limit the master's ordinary authority, under the general maritime law, to bind the ship in ordinary maritime contracts, as distinguished from an unlimited personal liability of the owners, to the prejudice of foreign citizens in dealing with a ship in their own ports, upon the faith of the ordinary maritime law, quære. Semble, the decisions in respect to maritime liens for supplies indicate the contrary.

5. CARRIERS—BY SEA—LIMITATION OF LIABILITY—"PERILS OF THE SEAS ARIS-ING FROM NEGLIGENCE"—CATTLE FITTINGS—IMPRUDENT NAVIGATION—EVI-

DENCE-CONFLICT OF LAWS-LEX FORI.

The libelants, at Boston, shipped on board the British steamer B. C. 260 cattle, to be carried to Deptford, England, pursuant to a previous contract made in Boston with the resident agent of the line. The bill of lading, delivered shortly after the ship sailed, excepted "death, however caused," and loss from "stowage, or from perils of the sea, arising from negligence." Negligence was found by the court as respects the cattle fittings prepared at Boston, the stowage there, and navigation on the high seas, in consequence of which, in a storm of no unusual severity on the day after the steamer sailed, upon a lurch of the ship, the cattle fittings gave way, the cattle were thrown in heaps to leeward, and the vessel thrown nearly upon her beam ends, through which 98 per cent. of the cattle died, and were cast overboard before they reached England. *Held*, (1) that the loss arose by negligence of the ship; (2) that the insufficiency of the cattle fittings was a breach of her implied warranty that the ship should be fit for the voyage, and for the cargo, and not covered by the exceptions of the bill of lading; (3) that the stipulation as respects negligent stowage and negligent navigation was invalid in our courts, whether the case were viewed as a case of tort, or as a case of the proper construction of the contract in a conflict of laws; and (4) that the law of the flag-that is, the law of England-which upholds such stipulations was not controlling, (a) because there was no sufficient evidence that the parties intended a purely English contract; (b) because such stipulations were deemed by our law extorted, and, being without the assent necessary to prove a legal contract, the alleged contract, pro tanto, was not proved, as a matter of evidence, according to the law of the forum; and (c) because our national policy, which disallows such stipulations in favor of our own carriers, cannot permit the adoption of the foreign law, in favor of foreign carriers, by comity.

In Admiralty.

North, Ward & Wagstaff and Henry M. Rogers, for libelants. Wheeler & Cortis, for claimants.

Brown, J. The libel in this case was filed to recover \$40,000, damages for the loss of 234 cattle on a voyage from Boston to West Hartlepool, England. The proofs show that in October, 1880, the libelants made a contract at Boston with Brigham & Co., the local agents of the

British steam-ship Brantford City, by the terms of which the libelants were to ship at Boston "from 250 to 300 head of cattle, as may be needed and demanded by the agents of the steamer; freight to be 85 shillings sterling per head, said cattle to be landed at Deptford, England." On the twenty-ninth of October, 260 head were accordingly shipped on board, and bills of lading were given therefor, which contained the following exceptions:

"Loss or damage resulting from * * * stowage, * * * or from any of the following perils, (whether arising from the negligence, default, or error in judgment of the master, mariners, engineers, or others of the crew, or otherwise, howsoever,) excepted, namely: Risk of craft, explosion, or fire at sea in craft, or on shore; boilers, steam, or machinery, or from the consequence of any damage or injury thereto, howsoever such damage or injury may be caused; collision, stranding, or other perils of the seas, rivers, or navigation, of whatever nature or kind soever, and howsoever such collision, stranding, or other peril may be caused. * * Not accountable for death, loss, or injury, howsoever occasioned. Weights, contents, and value unknown, and not answerable for leakage or breakage."

The vessel sailed on October 30th; arrived in England on the sixteenth of November; and delivered only 26 of the 260 head that were taken on board. The rest had died, and been thrown overboard, during the voyage.

The libelants allege that the loss of the cattle was occasioned through the negligence of the defendants in the following particulars: First, that the steam-ship was improperly stowed, so as to be unseaworthy when she sailed, having a list to port, and being down by the head; second, that the fittings for the cattle were insufficient and improper, the head-boards being weak and insecurely fastened, and the cleats on the floor insufficient to prevent the cattle from slipping; third, that the ventilation was insufficient; and, fourth, that the navigation was unskillful and negligent.

The claimants deny any negligence; they also set up the stipulations of the bill of lading as a further defense, in case any negligence is established; and they further plead in their answer to the libel that these stipulations are valid by the British law, and that that law governs this case.

The evidence shows that on Sunday, the second day out, the ship met a gale from the S. S. E., with cross-seas. The log of that day reads as follows:

"This day commenced with strong wind S. S. E., and showers of rain. 4 A. M. Strong gale, and heavy rain. 8 A. M. Strong gale, with rain and heavy sea, shipping large quantities of water. Noon. Wind and weather do. P. M. Very heavy cross-sea; ship rolling very heavily. Put ship's head to sea, and eased the engines. 4 P. M. Wind veering to the S. W., with heavy squalls. 6 P. M. Ship took a very heavy lurch to port, breaking cattle fittings, and throwing the cattle to leeward. Employed all hands righting the cattle. Midnight. Sea decreasing, with moderate S. W. wind. Kept ship her course, full speed."

The testimony shows that the weather was moderate during the rest of the voyage, except on the 4th and 5th, when there was again much

rolling, with further injury to the cattle; but that, as a whole, the passage was not one of any unusual severity for that season of the year.

The steamer was 290 feet long over all, 36 feet beam amid-ships, and her mean draft on this voyage 20 feet 4 inches. Her gross tonnage was 2,371 tons. In her lower hold she carried 1,447 tons of grain and other cargo. On her three decks above she carried, in all, 509 cattle, weighing about 351 tons. The cattle were put in pens or stalls on each side of and facing a central passage-way running fore and aft, each pen holding from four to six cattle. The cattle were tied to head-boards secured to the stanchions. On the lower or orlop deck were 203 cattle, weighing about 140 tons; on the upper 'tween decks, 210 cattle, or about 145 tons; and on the spar deck, 96 cattle, weighing about 67 tons.

The evidence shows that by the heavy lurch to port on the thirty-first of October, above referred to, the steamer was thrown nearly upon her beam-ends, and so continued for a considerable time; that the cattle on all the three decks were hurled to the port side of the ship, breaking through, and carrying away the head-boards on each side, and lav in heaps until extricated during the following night. Some had their limbs In others, their horns were broken and bleeding. were more or less crushed, and suffered from the weight of the heaps in which they lay. By this misfortune the courage and spirits of the cattle were broken. Some were so badly injured that they died very shortly Some others could not be kept on their feet at all, and the rest only with difficulty. They would not take necessary food or drink. All became more or less overheated and fevered, and they died rapidly, from day to day. Scarcely a day passed that many carcases were not thrown Moreover, the difficulty and delay in removing the swelling overboard. and decaying bodies of the dead, in the feverish air of the ill-ventilated lower decks, increased the misery of the situation, and made existence there scarcely endurable to the attendants. The 26 cattle that alone remained alive were landed in England on the sixteenth of November, much damaged.

Besides the libelants' cattle, 249 others were shipped upon the same trip by one Osborne. A still larger loss proportionately occurred in his shipment, only seven being landed alive. This circumstance leads me to the conclusion, with the other evidence, that the loss of the libelants' cattle is not attributable to their weakness through previous transportation without a sufficient period of rest, as averred in the answer.

A large amount of testimony has been taken, and the case has been argued with the most painstaking thoroughness. Upon the best consideration that I have been able to give to it, in all its aspects, I am satisfied that, whatever faults may be attributable to the ship in respect to her stowage and fittings, the lurch on the evening of the thirty-first of October was the immediate cause of the loss that ensued. Without that, all the other causes combined would, I think, have had comparatively small effect, if any, in producing death of the cattle. This lurch was, doubtless, one of the perils of the sea, provided it was the unavoidable result of the wave that struck the ship at that time; and also pro-

vided the ship was navigated with all reasonable prudence and skill to avoid the effect of such waves, having reference to the nature of the cargo. But as all of the cargo above the hold consisted of live-stock, if the cattle fixtures and fastenings were not secure and adequate, or if the foothold furnished the cattle was insufficient, the moment these should give way, from some lurch a little greater than usual, the whole weight of live-stock, amounting to 351 tons, would constitute a suddenly shifting cargo, going over to leeward, as happened in this case; so that what might otherwise have been only a little greater lurch than usual, doing no injury, would result, through this shifting of the live-stock cargo, in throwing the vessel upon her beam ends.

The question to be determined here is whether the vessel's being thrown nearly upon her beam ends can be fairly attributed to a peril of the sea alone, or whether there existed such faults in the navigation of the ship, or in the stowage of the cargo, or in the fittings for the cattle, as were the necessary conditions without which this lurch, to the extent that it reached, and its consequent disaster, would not have occurred. If the latter is the fact, then the loss is not to be deemed a mere peril of the sea, but a result of the ship's negligence, (Transportation Co. v. Downer, 11 Wall. 129,) or, as the bill of lading has it, a "peril of the seas arising from negligence."

The loss in this case was not only unusual and extraordinary, but unparalleled. No other similar misfortune in the transportation of cattle is reported. The proof shows that cattle shipped on other vessels, at about the same time that the Brantford City sailed, met either with no loss, or with very slight loss. During the last three months of that year, from October to December, upon many voyages on which cattle were carried, none were lost. One of the claimants' witnesses says that, out of 7,000 cattle shipped during the year, only 40 were lost, or about one-half of 1 per cent.; another witness that, out of 4,500 head, only 4 were lost. The Brantford City, on her two previous voyages, lost but two or three cattle. On the present voyage, out of 509 taken on board, 476 cattle, or 93 per cent., were lost.

That a cattle ship like the Brantford City should be thrown upon her beam ends, or nearly so, is as extraordinary as the nearly total loss of the cattle on board. Upon repeated consideration of all the testimony. I find it impossible to become satisfied that this heavy lurch is reasonably to be accounted for by anything in the weather, the sea, or other circumstances, had the usual and reasonable skill and precautions been observed in the fittings, the stowage, and the navigation of the ship. The evidence, as I have said, does not indicate anything unusual for that season, either in the wind or sea, in the storm of the 31st. Nothing of any account was carried away on deck; and, though the hatches were left off up to that time, little, if any, water was taken in below. The log, indeed, reads: "P. M. Very heavy cross-sea, ship rolling very heavily. Put ship's head to sea, and eased the engines. 4 P. M. Wind veered to S. W., with heavy squalls." But the stowage of 1,447 tons of cargo in the lower hold, with only 351 tons on the three decks above, be-

sides the hay and water-tanks, was calculated to make her center of gravity low, and her rolling greater than if more weight of cargo had been stowed above the hold. But, however great the rolling actually was on the 31st, it was not such as to do any harm until two hours after the wind had veered to the S. W., when, at 6 P. M., the heavy lurch occurred, without any further explanation of its cause in the log. The testimony on the part of the claimants affords no additional explanation, except that a heavy wave struck the ship upon her starboard bow. But, as I have said, it also appears that no considerable water was taken aboard by it, none went down the open hatches, and no damage was done on deck. The third officer testified that he was on the dog watch from 4 to 6 P. M., and that "there was not a great deal of sea;" but, before he left, a "very heavy sea struck her starboard bow, and made her keel right over to port." "The ship," he says, "was exactly on her course."

A steamer of the size of the Brantford City is not thrown upon her beam ends, even by a heavy sea, when heading the sea, or when meeting it at a reasonable angle, but only when the seas approach more from abeam. Considering the heavy weight of live cargo on board, it was the undoubted duty of the commander, in any considerable sea, to head towards it for the purpose of easing the ship, and thus to avoid the dangers incident to excessive rolling. The log states that the commander did head to the sea. But the time of doing so is not stated, although, from the form of the entry in the log, the ordinary inference would be that it was done at 12 o'clock noon, or very soon thereafter. is no statement that this heading to the sea was continued after the wind veered to the S. W., while the cross-sea, and the effect of the wave referred to, apparently giving the ship an impetus to leeward greater than had been experienced before, would indicate that no such further change was made; and the third officer confirms this inference, even if any change at all was made before 6 P. M.

There is strong ground for suspicion that the entries in the log in respect to what was done in the afternoon are misleading, and that the ship's head was not put to sea at all until after the lurch. The speed of the ship was not sufficient, nor was her position at noon of the next day, as given by the log, such as to make it seemingly credible that the ship was put head to the sea at or about noon of the 31st, as would naturally be inferred from the reading of the log. During the 24 hours the distance made, and the positions of the ship in latitude and longitude as indicated by the other entries in the log, are incompatible with the steamer's having been headed to the sea, i. e., S. S. E., during most of the afternoon of the 31st. The third officer, as above stated, testified that the ship, at the time of the lurch, was exactly on her course, and that there was not a great deal of sea. Moreover, Williams, who was in charge of the cattle, in his memorandum written the next day, put down 5 o'clock in the evening as the time when the storm arose. The engineer testifies that it was between 7 and 8 in the evening when the engines were eased; that is, after the lurch. For the claimants it is suggested that this is a mere error of the engineer as to time; but the engineer's log, which

should have shown the correct time, is not produced, nor is its absence accounted for.

From the circumstances above referred to, it is quite possible that neither the storm nor the sea were such as to have clearly required the steamer to be put head to the sea before 6 p. m., had she been in perfect trim, and her stowage favorable. But she had a list to port on leaving Boston, variously estimated from a foot and a half to two or three inches only. She was down a foot by the head, instead of being somewhat by the stern, as she ought to have been; and her stowage brought her center of gravity so low as to induce more rolling than usual or prudent. testimony shows that she rolled heavily. Her navigation should have been accommodated to these unfavorable conditions to a greater degree than, in my judgment, was done. In addition to this, I am also satisfied from the evidence that there was a parsimony in the preparation of the fittings,—the head-boards, floorings, and cleats for the cattle,—in consequence of which they were neither sufficient nor secure enough for a voyage at that season. In my judgment, it was from the effects of all these causes combined that a lurch a little heavier than usual, in a storm of no extraordinary character, resulted in throwing the vessel nearly upon her beam ends, and in the destruction of the cattle that followed.

It would not be profitable to discuss the details of the voluminous evidence in regard to the fittings, or other condition of the vessel on leav-As to some particulars, there is great diversity in the proofs; and as to others, the facts are not entirely clear. For the defense it is urged, particularly as respects the fittings, that they were subjected to the inspection of the libelants' agents, and of the agents of the insurers, and that both substantially approved of everything that was done. evidence does not, to my mind, sustain this contention. Some complaint was certainly made, both as to stowage and as to the insufficiency of the One of the witnesses testified that, on complaint to the chief agent of the line that the fittings were insufficient, the latter replied that the captain and owners were grumbling about expenses, and he did not know whether he could get anything done or not; that he wanted to keep the expenses down, and had great difficulty in getting the captain's and the owners' consent. Had these fittings been built with such substantial strength and security as experience, up to that time, had shown to be necessary, in the judgment of persons versed in that business, I should not regard the vessel as in fault simply because they subsequently The Titunia, 19 Fed. Rep. 101; The J. C. Steproved to be insufficient. venson, 17 Fed. Rep. 540. But, upon the evidence, I cannot find that these fittings meet that test. On the contrary, I think that they were not such as the current knowledge and experience at that date had shown to be reasonably required for a voyage at that season; the proof of which is found in the complaints on this subject made at the time, and in the evidence as to the character of the fittings, and their subsequent giving

The evidence as to the flooring is somewhat contradictory. It may have been laid differently in different places. A good deal of evidence

given by the libelants tends to show that it was simply boards or planks. laid upon the iron deck, and affording no sufficient hold for the cleats In one place the cleats could be kicked off with the boot. nailed into it. Much of the material for all the fittings was old, pieced, and spliced. after use on two prior voyages, instead of being new. Several of the libelants' witnesses say it was rotten, warped, and, in general, unfit. The testimony of the claimants' witnesses on this point is, in the main. in general terms only, affirming its good quality and sufficiency; and the captain so testifies as to all the details. But the testimony of those who did the work is the less satisfactory from the lack of any clear recollection on definite points of detail, partly, perhaps, the natural result of the lapse of time. But some of them say that they speak only from their general habit of doing such work, and their belief that this work was done well, and in the usual way. In this state of the evidence, the proof that all the head-boards gave way upon this lurch of the ship, in a storm of no extraordinary character, points indubitably, as it seems to me, to the insufficiency of the head-boards, cleats, and flooring as one of the causes of the disaster.

In the case of *The J. C. Stevenson*, 17 Fed. Rep. 540, the proofs, as respects nearly all the important facts, appear to have been wholly different from the proofs in the present case.

Whether the grain cargo shifted, or did not shift, during the voyage, is also a controverted question. It is not very material, except as evidence in regard to the degree of care used in stowage. The evidence for the claimants is very positive that there was no shifting of the grain. The evidence from the libelants' witnesses is equally positive to the contrary, and is sustained by the contemporaneous memorandums of Williams. It seems to be further sustained, also, by the local deviations of the compass, as recorded in the log, which are difficult to be accounted for in any other way than through a decided list to starboard after November 5th.

Without dwelling further upon these details, I must find, upon the evidence, that the vessel, while not chargeable in any one particular with a very palpable or very gross departure from the requirements of prudence, is nevertheless chargeable with such departures from the customary and safe course, in several important particulars, as to indicate a general disregard of the reasonable and necessary conditions of safety for such a cargo; and that these various departures constitute negligence in the discharge of her duty, which, combined, must be held to be the cause of the disaster. Her starting with a list to port; her being down. by a foot, at the head; the large quantity of hay over the sheds on her spar-deck; her stowage so low as to cause unusual rolling; her fittings, to a considerable extent of old materials, more or less patched up; and the flooring and cleats imperfect, and insecurely laid,—are all evidences of a general indifference to the conditions of assured safety for a cargo of live-stock; and, unless the incompatibilities in the statements in the log, and their inconsistencies with the testimony, can be reconciled in some way that I have not been able to discover, the further inference is also unavoidable that, until after the disastrous lurch, the ship was not navigated so much with reference to the safety of her cargo of live-stock as to the speedy accomplishment of her voyage. If all these acts were done under a supposed exemption from liability for negligence, under the terms of the bill of lading and the English law, this tendency to subordinate, if not to sacrifice, the interests of the cargo to the supposed interests of the ship, would be to some extent explained; and the wisdom and the necessity of the law of the federal courts of this country, as respects liability for negligence, would be both illustrated and vindicated by the results of this voyage.

2. The defendants contend, however, that, inasmuch as the cargo was taken on board of a British ship, and as the bill of lading was signed by a British master, for transportation to England, the stipulations of the bill of lading exempting the ship from liability for negligence, and from loss by death, however occasioned, afford a complete defense; because such stipulations are valid by the law of England, (Carr v. Lancashire & Y. Ry. Co., 7 Exch. 711; Chartered Mercantile Bank of India v. Netherlands India Steam Nav. Co., 9 Q. B. Div. 118, 122; S. C. 10 Q. B. Div. 521, 532; Steel v. State Line Co., 3 App. Cas. 88; The Regulus, 18 Fed. Rep. 380; S. C. 23 Fed. Rep. 98,) and because the English law, as it is claimed, is controlling in this case as the "law of the flag."

Notwithstanding the considerable time during which similar stipulations have been in use by most of the English lines of steamers, no case, so far as I am aware, has expressly adjudicated whether the English law or the American law should be deemed controlling. The cases most nearly approaching this are those of The Montana, 17 Fed. Rep. 377, S. C. 22 Fed. Rep. 716, and The Oranmore, 24 Fed. Rep. 922. In the latter there was an express stipulation that any question arising under the bill of lading should be determined by the English law. In the former case, the answer alleged exemption from liability by the provisions of the bill of lading; but it did not set up the defense that the case was subject to the English law, or that the English law, as respects the validity of stipulations against negligence, was different from our The failure to plead this defense was held to exclude it, both in the original decision and upon the appeal. 22 Fed. Rep. 716-728. After the decision on appeal, upon a petition for leave to amend the answer by setting up this defense, the petition was held to come too late, under the rules. Id. 730. In the present case the defense is specifically pleaded, and the validity of the stipulations for exemption from liability for negligence under the British law, as shown in the cases above cited, was admitted at the hearing.

The neglect to supply adequate fittings for the cattle, such as stanchions, head-boards, and flooring with secure cleats for proper foot-hold, etc., was negligence arising before the cattle were shipped, and before the voyage was commenced. The exceptions in the bill of lading, carefully scrutinized, will be found not to include any exemption from negligence in these particulars. There was no express warranty in this bill of lading that the ship was seaworthy; but in every such contract there

is an implied warranty that the ship shall be reasonably fit for the voyage, and for the particular service for which she is engaged. The neglect to fulfill this preliminary obligation has been held not covered by the ordinary exceptions as to negligence. Steel v. State Line S. S. Co., 3 App. Cas. 72, 86; Kopitoff v. Wilson, 1 Q. B. Div. 377; The Hadji, 16 Fed. Rep. 861, 864; Tattersall v. National S. S. Co., 12 Q. B. Div. 297. first case cited a defective fastening of the orlop port-hole before the ship sailed, if such as to make the vessel unseaworthy, was held not covered by the exceptions, because not arising upon the voyage. In the last case cited, death of cattle, caused from failure properly to purify the ship from the effects of a contagious disease through the carriage of cattle on a previous voyage, was held not within the terms of a bill of lading quite as broad as the present. These exceptions, however, do include "stowage," which embraces the distribution of the cattle, and of the other cargo; and they include also "perils of the seas arising from negligence," which would cover imprudent navigation. But as I cannot find that the loss of the cattle would have probably happened if there had been no negligence in these respects, notwithstanding the inferiority of the fittings, the validity of the exceptions, as depending upon the application of the English or the American law, is involved in the decision.

The question presented is a very important one. All the steam-ship lines, whether domestic or foreign, that sail from this port, insert in their bills of lading substantially the same conditions. Considering the number and magnitude of the shipments by these lines, and the very diverse views found in the text-books and decisions upon this branch of the conflict of laws, I have deferred a decision of the cause until able to give the questions involved something, at least, of the consideration their importance demands. The conclusion to which I have come is that our law must prevail, whether the question be viewed as a question of responsibility for a tort; or of the construction and validity of the exceptions in the bill of lading, in a conflict of laws; or as a question of evidence and procedure; or as a question of comity, as related to our national policy.

First. By the law of both countries negligence in a common carrier is a tort, as well as a breach of contract. It was upon its aspect as a tort that the decision of the court below was reversed on appeal, and only half damages given, in the case of Chartered Mercantile, etc., v. Netherlands, etc., 10 Q. B. Div. 521, 534. The tort found upon the facts in the present case is a tort committed partly within the exclusive jurisdiction of this country, and partly upon the high seas, within the exclusive jurisdiction of neither country. Under the terms of the bill of lading in this case, the English courts hold that, for such a tort, the ship and owners are not liable; the law of this country holds that they are liable. It is well settled, however, that responsibility for torts committed within the exclusive jurisdiction of the country of the forum, and affecting its own citizens, are determined according to its own laws.

It is only as respects tortious acts committed beyond its jurisdiction that any doubt has existed as to the remedy to be afforded. In the latter

cases, the principle generally accepted is that, to entitle the suitor to recover in a foreign forum, the act must have been tortious according to the law of the jurisdiction wherein it was committed, as well as by the law of the forum. West. Int. Law, § 186; Whart. Confl. Laws, §§ 475-478; Foote, Priv. Int. Law, 393, 410; Phillips v. Eyre, L. R. 4 Q. B. 225. But inasmuch as the high seas are the common ground of all nations, and are not governed by the merely municipal laws of either, the quality of acts committed on the high seas, as between persons or ships belonging to different nations, whose laws are different, is determined by the maritime law as accepted and administered in the forum where the suit is prosecuted. Hence acts, tortious by the law of England, if committed on the high seas, are actionable in England, though not tortious by the municipal law of the defendant's domicile, or of the ship's flag; and; in general, the law of the flag has no application to torts committed on the high seas, as between persons or ships of different countries having different laws. Foote, Priv. Int. Law, 398, 403; Mars. Coll. (2d Ed.) 208, 209, 212. The point was distinctly presented, and so adjudged, in the case of The Leon, 6 Prob. Div. 148. The same rule in this country has been repeatedly affirmed by the supreme court. The Scotland, 105 U. S. 24, 29; The Belgenland, 114 U. S. 355; S. C. 5 Sup. Ct. Rep. 860. In the latter case the court say, (page 369:)

"As to the law which should be applied in cases between parties or ships of different nationalities, arising on the high seas, not within the jurisdiction of any nation, there can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted."

The fact that, in most of the cases cited, the injury arose from collision is immaterial. The gravamen of the action is negligence. On that alone the action depends. It is the negligence only that constitutes the tort. It is so in this case, in its aspect as a tort; and as this negligence, resulting in damage to the libelants, occurred partly within our jurisdiction, and partly upon the high seas, the law applicable to the case, as one of tortious negligence, would seem, upon the above authorities, to be our own law, as the law of the forum.

Second. As a question of contract, concerning the construction and validity of the exceptions in the bill of lading, as between the different laws of England and the United States, our own law should, I think, prevail; whether the question be determined in view of the general maritime law, or by the presumed intent of the parties, upon the principles of comity. The "law of the flag," so called, which it is urged should govern the case, does not embody any rule of legal construction. Literally, it is but a concise phrase to express a simple fact, namely, the law of the country to which the ship belongs, and whose flag she bears, whether it accords with the general maritime law or not. In so far, however, as the law of the flag does not represent the general maritime law, it is but the municipal law of the ship's home. It has, therefore, no force abroad, except by comity. But foreign law is not adopted by comity, unless some good reason appear in the particular case why it should be

preferred to the law of the forum. The most frequent and controlling reasons are the actual or presumed intent of the parties, or the evident justice of the case arising from its special circumstances. On this ground, the law of the ship's home is applied, by comity, to regulate the mutual relations of the ship, her owner, master, and crew, as among themselves; their liens for wages, and modes of discipline. The Johann Friederich, 1 W. Rob. 35; The Enterprise, 1 Low. 455; The Wexford, 3 Fed. Rep. 577; The J. L. Pendergast, 29 Fed. Rep. 127. For the same reasons it is also applied, by comity, to torts on the high seas, as between vessels of the same nation, or vessels of different nations subject to similar laws, though not if they are subject to different laws. The Scotland, 105 U. S. 24, 30.

To what extent the law of the ship's home is entitled to be applied, by comity, to contracts of affreightment, made in a foreign port, has long been a mooted question. Opposite decisions have been made in this country. Arayo v. Currel, 1 La. 528; Pope v. Nickerson, 3 Story, 465. The later English decisions hold that the law of the ship's home port should govern as respects the future and unforeseen incidents of the voyage,—such as the execution of bottomry in a port of distress, and the liability of the owners for damages beyond the value of the ship and This is rested, in part, upon the ground of the legal limitations of the master's authority to bind the owners personally; but more especially on the ground of the presumed intention of the parties, having reference to all the contingencies of navigation, and to the circumstances likely to arise in the prosecution of foreign voyages. The Gaetano, 7 Prob. Div. 137; Lloyd v. Guibert, 6 Best & S. 117; S. C. L. R. 1 Q. B. 115. In the case of The Titania, 19 Fed. Rep. 101, 103, a bill of lading, given in England upon a shipment of goods on an English ship, was accordingly assumed to be governed by the English law, as respects damages arising on the high seas. See, also, Blanchet v. Powell's, etc., Co., L. R. 9 Exch. 74, 77.

Upon the reasoning in Lloyd v. Guibert, it has been asserted by a recent author (Foote, Priv. Int. Law, 329) that the law of the flag is "to regulate the liabilities and regulations which arise among the parties to the agreement, be it of affreightment or hypothecation, upon this principle: that the ship-owner who sends his vessel into a foreign port gives notice by his flag, to all who enter into contracts there with the shipmaster, that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation, or not contract with him or his agent at all." If the law of the flag were accepted as authoritative and binding to the extreme extent thus stated, it would go far to sustain the respondent's claim in the present case. The doctrine claimed, however, does not appear to me to be warranted either on principle or by the authorities on which it purports to rest. It is inconsistent with the existence of any maritime law at all, as distinguished from mere municipal law; and in Lloyd v. Guibert the maritime law was ignored, (The Karnak, L. R. 2 P. C. 505, 512,) though the conclusion agreed with it. But in this country the general maritime law has been often

recognized by the supreme court as a guide in interpretation and construction, (Norwich Co. v. Wright, 13 Wall. 104, 121;) and in some notable cases it has been made the ground, or one of the grounds, of the decision; when an adoption of the mere law of the flag would have led to an opposite conclusion, (The Scotia, 14 Wall. 170, 186-188; The Scotland, 105 U. S. 24, 29, 30.)

Practically, moreover, the extreme rule above declared would require all merchants to acquaint themselves, at their peril, with all the details of the municipal law of every nation with whose ships they might deal, even in ordinary commercial transactions; certainly a most onerous, if not impracticable, requirement.

In Searight v. Calbraith, 4 Dall. 327, Mr. Justice IREDELL said:

"Every man is bound to know the laws of his own country, but no man is bound to know the laws of foreign countries. In two cases, indeed, (and, I believe, only in two cases,) can foreign laws affect the contracts of American citizens: (1) Where they reside or trade in a foreign country; and (2) where the contracts, plainly referring to a foreign country for their execution, adopt and recognize the lex loci."

These observations are precisely opposite to the contention of the claimants.

By the maritime law the owners are liable, up to the value of the ship and freight, for all the master's contracts in the business of the ship. Emerigon, Contracts a la Grosse, cited in The Scotland, 105 U.S. 28; The Phebe, 1 Ware, 263, 268; The Paragon, Id. 322. Wherever the general maritime law is recognized as a source of authoritative exposition or construction, it would seem, therefore, that the master's authority in foreign ports, in the absence of statutory definition, might, well be held to be that which the general maritime law confers, without regard to any narrower limitations that may be imposed by the mere municipal law of the ship's home. In the case of The Lottawanna, 21 Wall. 558, 572, Mr. Justice Bradley says: "In matters affecting the stranger or the foreigner, the commonly received law of the whole commercial world is more assiduously observed, as, in justice, it ought to be." As respects any extension of the owner's personal liability beyond the rule of the maritime law, or any acts of the master beyond the scope of his authority as generally recognized by that law, the law of the flag may justly be invoked. In Lloyd v. Guibert the plaintiff sought to extend the shipowner's personal responsibility beyond that of the general maritime law. which was in fact the law of the flag; and the language of Blackburn, J., in the court below, quoted in part by the author above named, clearly appears from the context to have been used in reference to the shipowner's unlimited personal liability in a common-law action, such as that cause was; not as respects his limited liability under the maritime law.

Except as relates to this unlimited personal liability, the above-stated rule, to the broad extent asserted for it, is certainly not in accordance with the prior decisions in this country that hold British ships liable to a maritime lien for necessary supplies furnished here, though no such lien, or authority in the master to create such a lien, was then, or is

now, recognized by the law of the flag. The Rio Tinto, 9 App. Cas. 356; The Walkyrien, 3 Ben. 394; affirmed, 11 Blatchf. 241; The Eliza Jane, 1 Spr. 152; The Selah, 4 Sawy. 40; Hatton v. The Melita, 3 Hughes, 494. In several English cases, also, concerning bottomry bonds given in foreign ports, the validity of the law of the foreign port giving a maritime lien for necessary supplies, and a right to arrest the vessel therefor, is directly recognized as a ground of validating subsequent bottomry, though such a lien was contrary to the law of the flag. The Vibilia, 1 W. Rob. 1, 8; The Prince George, 4 Moore, P. C. Cas. 21, 25; The Karnak, L. R. 2 Adm. & Ecc. 289; S. C. L. R. 2 P. C. 505.

In the present case no question arises concerning the authority of the master, as respects future incidents of the voyage. The question concerns only the validity of the exceptions inserted in the bill of lading. On this subject the ordinary rule is that the law of the place where the contract is made governs, as respects the nature, validity, and interpretation of it, unless it be made with a view to performance elsewhere; and, in that case, it is governed by the law of the place where it is designed to be performed. Story, Confl. Laws, §§ 242, 280. This contract was made within the United States, i. e., both the original agreement for the transportation of the cattle to Deptford, and also the bill of lading. respects proper stowage, suitable cattle fittings, and general seaworthiness, the contract was to be performed wholly in Boston, i.e., within the exclusive jurisdiction of the United States. As respects navigation, it was to be performed chiefly on the high seas; as respects final delivery, in England. The negligence found arose in part within the United States, and in part upon the high seas. The general rule of construction, in the form above stated, does not, therefore, afford a sufficient guide in this case, unless the same stipulation should be held valid or invalid, according as the acts of negligence are committed within the jurisdiction of England, or the jurisdiction of the United States; and, even then, the rule would not determine the question as respects acts of negligence committed on the high seas, within the exclusive jurisdiction of neither.

In the case of Scudder v. Union Nat. Bank, 91 U.S. 406, the supreme court say, pages 412, 413:

"Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy,—such as the bringing of suits, admissibility of evidence, statutes of limitation,—depend upon the law of the place where the suit is brought."

The same language is repeated in *Pritchard* v. *Norton*, 106 U. S. 124, 130; S. C. 1 Sup. Ct. Rep. 102. But these distinctions are inconclusive here; because while, on the one hand, the question concerns the "validity" of the stipulation, and so would fall under the first branch of the rule, the negligence, on the other hand, and the stipulation for exemption from liability for negligence in the performance of the contract, are "matters connected with its performance," which would fall under

the second branch. Nor does this rule indicate what law is to be deemed to prevail when the place of the negligence is the high seas. The modern English and American decisions, while they approach the point, do not precisely meet it.

In Peninsular, etc., Nav. Co. v. Shand, 3 Moore, P. C. (N. S.) 290 and

291, TURNER, L. J., says:

"The general rule is that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or, as temporary residents, owe it a temporary allegiance. In either case, equally, they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms. It is equally an agreement in fact, presumed de jure; and a foreign court, interpreting or enforcing it on any contrary rule, defeats the intention of the parties, as well as neglects to observe the recognized comity of nations."

In the recent case of Watts v. Camors, 115 U.S. 353, S. C. 6 Sup. Ct. Rep. 91, the question arose as to the amount of damages recoverable upon the refusal of a charterer to accept an English vessel, pursuant to a charter executed in New Orleans, by which a citizen of Louisiana had agreed to freight the ship, under a stipulated penalty; the libelants claiming the whole stipulated penalty under the law of that state, whereas, by the general maritime law of both England and this country, the actual damages only could be recovered. The court held that the case was not governed by the local law of Louisiana, and say, (Gray, J.:)

"The law of Louisiana does not govern this question, whether it is treated as a question of construction of the contract of the parties, or as a question of judicial remedy. If it is considered as depending upon the intent of the parties, as manifested by their written contract, the performance of that contract is to be regulated by the law which they must be presumed to have had in view when they executed it. Americans and Englishmen, entering into a charter-party of an English ship for an ocean voyage, must be presumed to look to the general maritime law of the two countries, and not to the local law of the state in which the contract is signed."

The rule indicated by this case is not simply the law of the place of performance, but "the law that the parties must be presumed to have had in view in making the contract;" thus returning to the form of the rule as expressed by Lord Mansfield in Robinson v. Bland, 2 Burr. 1078. The presumed intent of the parties, however, is the basis of the common rule making the law of the place of performance govern, instead of the law of the place of the execution of the contract, (Story, Confi. Laws, § 280;) and all the late cases emphasize the intent of the parties, either actual or presumed, as the controlling feature. The case of Watts v. Camors was decided, it will be also observed, not upon the ground that "the law of the flag" prevailed, i. e., the law of England alone, but on the ground that the law that the parties are presumed to have had in view should control, and that that law must be presumed to be the general maritime law of the two countries. That decision, however, does not directly answer the present question; because the general maritime law, as admin-

istered in England, is opposite to that of this country, as respects the validity of stipulations exempting carriers from liability for negligence. But in so far as that case rejects the law of the flag as presumably representing the intent of the parties, and substitutes therefor the maritime law of the two countries, it would sustain the authority of our own law in a case of difference; because no foreign law can be adopted by comity, unless some prevailing reason be found for preferring it to our own; and, if the two apply equally, ours must stand here, unless a different intention be proved, or be legally inferred.

In the oft-quoted case of Lloyd v. Guibert, L. R. 1 Q. B. 115, where the libelant, pursuant to a charter-party executed in England, had loaded cargo, at the Danish island of St. Thomas, on board a French vessel commanded by a French master, who, in the course of the voyage, had executed a bottomry bond upon the ship and cargo, and, by reason of subsequent disasters, the ship was afterwards surrendered in discharge of the owner's liability, pursuant to the French law, it was held that the French law governed the contract as the law of the flag, which the parties, under the circumstances, were presumed to have had in view as the governing law of the transaction; and that the libelant could not, therefore, after such surrender, recover of the French owners, in accordance with the English law, any part of the amount that he had been obliged to pay in consequence of the bottomry of his goods, though he would have been entitled to do so under the English law. But this case referred, not to the validity of any of the express terms of the contract itself, but only to the law governing the contract as respects the extent of the owner's liability "for sea damage to the ship, and its ordinary result." The court, in conclusion, say, (page 129:)

"The general rule that, where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce."

The decision has no reference to the validity of the terms of the original contract, or to the law by which its validity is to be determined. The general rule on that point, as above stated, is repeatedly recognized. Pages 122, 123.

In the case of *The Gaetano*, 7 Prob. Div. 1, 137, a question arose in regard to the validity of a bottomry bond, for want of communication with the owner. The cargo was shipped at New York, on board an Italian vessel which had been chartered for the purpose in London. The ship, in the course of the voyage, having put into Fayal in distress, the master executed a bottomry bond in accordance with the Italian law; but without any such communication with the owners of the cargo as was practicable, and such as by the English and American law was necessary to make the bottomry valid. It was held that the Italian law, as the law of the flag, prevailed, as presumptively the law contemplated by the parties to the charter and shipment, and that the bond was valid.

This case, also, had no reference to the validity of any of the express terms of the contract, but to the incidental authority of the master, in unforeseen contingencies that happened in the prosecution of the voyage. I cannot reconcile this decision, however, with that of the earlier case of *The Hamburg*, 2 Moore, P. C. (N. S.) 289, where an opposite result was arrived at.

The case of Chartered Mercantile Bank of India v. Netherlands, etc., Co., 10 Q. B. Div. 521, was brought to recover damages for an injury to cargo in a case of collision. A bill of lading exempting from liability for negligence had been given at Singapore, an English port, by the captain of the ship, which was registered in Holland, and which carried the Dutch flag. Brett, L. J., says, (page 529:)

"Even if this is to be regarded as a Dutch ship, it seems to me that the contract is nevertheless English. It may be true, in one sense, to say that, where the ship carries the flag of a particular country, prima facie the contract made by the captain of that ship is a contract made according to the law of the country whose flag the ship carries. But that is not conclusive. The question what the contract is, and by what rule it is to be construed, is a question of the intention of the parties, and one must look at the circumstances, and gather from them what was the intention of the parties. In this case the persons for whose benefit the ship was employed, and for whom the ship was earning profit, were undoubtedly the defendants, every one of whom is an Englishman. The defendants are registered in Holland as a Dutch company, but they are also registered in England as an English joint-stock company. The contract was made in an English form. The contract, therefore, was made by a servant and agent of the defendants, who authorized that contract to be made in order to obtain profit for themselves. The contract was made for the carriage of goods from an English port to a Dutch port. It was made with an English merchant. The contract was drawn up in the English language, in the ordinary form of an English bill of lading, and the defendants were named in the contract as a limited company; in other words, they were described as an English company. It seems to me that, upon taking those circumstances into consideration, the inference is irresistible that it was the intention of the parties that the contract should be an English contract, even though one considers the ship to have been a Dutch ship, which I think she was not. If the contract be English, it must be construed according to the rules for construing an English bill of lading."

The latest English case on this subject that I have met is that of Jacobs v. Credit Lyonnais, (1884,) 12 Q. B. Div. 589, in which the defendants, a firm in London, contracted in London with the plaintiffs, who were also merchants in London, to deliver to the latter 20,000 tons of Algerian esparto, to be shipped by the Compagnie Franco-Algerianne, from Arzew, during the year 1881, upon ships to be supplied by the plaintiffs, in about equal proportions in each month. The agreement contained numerous provisions in regard to the shipment by steamers from Algiers, and the plaintiffs were required to accept and approve of the esparto as put on board in that country. After the partial execution of the contract, its further performance was rendered impossible through the outbreak of an insurrection in Algiers, and the consequent military operations there, which, by the French law prevailing in that country, constituted a case of major force that discharged the defendants from the

further performance of their contract. Notwithstanding the fact that the esparto was to be accepted and approved in Algiers, it was held that the contract was subject to the English law, and not the French law; that the contract was not, therefore, discharged; and that the defendants were liable for the non-delivery of the residue of the goods under the contract. The court, Bowen. L. J., after referring to the ordinary rule that the law of the place where the contract is made is prima facie that which the parties intended, and which ought to be adopted, as the footing upon which they dealt, says:

"It is obvious, however, that the subject-matter of each contract must be looked at as well as the residence of the contracting parties, or the place where the contract is made. The place of performance is necessarily, in many cases, the place where the obligations of the contract will have to be enforced; and hence, as well as for other reasons, has been introduced another canon of construction, to the effect that the law of the place of fulfillment of a contract determines its obligations. But this maxim, as well as the former, must, of course, give way to any inference that can legitimately be drawn from the character of the contract and the nature of the transaction. In most cases, no doubt, where a contract has to be wholly performed abroad, the reasonable presumption may be that it is intended to be a foreign contract, determined by foreign law; but this prima facie view is, in its turn, capable of being rebutted by the expressed or implied intention of the parties, as deduced from other circumstances. Again, it may be that the contract is partly to be performed in one place and partly in another. In such a case, the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law, or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to English law. Stereotyped rules, laid down by juridical writers, cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character, and increased in complexity; and there can be no hard and fast rule by which to construe the multiform commercial agreements with which, in modern times, we have to deal."

The facts of the case were there held insufficient to rebut the ordinary presumption that the law of the place where the contract is made governs its interpretation, and the contract was therefore held to be subject to the English law.

The same general question was elaborately considered, also, by Mr. Justice Matthews, in the case of *Pritchard* v. Norton, 106 U. S. 124, S. C. 1 Sup. Ct. Rep. 102, where a bond had been executed in New York which would be void there for want of consideration, though valid in Louisiana, where the transaction out of which it grew originated; and it was held that, from the circumstances, "the situation, and the relation of the parties, the obligation was entered into in view of the laws of Louisiana," and on that ground it was upheld.

So, in Morgan v. New Orleans, etc., R. Co., 2 Woods, 244, a contract was executed in New York which provided for the performance of different

parts of the contract in different states,—some in New York, but largely in several southern states, including the building of a railroad in Louisiana,—for breach of the latter part of which a bill was filed in Louisiana to rescind the contract. The plaintiff would have been entitled to that relief had the law of that state been the law of the contract; otherwise not. It was held by Mr. Justice Bradley that such cases must be governed each by its own circumstances; and, though the building of a railroad in Louisiana was deemed a very important consideration of the contract, it was not held sufficient to control the whole contract, or to entitle the plaintiff to its rescission, but that it was, in that respect, governed by the law of New York, as the place where the contract was made, and to be in part performed. This case, it will be observed, was treated much in the same way as that of Jacobs v. Credit Lyonnais, above cited.

The reported cases arising out of the carriage of passengers in relation to loss of baggage, and the limitations upon the carrier's responsibility, show that the decisions follow the presumed intention of the parties, rather than any technical rule. In *Peninsular*, etc., Co. v. Shand, 3 Moore, P. C. (N. S.) 280, an English company agreed to carry the plaintiff, an Englishman, from Southampton to Mauritius, in the defendant's ship, exempting itself from liability for loss of baggage. The court held the English law to be the intended law of the contract, and not that of France, the place of destination.

So, in Cohen v. South Eastern Ry. Co., 2 Exch. Div. 253, the plaintiff, an Englishman, took a ticket from an English railroad company, at Boulogne, for a passage to London, and his baggage was lost by negligence in the Channel. Counsel agreed that it was an English contract, but the court intimate that, as regards any loss that might have happened

within French territory, the French law would have controlled.

In Brown v. Railroad Co., 83 Pa. St. 316, the plaintiff bought a ticket in Philadelphia for a passage to Atlantic City, over the Camden Railroad, a New Jersey corporation. His trunk was lost. On the trial it was held that the law of New Jersey governed, and that the defendants were not entitled to a limitation of damages to \$300, under the Pennsylvania statutes, merely because the ticket was bought in Philadelphia, and the contract made there.

In Curtis v. Delaware, L. & W. R. Co., 74 N. Y. 116, it was similarly held, where the plaintiff took passage at Scranton, Pennsylvania, for New York city, and his trunk was lost after its arrival in New York city, that the restriction of the Pennsylvania state statutes was not applicable, and that the contract should be governed by the law of New York, where the negligence happened, and where the baggage was to be delivered.

In these several cases, concerning passengers' baggage, though there is no extended discussion of principles, there is an evident disposition to regard the law of the place where the negligence occurred as the law impliedly intended by the parties to govern that part of the contract.

From the later English authorities, above cited, it is apparent that

the "law of the flag," so called, is not even there held to represent any controlling principle of law. It has no application to torts, and, as respects the construction of contracts, its application depends wholly upon the intent of the parties, actual or presumed, or on the manifest justice of the case as shown by the special circumstances. The nationality of the ship is but a single circumstance, among many others, all of which are to be taken into account. *Prima facie*, as all agree, the validity of the contract is governed by the law of the place where it is made, unless it is to be "wholly performed elsewhere." *Lloyd* v. *Guibert*, L. R. 1 Q.

B. 122; Jacobs v. Credit Lyonnais, supra.

This contract was neither wholly nor chiefly to be performed within English jurisdiction. It was made here, and was to be chiefly performed either here or upon the high seas. The original contract was not even made with the master, but with the resident agent of the ship-owners, and with no exceptions as to negligence. Doubtless the ordinary bill of lading must be presumed to have been intended. The ordinary bill of lading was given, with the same exceptions inserted in it as regards negligence that are now usually inserted, for what they are worth, by all steamers alike, whether foreign or domestic. The exceptions exempting from the consequences of negligence have been long held void by the federal law, as was presumptively known to both parties. form of the bill of lading been proved to be peculiar to British ships, that would have been one circumstance to indicate that a British contract, under British law, might have been intended. But its common use by all lines alike prevents any inference that the British law was intended from the mere presence of an exception common to all, or because it is held valid in England, while invalid here.

If the situation and natural expectation of the shipper be regarded, it is not reasonable to presume that he intended to renounce the superior protection secured to him by his own law, to which he was entitled, in favor of a foreign law less to his advantage; and, as respects the master and owner of the ship, how can they be "reasonably presumed" to have been counting upon an immunity in making contracts here which is denied to our own ships, when the contract is silent on the subject? In the language of Turner, L. J., above quoted, "he owed a temporary allegiance here, and must be understood to submit to the law here prevail-

ing, and to agree to its action on his contract."

In the cases of Lloyd v. Guibert and The Gaetano, above referred to, a long array of special considerations, drawn from the general experience, convenience, or necessities of commerce, as respects the questions there presented, sustained the conclusion of the court, which, in the former case, was in accord, and in the latter was certainly not discordant, with the general maritime law. In the present case no such circumstance exists, and the exemption from liability claimed is directly opposed to the immemorial law of the seas, and is so contrary to natural justice and expediency that, even where the exemption is upheld at all, it is under so high disfavor that every intendment is made against it by construction; and, in the federal courts, it is held so unreasonable as to be deemed ex-

torted without the shipper's real assent, and void. In the federal courts, at least, it would therefore seem to be impossible to hold that the parties can be "reasonably presumed" to have intended to adopt a foreign law in order to uphold a stipulation which is so unreasonable as to be deemed extorted, and void. As a question of fact and law, I must hold, as was intimated by Mr. Justice Blatchford in the case of *The Montana*, 22 Fed. Rep. 715, 728, that there is "nothing in these contracts of affreightment to indicate any contracting in view of any other law than the recognized law of such forum in the United States as should have cognizance of suits on the contracts."

Third. In one aspect the question is one of evidence and procedure, which is always governed by the law of the forum. The carrier is liable for negligence unless he establishes some contract of exemption, and the sufficiency of the proof of such a contract must be judged by the law of the forum. Ordinarily, doubtless, proof of the acceptance by the shipper of the shipping receipt or bill of lading, without objection, is sufficient; because the law generally implies therefrom an assent to its terms. But this rule is not without familiar exceptions; and where, under special circumstances, such assent is negatived, or is not implied by the law, the contract is not proved. Whether assent is implied by the law or not depends upon the lex fori. Hutch. Carr. § 45.

In some of the states it is the settled law that no assent to any limitation of the common-law liability of carriers is to be implied from the mere acceptance of the bill of lading, without further proof. Hutch. Carr. § 240, note; Field v. Railroad Co., 71 Ill. 458; Gaines v. Union Transp., etc., Co., 28 Ohio St. 418. And such seems to be the federal law, as regards any implied assent to stipulations exempting from the consequences of negligence, which are deemed extorted from the public without any real assent.

Thus, in Railroad Co. v. Lockwood, 17 Wall. 357, 379, the court say:

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. * * The inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity."

The same language, in effect, is used in Express Co. v. Caldwell, 21 Wall. 264, 266.

In the case of *The Montana*, 22 Fed. Rep. 715, 727, Mr. Justice Blatchford, in reviewing the results of the supreme court decisions, says that "the carrier cannot be permitted to stipulate for immunity for the negligence of his servants. The business of a carrier is a public one, and those who employ the carrier have no real freedom of choice, and the carrier cannot be allowed to impose conditions adverse to public policy and morality."

In the case of Railroad Co., v. Manufacturing Co., 16 Wall. 318, it was held that exemptions printed on the back of the shipping receipt, though referred to in the body of the receipt as a part of the terms of shipment, were not to be presumed assented to, and were no part of the contract, because the qualifications of the carrier's responsibility were unreasonable, and the law would not presume acquiescence in the conditions.

In Ayres v. Western R. Corp., 14 Blatchf. 9-13, WALLACE, J., observes that the shipper is not to be deprived of the benefit of the common-law liability of the carrier without clear evidence of his assent. See, also, Rackett v. Stickney, 27 Fed. Rep. 878.

In Railway Co. v. Stevens, 95 U. S. 655, 659, Mr. Justice Bradley, referring to the railway ticket with its printed exemptions, says: "It was not evidence of any contract by which the plaintiff was to assume all the

risk, and would not have been valid if it had been."

A very similar question arose in the case of Hoadley v. Transportation Co., 115 Mass. 304. There are engine had been delivered to the defendant at Chicago, for transportation to Lawrence, Massachusetts, but was destroyed at Chicago in the great fire of 1871, without the defendant's The defendant had given its receipt, excepting loss by fire while fault. in depot or in transit. By the law of Illinois, where the contract was made, the mere acceptance of the receipt did not import assent to its exceptions, without additional proof; while by the law of Massachusetts, where the suit was brought, the acceptance of the receipt without dissent was sufficient proof of the contract, and of assent to all of its exceptions from losses not arising through negligence. At the trial the receipt was put in evidence without further proof than its delivery to the shipper, and the plaintiff recovered, the court holding that the law of Illinois governed. Upon appeal, the ruling below was reversed, on the ground that the question concerned only the mode of proof of the contract set up in the receipt, and that, as a question of evidence, the case was governed by the law of the forum. The court say:

"The nature and validity of the special contract set up is the same in both states. It is only a difference in the mode of proof. A presumption of fact in one state is held legally sufficient to prove assent to the special contract relied on to support the defense. In the other state it is held not to be sufficient. It is as if proof of the contract depended upon the testimony of a witness competent in one place and incompetent in the other."

So, in the present case, since, by the federal law, the shipper's assent to such stipulations is not legally implied by acceptance of the bill of lading or shipping receipt, no contract, as respects such stipulations, is

legally proved, according to the law of the forum.

Fourth. Besides the above general considerations, a special reason why the foreign law could not, in any event, be adopted in this case, is found in the repeated adjudications of the supreme court that such stipulations are against the public policy of the country, and are on that ground illegal and void. Contracts, though designed to be performed elsewhere, are void, if criminal or illegal where made; i. e., if the very promise or con-

dition which is the consideration of the contract, as distinguished from the thing to be done by the other party, be illegal where made,—the only exceptions being cases arising under the laws against usury; and a foreign law is never adopted by comity where it would be against the public policy of the country of the forum, and prejudicial to its citizens. Story, Confl. Laws, §§ 243, 244, 324; Westl. Priv. Int. Law, §§ 203, 204; Miller v. Tiffany, 1 Wall. 298, 310; Blackwell v. Webster, 23 Blatchf. 537; Hyde v. Goodnow, 3 N. Y. 269.

Nothing could be more unequal or prejudicial to our own citizens, or more suicidal in national policy, than to uphold, in favor of foreign ships, stipulations, as respects carriage here or upon the high seas, which, when made by our own carriers, we declare to be against public policy, extortionate, and void. As respects such stipulations, foreign ships cannot stand on any different footing from our own, nor can a foreign law be suffered to subvert our own law to the prejudice of our own ships. No comity demands that. Whatever force, therefore, the law of the flag might ordinarily have abroad, it cannot override, in a foreign forum, these fundamental principles of international law. This plainly appears, also, from the same author above quoted, who makes the largest claim for the law of the flag, and who elsewhere says:

"Wide as the operation necessarily is which is given to the intention of the parties to a contract, it is plain that it can have no effect upon the question of the legality or illegality of the thing contracted for. No law can permit itself to be evaded, nor can it, consistently with the principles of international jurisprudence, sanction the evasion of a foreign law. Thus, if the thing contracted to be done is illegal by the law of the place of the intended performance, the contract should be held void, wherever it was actually entered into, by all courts alike. Where, however, it is the contract itself—the exchange of a certain consideration, either for any or for a certain promise that one of the competing laws claims to forbid, the question assumes a different form. In such a case it would seem that the legality of the agreement must be decided by the law of the place where it is made. It appears clear, at any rate, that a contract illegal by that law will not be recognized or adopted by the English courts, though the converse case, where a contract was legal where made but is forbidden by English law, may often prove a more complex one. No tribunal can, of course, be called upon to sanction or enforce any agreement which is contrary to its own notions of justice or morality." Foote, Priv. Int. Law, 287, 288.

The question here considered does not touch the mere performance of the contract, i. e., the mere carriage and delivery of the goods. It touches the supposed promise on the shipper's part, or the conditions exacted by the carrier, as a consideration of his undertaking the transportation, viz., that he shall not be liable for negligence in the course of the performance of his contract. This promise or condition or consideration was given or exacted in this country; and, though relating to the performance, in one sense, was yet, as a promise or condition exacted here, wholly independent of the performance itself, being complete before the performance began. This case would seem to fall, therefore, clearly within the rule as laid down by the author last cited.

The cases of Branley v. Southeastern R. Co., 12 C. B. (N. S.) 63, and

Parker v. Great Western R. Co., 11 C. B. 545, illustrate the distinction between illegality of performance and illegality of the promise which is the consideration of performance. In the former case the law of France, where the contract was made, was held to determine the validity of the carrier's stipulation for increased rates on "packed parcels," though the transportation was to be partly in England, where increased charges were illegal.

Any additional express stipulation inserted by our own carriers in their bills of lading adopting the foreign law as the law of the contract, would be regarded as but an additional extortion or evasion, designed for the same illegal end, and would not be suffered to overturn the policy of the federal law on this subject, any more than an express contract to absolve from negligence, signed by the shipper, would do, (Railway Co. v. Stevens, 95 U. S. 655, 659;) and if such an express stipulation by our own carriers could not be upheld in favor of our own citizens, an implied one to the same effect, in favor of a foreign ship, if any such could be implied, is no better. In my judgment, all stipulations made here, of whatever form, designed to secure, directly or indirectly, the exemption of the carrier from the consequences of his own negligence, whether the carrier is a domestic or a foreign ship, are equally illegal and void under the federal law. Phænix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312, 322, 323; S. C. 6 Sup. Ct. Rep. 750, 1176; The Hadji, 22 Blatchf. 235; S. C. 20 Fed. Rep. 875; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344.

In no aspect in which I am able to view it does the provision of the bill of lading as to negligence afford a defense, and the libelant is therefore entitled to a decree, with costs. A reference may be taken to compute the damages.

THE J. CARL JACKSON.

HALL v. THE J. CARL JACKSON.

(District Court, S. D. New York. December 16, 1886.)

CHAMPERTY-"AN OBLIGING ADVANCE" BY PROCTOR-CODE CIVIL PROC. N. Y.

SS 73, 74.

The essential characteristic ingredient of champerty is the intent to promote litigation. Therefore, where proctors in a suit in admiralty, by the arrest of the vessel, and stipulation given for her release, had secured the payment of the demand, and had informed the libelant that the claim was secured, and the latter afterwards, supposing the money had been collected, gave to a third person an order for the amount upon the proctors, and the latter honored and paid the order while the suit was in progress, and before collection held upon the evidence that this was not for the purpose of proscollection. held, upon the evidence, that this was not for the purpose of prosecuting the suit, but was an obliging advance only, and did not violate, in letter or in spirit, the statute against champerty and maintenance.

In Admiralty. Hyland & Zabriskie, for libelant. Derby & Luques, for claimant.

Brown, J. The Jackson was prosecuted for a balance of \$50 claimed to be due to the libelant for towing a canal-boat from Buffalo. show, without question, the performance of the contract for the agreed price of \$100, and that the balance of \$50 has not been paid by the respondent, or any part of it. After the filing of the libel, the attachment of the canal-boat, and security given for the claim, the libelant was told by the proctors that the claim had been secured. Subsequently he gave to a third person an order upon the proctors for the money, and the proctors, at the request of the bearer, honored the order by an advance of the amount; it being supposed, when the order was given, that the amount had been collected. The proctors stated at the time they honored the order that they would hold the plaintiff responsible for it if not collected as expected. The respondent claimed that the advance was made by the proctors as a purchase of the claim; and that the further prosecution of the action was in violation of the statute against champerty and maintenance, as contained in sections 73 and 74 of the New York Code of Civil Procedure. It is entirely clear, however, that the essential and characteristic ingredient of these and other statutes on the same subject, namely, the inducement by the proctors to litigation, is here entirely wanting. The transaction, as the evidence shows, was nothing more than an obliging advance, made by the attorneys upon an order upon them given by their client under a misapprehension. The statutes as to champerty and maintenance, neither in letter nor in spirit, cover such a case. Fowler v. Callan, 102 N. Y. 395, 399; S. C. 7 N. E. Rep. 169; Harris v. Brisco, 17 Q. B. Div. 504.

The receipt of the bill in full is clearly explained as made prospectively only, and for the purposes of collection. The balance was not paid by the respondents, or by any one in their behalf. The libelant is entitled

to a decree for \$50, with interest and costs.

THE SAMUEL E. SPRING.1

(District Court, D. Massachusetts. December 15, 1886.)

CARRIERS—OF GOODS—SHIPS—DAMAGE TO CARGO—LEAKY HOLD — OBLIGATION OF THE CARRIER.

The presence of a leak in a vessel's hold, and injury to the cargo in consequence, is sufficient to charge the carrier with negligence, unless it can be shown that the direct cause of the damage was a peril of the sea. The ship is bound to provide the means necessary to enable her hold to be kept free from water, and will be liable for the failure in this regard, from whatever other cause it may occur.

Admiralty. Libel in rem. H. M. Rogers, for libelant. A. A. Strout, for claimant.

Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

Nelson, J. The Samuel E. Spring sailed from Matanzas, Cuba, on the nineteenth of April, 1886, for Boston, having on board, as part of her cargo, 687 hogsheads of Muscovado sugar, the property of the libelant, the Continental Sugar Refinery. The cargo was properly stowed, and well dunnaged. The bill of lading was in the common form, containing the usual exception of the perils of the sea. On the fifth day out, in latitude 29 deg. N., it was discovered, on sounding the pumps, that there was three feet of water in the hold. The pumps had previously been sounded regularly every four hours without finding any more than the usual amount. A few hours pumping was sufficient to relieve the hold of the water, and no unusual quantity was made for the remainder of the voyage. She arrived in Boston May 7th, having met with no unusual weather on the passage. On discharging the cargo, the bottom tier of hogsheads, principally those stowed in the bilges, proved to be damaged by sea-water. No leak whatever could be found in any part of the ship, after a full examination. The libelant attempted to account for the undetected presence of the water in the hold by showing neglect to try the pumps, choking of the limber holes or water passages to the pump-well, and want of capacity of the pumps to lift the mixture of sea water and sugar drainings.

The evidence is hardly sufficient to prove either of these to have been the real cause of the damage. A more probable solution of the difficulty is this: Before sailing for Boston, the ship lay at Matanzas and Havana for 25 days, exposed to the hot tropical sun. The effect of this exposure was to cause a slight opening of the seams of the upper works, owing to the shrinkage of the outer planks. For the 24 hours next preceding the discovery of the water the ship had been beating, under full sail, against strong head winds, in a choppy sea. This caused a considerable list to leeward. The sides of the ship being submerged, the water entered through the open seems, and settled in the bilges, where it could not be reached by the pumps, so long as the list continued, or until a larger quantity had accumulated than had already entered. On the 24th the wind died out, and the ship righted. Then the water flowed to the pumps, and its presence became known. The action of the sea, and the cooler climate, will account for the closing of the seams before reaching Boston.

This is probably the true explanation of the way the leak occurred. If it is, the direct cause of the damage was not a peril of the sea within the exception, but the leaky and unseaworthy condition of the ship before sailing. But, in whatever manner the leak happened, the ship was bound to provide whatever means were necessary to enable the hold to be kept free from water. In either alternative, the ship must be held responsible for the damage. The Centennial, 7 Fed. Rep. 601; S. C. 2 Fed. Rep. 409.

Decree for the libelant.

THE BERMUDA.1

PEREIRA v. THE BERMUDA, etc.

(Circuit Court, E. D. New York. June 22, 1886.)

CARRIERS OF GOODS—SHIPS—LIMITATION OF LIABILITY—BILL OF LADING—REV. St. U. S. § 4281.
 A stipulation in a bill of lading that the carrier will not be responsible for

A stipulation in a bill of lading that the carrier will not be responsible for certain specified articles of value contained in any package shipped under the bill of lading, unless the value thereof be expressed, and extra freight paid therefor, is authorized by section 4281, Rev. St. U. S., and the reasonableness of it cannot be questioned.²

2. Same—Concealment of Value—Subsequent Loss—Carrier's Liability.

Libelant shipped a trunk containing jewelry on the steam-ship B., under a bill of lading which contained the stipulation that the carrier would not be responsible for the loss of valuables, unless the value thereof were expressed in the bill of lading, and extra freight paid therefor. Libelant did not disclose the valuable nature of the contents of the trunk. On the voyage the trunk was broken open, and the contents stolen. Held, that the carrier was not liable for the loss; affirming 27 Fed. Rep. 476.

In Admiralty.

Lorenzo Ullo, for libelants.

Wilhelmus Mynderse, for claimant.

Blatchford, J. The decision of the district court dismissing the libel was correct, and the grounds assigned for it were proper. 27 Fed. Rep. 476. There was a special acceptance of the merchandise under the clause in the bill of lading in regard to non-accountability for gold or silver, manufactured, plated articles, jewelry, trinkets, and watches, contained in any package or parcel shipped under the bill of lading, "unless the value thereof will be therein expressed, and extra freight, as may be agreed, be paid." The shippers were, in view of that clause, substantially guilty of imposition on the owners of the vessel, and of misrepresenting the nature of the articles, within the rule sanctioned in Hart v. Pennsylvania R. Co., 112 U. S. 340, S. C. 5 Sup. Ct. Rep. 155, where it is said:

"If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed. 2 Kent, Comm. 693, and cases cited; Relf v. Rapp, 3 Watts & S. 21; Dunlap v. International Steam-boat Co., 98 Mass. 371; Railroad Co. v. Fraloff, 100 U. S. 24."

The same rule was applied in Gibbon v. Paynton, 4 Burr. 2298, and in Batson v. Donovan, 4 Barn. & Ald. 21.

²See note at end of case.

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

The reasonableness of the stipulation in the bill of lading cannot be questioned, for it is authorized by section 4281 of the Revised Statutes, which declares the total exemption of the carrier from liability for jewelry, manufactured gold or silver, watches, trinkets, or plated articles, contained in any parcel, package, or trunk, laden as freight on any vessel, unless at the time of the lading the shipper gives written notice of the true character and value thereof, and has the same entered on the bill of lading; and also provides that, when the value and character are so notified and entered, there shall be no liability beyond such value, or otherwise than according to such character. Reasonable stipulations by a carrier for exemption from responsibility are sanctioned and upheld. York Co. v. Central R. R., 3 Wall. 107; Express Co. v. Caldwell, 21 Wall. 264.

The libel is dismissed, with costs to the claimant in the district court, taxed at \$44.46, and with costs to it in this court, to be taxed.

NOTE.

Carriers—Limitation of Liability. A stipulation exempting the carrier from responsibility for certain articles of value, unless the value thereof be expressed, and extra freight paid, is valid. Grogan v. Adams Exp. Co., (Pa.) 7 Atl. Rep. 134. So is one limiting its liability to the amount of the agreed valuation of the property, on the basis of which valuation the freight is paid. Hart v. Pennsylvania R. Co., 5 Sup. Ct. Rep. 151; S. C. 7 Fed. Rep. 330; The Lydian Monarch, 23 Fed. Rep. 298; The Hadji, 18 Fed. Rep. 459; Grogan v. Adams Exp. Co., (Pa.) 7 Atl. Rep. 134; Rosenfeld v. Peoria, D. & E. Ry. Co., (Ind.) 2 N. E. Rep. 344; Moulton v. St. Paul, M. & M. Ry. Co., (Minn.) 16 N. W. Rep. 497; Black v. Goodrich Transp. Co., (Wis.) 13 N. W. Rep. 244; but one limiting the liability to a certain arbitrary sum is invalid, Moulton v. St. Paul, M. & M. Ry. Co., (Minn.) 16 N. W. Rep. 497; McGune v. Burlington, C. R. & N. R. Co., (Iowa,) 8 N. W. Rep. 615.

MILLER, Jr., and others, Assignees, etc., v. Rogers and others.

(Circuit Court, W. D. Pennsylvania. June 1, 1886.)

1. EQUITY—SUPPLEMENTAL BILL—UNITED STATES CIRCUIT COURT—JURISDIC-

Where a federal court has acquired jurisdiction of a cause, a supplementary proceeding may be maintained therein without regard to the citizenship of the parties.

2. Same—Bankruptcy—Setting Aside Fraudulent Conveyances—Transfer of Plaintiffs' Title Pendente Lite.

Pending a suit in equity brought by assignees in bankruptcy to set aside a conveyance of real estate alleged to have been made by the bankrupts in fraud of creditors, the assignees under an order of the bankrupt court sold and conveyed the bankrupt's title to one of his creditors whose citizenship was the same as that of the defendants in the suit. Held, that such creditor might file in the cause a bill in the nature of a supplemental bill, and prosecute

8. SAME—NATURE OF BILL BY PURCHASER FROM PLAINTIFF PENDENTE LITE. While a bill to obtain the benefit of a depending suit by a party who acquired the plaintiff's title by transfer from them pendente lite may be technically and to some intents an original bill, it is essentially supplementary. Such bill is not, in a proper sense, the commencement of an original suit, but is rather the mere continuation of the former suit.

In Equity.

Sur motion by the Metropolitan National Bank for leave to file a bill in the nature of a supplemental bill.

J. H. McCreery and James Bredin, for the motion.

D. D. Bruce and W. L. Chalfant. contra.

v.29f.no.10-26

Acheson, J. The Metropolitan National Bank, a banking association under the laws of the United States, located and doing business in the city of Pittsburgh, Pennsylvania, moves the court for leave to file in this cause a bill in the nature of a supplemental bill, agreeably to equity rule The plaintiffs to the suit, as the record now stands, are the assignees in bankruptcy of Rogers & Burchfield; and the purpose of the suit is to set aside a deed of conveyance of real estate made by the bankrupts to Mary Ann Rogers, one of the defendants; the bill charging that it was a voluntary conveyance, and fraudulent and void as against the creditors of the bankrupts and said assignees. Pending the suit, the assignees sold this real estate at public auction to the said bank, and they have conveyed their title to the bank.

The only objection urged against the allowance of the present motion is that, as the bank could not bring an original suit in this court against the defendants, they being citizens of Pennsylvania, so it cannot maintain the proposed bill, which, while partaking of the nature of a supplemental bill, is yet an original bill. Story, Eq. Pl. §§ 349, 353. But while technically, and to some intents, it may be an original bill, it is essentially supplementary to the bill of the assignees in bankruptcy. Id. §§ 345, 346; Mitf. & T. Pl. & Pr. 158. Such a bill, by a party who has acquired the plaintiff's title by transfer from him pendente lite,

is not, in a proper sense, the commencement of an original suit, but is rather a mere continuation of the former suit. Harrington v. Slade, 22 Barb. 166; Lloyd v. Johnes, 9 Ves. 37; Adams, Eq. *408; Hoxie v. Carr, 1 Sum. 173. In this latter case, Judge Story, discussing the effect of a transfer of the plaintiff's title pendente lite, says that the abatement in equity which might thereby ensue would not necessarily be a destruction of the suit, like an abatement at law, but merely an interruption of the suit, suspending its progress until the new party is brought before the court. And in Clarke v. Mathewson, 12 Pet. 164, it was held that the federal court has jurisdiction of a bill brought by the administrator of a deceased plaintiff to revive a suit abated by the plaintiff's death, notwithstanding the administrator is a citizen of the same state as the defendants, and the original jurisdiction depended on the citizenship of the parties. The doctrine of the case is that, where the court has once acquired jurisdiction of the cause, a supplementary proceeding may be maintained without regard to the citizenship of the parties. The principle is applicable here, and justly so; for the bank was a creditor of the bankrupts, and thus was directly interested in the original bill; and for its protection, having bought the title of the assignees when exposed to public sale, it ought to have the benefit of the suit brought by them. Otherwise, and if driven to a new suit, the bank might, perhaps, be subjected to the bar of the statute of limitations. Section 5057, Rev. St.

And now, June 1, 1886, leave is granted to the Metropolitan National Bank to file its bill.

PEIRCE v. O'BRIEN and others.

(Circuit Court, N. D. Iowa, E. D. November Term, 1886.)

DOWER—WHAT STATUTE GOVERNS.
 In determining the extent of a widow's right in real property alienated by her husband solely in his life-time, the law in force at the time of the alienation governs.

2. Same—Lands Alienated by Husband—Improvements by Purchaser. In determining the value of such a right, improvements made by the purchaser, or his successors, in good faith, supposing their grantor to have been unmarried, and the increased value caused thereby, are to be excluded; and this rule is not affected by a change in the law making the estate of the widow

a fee-simple instead of a life-estate.

In Equity. Exceptions to answer.

Noble & Updegraff and Henderson, Hurd & Daniels, for complainant.

L. E. Fellows, for defendants.

Shiras, J. From the averments of the bill and answer, it appears that one George S. Peirce died on the eleventh day of July, 1882, leaving complainant his widow, they having been married on the ninth day of March, 1852; that from 1858 until February 2, 1869, the said George

S. Peirce was the owner in fee-simple of 120 acres of lands situated in Alamakee county, Iowa, and that on the last-named day said Peirce sold the lands to one Mary O'Brien, from whom the same passed to the present defendants; that the complainant did not join in the sale or conveyance of the lands; that the said Mary O'Brien and her grantees did not know that George S. Peirce was a married man, and took title in ignorance of the rights of complainant, and have since placed valuable improvements upon the land, in the belief that they were the sole owners of the property.

The main question presented by the exceptions to the answer is whether, in determining the value of the widow's right, the improvements placed upon the property by the defendants, and the increased value caused thereby, are to be included or excluded. The law in force at the time of the alienation by the husband determines the extent of the widow's right. Young v. Wolcott, 1 Iowa, 174; Moore v. Kent, 37

Iowa, 20.

In the case of Felch v. Finch, 52 Iowa, 563, S. C. 3 N. W. Rep. 570, it appeared that the husband conveyed certain lands in December, 1856, the wife not joining in the sale, and in 1876 a petition for assignment of dower was filed, the husband having died in 1862; and it was held that the widow took a life-estate, because that was the extent of her right under the statute in force in 1856, when the lands were alienated by the husband; and "that the widow takes her dower in the value of the property without the improvements put thereon by the labor and money of the grantees of her husband, but including such increased value of the land as has been caused by the general growth and prosperity of the country." It is, however, stated in the conclusion of the opinion that "it will be understood that this case is based upon the statute which was in force at the time the rights of the plaintiff accrued. Since that time the law of dower has been materially changed. It is now held by a different tenure, and possibly may be controlled by different rules. The case at bar must be considered as resting upon its own peculiar facts, and upon the statute in force at the time the rights of the plaintiff as a doweress attached."

It is impossible to determine, with absolute certainty, the meaning that should be attached to this warning and caution. The case involved peculiar facts, and it may be that the court deemed it wise to limit the effect of the decision, without intending to throw doubt upon the correctness of the general rule announced, to-wit, "that the widow shall not profit by the labor and money of the grantee of the husband, expended in enhancing the value of the land," because it is declared that this rule "is founded upon the broadest principles of equity, which preclude one person from reaping that which another has innocently and rightfully sown."

The right of the widow is now, and was in 1869, when the alienation in the present case took place, a fee-simple instead of a life-estate, but just as much now, as under the former statute, the right is in the property of the husband. When an alienation takes place by the husband,

without the wife joining therein, her right is to one-third of the property as owned and possessed by the husband, and not a right to one-third, also, in the improvements put thereon by the labor and money of one in whose property she has no right. I am not able to find anything in the statute of Iowa, changing the right of the wife from a life-estate to one in fee-simple, which indicates the intention of the legislature to change the equitable rule recognized in Felch v. Finch. The statute now in force (section 2440, Code) declares that "one-third in value of all legal and equitable estates in real property, possessed by the husband at any time during marriage, which have not been sold on execution, or any other judicial sale, and to which the wife has made no relinquishment of her right, shall be set apart as her property in feesimple, if she survive him."

The clear intent of this language is to confer upon the wife one-third in value of the estate possessed by the husband, and certainly there is nothing in the language used which countenances the idea that it was the intent of the legislature to confer upon the wife, in addition to the one-third in value of the estate as possessed by the husband, a one-third in the value added to the estate as possessed by the husband, by the improvements placed thereon by the husband's grantees. If the contrary was held to be the rule, it would result in preventing the improvement of all property in which the wife's interest had not been conveyed. son who, as in this case, should purchase and take a conveyance of property from a grantor who was supposed to be unmarried, and should then ascertain that the grantor was in fact married, would practically be debarred from improving the property, if the law was such that one-third in value of the improvements thus put on the land would become the property of the wife, in case she survived her husband. The rule, if adopted, would work with especial hardship in cases of city property, where the value of the buildings in many cases so largely exceeds the value of the lots upon which they are built.

In the interest of the public, it is unwise to burden property in such a manner as to prevent its improvement, and this consideration adds weight to the thought that it could not have been the intent of the legislature, by changing the tenure of the dower right from a life to a feesimple estate, to also enlarge the extent of the right by including therein the value of improvements placed upon the land by the grantees of the husband, and which formed no part of the estate possessed by the husband. The rule limiting the right of the widow to one-third of the value of the estate, not including the value added thereto by improvements put upon the property by the grantee of the husband, is the general doctrine of the American courts. 2 Scrib. Dower, 573-586; Thompson v. Morrow, 5 Serg. & R. 289; Powell v. Monson, etc., Manuf g Co., 3 Mason, 347.

Seeing no reason, therefore, why this rule is not as sound a construction of the statute in force in 1869, when the alienation in the present case was made, as it was of the statute in force when Felch v. Finch was decided, it must be held to be the rule governing this case; and, so far

as the exceptions question the correctness of this interpretation of the statute, the same are overruled.

The exceptions also raise other questions, affecting some matters of form in the answer, but as counsel stated that the main purpose was to settle the rule upon the question already decided, and as the other matters do not in any way affect the merits of the controversy, they will be deemed to be waived, and no ruling is made thereon.

Wood and another v. Wellpton and others.

(Circuit Court S. D. Iowa, W. D. November 19, 1886.)

1. Fraud—Forged Deed—Tax Sale—Redemption—By whom.

B. purchased complainants' lands at tax sale. M., by means of a forged deed from complainants' grantor, procured an assignment of the tax certificates to himself after the time of redemption had expired, and had the treasurer's deed made out to himself. Held, that the purchase by M. of the tax certificates could not be a redemption of the land, because M. had no real title to the land.

2. SAME—TRUST.

Held, that M. could not be held as a trustee of complainants, because complainants had no interest under the tax sale.

8. Same-Who May Complain.

Held, that M.'s fraud was one of which B. could complain, and for which he might rescind the contract of sale, but that complainants' rights were not affected thereby.

In Equity. Bill to quiet title.

James A. New and Horace Speed, for complainants.

C. E. Richards and Smith McPherson, for defendants.

Shiras, J. The subject of controversy in this suit is the ownership of 320 acres of land, situated in Montgomery county, Iowa. plainants claim title under one Seward Wilson, who bought the land in question in 1862, the deed therefor to Wilson being recorded in July, Seward Wilson died in 1874, leaving a widow and several children surviving him. The widow and children, being the heirs at law of Seward Wilson, who died intestate, conveyed their interest in the land to Mary E. Wood, who in turn conveyed an undivided one-half interest to Leander Roberts; the said Mary E. Wood and Leander Roberts being the complainants herein. On the seventh of December, 1868, the treasurer of Montgomery county sold said lands for delinquent taxes of the years 1858 to 1867, inclusive; one P. P. Johnson purchasing the E. 1 of the S. W. to of section No. 11, township 72 N., of range 37 W., and one Walter B. Beebee purchasing the remainder of the 320 acres. Before the expiration of the period of redemption, Johnson assigned his certificate of purchase to the 80 acres to one H. N. Moore, to whom the treasurer's deed was subsequently issued in proper form. The said Moore also procured the assignment of the certificate of sale to W. B. Beebee.

and received a treasurer's deed for the 240 acres sold to Beebee. The defendants claim title under these tax sales and deeds, holding under conveyances from said Moore. When ready for hearing the cause was referred to W. W. Morsman, as master, to take the evidence and report his findings of facts and conclusions of law. The master heard the cause, and reported his findings of facts, and recommended that the bill be dismissed. The court ordered a decree in conformity with the findings of the master, but subsequently granted a rehearing upon the exceptions filed to the report of the master on behalf of complainants, and upon this rehearing counsel have ably and exhaustively discussed the questions of law and fact presented by the record.

The main contention arises over the 240 acres sold at tax sale to Walter B. Beebee. In regard to this tract, it appears that an instrument, purporting to be a quitclaim deed, executed by Seward Wilson and wife, dated July 24, 1871, and conveying the land in dispute to one J. R. Welpton, was delivered to H. N. Moore at Buffalo, New York, by one John W. Sewall, to whom Moore paid \$300. The complainants claim, and the master finds, that this deed is in fact a forgery, and not the deed of Seward Wilson and wife, and that Moore knew it was a forgery, and procured it as the first step in the fraudulent scheme he had devised to obtain title to the land in dispute. Moore procured a deed from Welpton, the grantee in the forged deed, and then claimed to be the owner of the land, and, as such, to be entitled to redeem the premises from the tax sales already mentioned. He endeavored to induce Beebee to assign his tax certificate to him, but at first was unable to do so. He deposited with the auditor of the county certain sums of money, and, claiming to have in fact redeemed the land, he finally, on or about the twenty-fifth of December, 1871, and after the expiration of the period of redemption. procured an assignment of the tax-sale certificate to him by said Beebee. paying him therefor the sum of \$200 over and above the amount of the taxes, interest, and penalties. Having thus obtained the assignment of the tax certificate, he procured the execution of a treasurer's deed; and his grantees now claim title under and through this deed so executed.

On part of complainants it is claimed that Moore's title is obtained in fraud, and that it would be contrary to all the principles of equity and morals to permit the complainants to be deprived of their property by means so nefarious as those adopted by Moore. Certainly, no court would permit the title of a rightful owner to be divested or destroyed by means of forgery and fraud, knowingly perpetrated. The deed apparently executed by Seward Wilson and wife, but in fact a forgery, does not affect the title held by the widow and heirs of Wilson; and the defendants cannot rest their right to the lands upon this forged instrument. Their title can be made out only under the tax title derived from the sale made to Beebee. No question whatever is raised as to the validity of this sale to Beebee; and the question to be determined is whether it ripened into a title.

On part of complainants it is claimed that, in fact, redemption was made of the premises within the statutory period, and that the execution

of the treasurer's deed was therefore a void act, and wholly inoperative. To support the claim of redemption the complainants are compelled to rely upon the acts of Moore; for, unless what he did in the premises amounted to a redemption from the tax sale, none was made. Complainants aver that Moore procured the forged deed in order to make it appear upon the record that he was the owner of the land, and therefore entitled to exercise the right of redemption, and that in fact he did redeem the premises.

In the exceptions filed to the master's report it is claimed that Moore had a colorable title to the lands, and had therefore a right to redeem. Certainly, it cannot be true that a person who knowingly procures the execution of a forged deed to himself thereby acquires any title whatever to the land in such deed described. Moore had no title to the land, nor color of title, previous to the assignment of the tax certificate to him, and hence had no legal right to make redemption.

As against Bebee, the purchaser at the tax sale, a payment by Moore to the auditor of the county of a sum sufficient to redeem the lands would not work a redemption thereof, and thereby defeat the interest of the

purchaser at tax sale.

Thus, in Byington v. Buckwalter, 7 Iowa, 512, it is said: "By the sale the purchaser acquires a valid and substantial interest in the land. He acquires the legal title, subject to redemption by the owner, or some one having an opposing interest. His position is, by the statute, made to resemble that of a mortgagee at common law. Third persons—those having no right nor interest in it—have no right to divest him of his interest. The doctrine concerning redemption is generally that one having any right or interest may redeem; but a mere stranger cannot intermeddle in it."

In Penn v. Clemans, 19 Iowa, 372, it is ruled that "it is settled beyond controversy that a party having no interest in land has no right to redeem it from a sale for taxes. And if it turns out that the person who pays his money for the purposes of redemption had no interest whatever to be protected by the redemption, his act of redemption can neither vest title in him, or divest that of the tax purchaser. Nor can such act of redemption inure to the benefit of the owner who had the right to redeem."

This is the well-recognized rule in Iowa, and under it, therefore, payment of the proper amount to the county auditor by a stranger to the title, will not divest the purchaser of his interest acquired at the sale; and the latter may disregard such payment, and, upon the expiration of the period of the redemption, may demand the execution and delivery of the proper treasurer's deed. If, however, the tax purchaser should consent to redemption being made by a stranger, and should accept payment of the redemption amount from him, thereby intentionally giving up his claim to the land, and receiving the money paid in exchange therefor, this would be in effect a redemption, and would inure to the benefit of the true owner of the property.

If, therefore, it was made to appear in the present case that Beebee

consented to a redemption being made of the premises by Moore, and that in fact Moore did redeem from the tax sale by payment of the proper amount, then such redemption would inure to the benefit of the complainants, as the real owners of the property at the time redemption was made. In brief, the facts of the payment are that Moore paid into the hands of the auditor the sum of \$625, which lacked some \$38 of being the full amount needed to perfect a redemption. An arrangement was made between the auditor and Moore to the effect that if Moore did not procure an assignment of the tax sale certificate, then this payment was to be considered as made upon a redemption; but, if he procured the certificate, then it was not. A certificate of redemption was filled out in a blank which was left attached to the book in the auditor's office, and subsequently canceled, never having been delivered to Moore.

Beebee, on the twenty-fifth of December, 1871, assigned to Moore the tax-sale certificate in consideration of the payment of \$200 over and above the amount of the taxes, penalties, and interest. When this assignment was made the period of redemption had expired, and Beebee was entitled to a deed. No redemption had been perfected by any one at that time. The true owner of the property had not made any effort to redeem. Moore had made a deposit with the auditor, but not of an amount sufficient to redeem, nor was it an unconditional payment. Under the arrangement between Moore and the auditor, if Beebee assigned the certificate, the money was not to be applied by way of redemption, but would belong to Moore. It is not shown that Beebee ever consented to Moore redeeming the property. What is shown is that Beebee assigned the certificate of sale upon receiving \$200 more than the sum needed to be paid in redemption. To induce him to transfer his rights, by assigning the certificate, it was represented to him that Moore had in fact redeemed, and that he was the owner of the property; but, while it is clear that a fraud was perpetrated upon him, and that he was thereby induced to assign his interest in the land, it is not shown that he consented to Moore's redeeming the land. Granting that Moore had an interest in the land, he did not perfect redemption, because he did not pay to the auditor unconditionally the full amount of the taxes, penalties, and in-On the other hand, if he had in fact no interest in the land, then no act of his would amount to a redemption, unless Beebee consented to redemption by him, and this consent is not shown. True, there is evidence tending to show that fact, and others represented and believed that redemption had been made; but this question is to be determined by what was done by Moore and Beebee. It is proven beyond dispute that the latter did not part with his interest in the land until the twentyfifth of December, 1871, at which time the period of redemption had expired, and then he demanded and received the sum of \$200 over and above the amount he would have been entitled to upon the redemption. He knew that Moore's purpose and desire was to obtain an assignment of the certificate, not as evidence of redemption, but as a source of title, and knowing this, he demanded and received the sum of \$200 over and above the taxes and penalties, and, in consideration thereof, he assigned his interest in the premises to Moore by transferring the certificate, and his interest at that time was the ownership of the land under and by virtue of the tax title.

If the court should hold that the fraud of which Moore was guilty wholly annuls all that he accomplished by it, this would only result in setting aside the transfer by Beebee of his interest in the land, and of the tax deed issued to Moore. It could not affect the validity of the interest held by Beebee, for he is not only entirely innocent of any participation in the fraud complained of, but is in fact the only person injured When Beebee parted with his interest in the lands on the twenty-fifth of December, 1871, he was entitled to a deed, which would have vested in him a good title to the lands. By reason of the fraud perpetrated upon him by Moore, Beebee might rescind the contract, upon discovery of the fraud, and, by repayment of the money paid him, compel a reconveyance of the lands by Moore. He might, however, elect to waive this right, and treat the voidable contract as valid. If he did, then, as he had a valid interest in the land, his interest and title would vest in Moore, and the latter could rely thereon as against all other claimants of the land.

Counsel for complainants argue that, in a court of equity, it should be held that Moore holds the title derived from Beebee in trust for the rightful owners, to-wit, complainants. The latter, however, never had any interest in the tax title. Beebee held the tax title, not for complainants, but adversely to them. They had no right to demand the conveyance of this title, and Beebee could sell it to any one he pleased. If the sale by Beebee to Moore was void for fraud, then Moore would hold the title in trust for Beebee. If the latter chose to waive the fraud, then Moore became the owner of Beebee's interest and title, and, as complainants never had any interest or right therein, it cannot be held that Moore received this title in trust for them.

In Porter v. Lafferty, 33 Iowa, 254, and Curtis v. Smith, 42 Iowa, 665, the supreme court of Iowa held that a tax title would not be invalidated if the tax-sale certificate was assigned by the tax purchaser in the belief that the party purchasing the same was the owner of the land, and as such was entitled to redeem; and if such transfer of the certificate was fraudulently procured by false representations, the party contesting the validity of the tax title as owner could not complain of such fraud, and had no right of relief by reason thereof, as he was not injured or defrauded thereby.

The facts in this case show that Beebee had a valid interest in the lands as a purchaser at the tax sale, and that, on the seventh day of December, 1871, he became entitled to a treasurer's deed for the lands. On the twenty-fifth of December, 1871, he sold and assigned his interest and title to Moore. This sale was brought about by fraud on part of Moore; but Beebee makes no complaint, but recognizes the sale as valid.

Consequently, Moore, on the twenty-fifth of December, 1871, became entitled to the treasurer's deed, and the same was executed to him. Under this title the defendants now hold the lands. To defeat this title

complainants aver that, in fact, Moore, though a stranger to the title, redeemed the land before the expiration of the three years. The evidence fails to show that a redemption was in fact made, and consequently the tax title must be held to be valid; and the defendants are therefore entitled to a decree dismissing the bill on its merits, at cost of complainants.

A large part of the argument of counsel, and of the evidence, is directed to the question of the validity of the mortgage, purporting to have been executed by Seward Wilson and wife to one C. C. Knowlton on the nineteenth day of June, 1862. In the view we have taken of the case, it is not necessary to discuss the questions touching this mortgage, as the same do not affect the chain of title under which the defendants hold the lands.

The exceptions to the master's report are overruled, and decree ordered dismissing bill, at cost of complainants.

MILLS v. HURD and others. (Four Cases.)

(Circuit Court, D. Connecticut. January 6, 1887.)

Injunction—Pendente Lite—Receiver—Corporations.

Where a plan for the incorporation and consolidation of certain joint-stock associations was being carried out, by consent of nearly all the stockholders, under a charter from the legislature, and one of the stockholders, who had previously favored the scheme, sought by suit in equity to prevent it, and to compel an accounting, and the winding up of the old companies, held, that, as the charges of fraud made in the bill appeared to be baseless, and no harm was likely to ensue to any one from allowing the proceedings to go on, questions of law arising concerning the validity of the proceedings in several respects would not be decided upon a motion for an injunction and receiver pendente lite, and that such motion would be denied.

In Equity.

Alvan P. Hyde and Wm. A. Underwood, for plaintiff.

Henry C. Robinson and Goodwin Stoddard, for Consolidated Rolling-stock Co.

Wm. C. Case and T. M. Maltbie, for Hurd.

Shipman, J. These four motions are for an injunction pendente lite, and for the appointment of a temporary receiver in each of said four cases. Upon these motions, supported and opposed by ex parte affidavits, it is not expedient to attempt to make an exhaustive finding of facts. I shall give merely an outlined statement.

Frederick H. Mills, the plaintiff, and John Hurd, one of the defendants, organized on October 1, 1881, an association by the name of the Housatonic Rolling-stock Company, which subsequently issued 27,400 shares of stock, of \$100 each, and owned 1,644 railroad freight cars. On December 1, 1878, they organized the New England Rolling-stock

Company, which had a nominal capital of \$1,011,700, divided among 311 stockholders, and owned 607 freight cars. On August 15, 1879, they organized the Boston & Maine Rolling-stock Company, having a nominal capital of \$1,250,000, and 365 shareholders, and owning 750 freight cars. On August 2, 1880, they organized the Bridgeport Rolling-stock Company, having a nominal capital of \$3,333,300, divided among 1,170 shareholders, and owning 2,000 freight cars.

The office of each of these associations was to be in the city of Bridgeport, Connecticut, unless the trustees should locate it in some other place. The offices remained in Bridgeport until September, 1884, when they were moved to Detroit, Michigan. They were moved back to Bridgeport, on October 11, 1886, by a vote of four trustees, at a meeting at

which said Mills was not present.

These associations are what are generally known as "car trust associations," formed for the purpose of owning freight cars, and leasing them to railroad companies. They are not corporations, but are unincorporated associations, the nominal capital of which is represented by certificates of stock, and the owners of these certificates are shareholders in the association. The associations resemble that class of partnerships which are not dissolved by the death or bankruptcy of a member, or by the assignment of his interest. Kahn v. Smelting Co., 102 U. S. 641; Bissell v. Foss, 114 U. S. 252; S. C. 5 Sup. Ct. Rep. 851.

By the articles of association of each company, the title to its property was vested in a board of trustees, upon whom exceedingly large powers were conferred. Mr. Hurd and Mr. Mills were the original trustees. The former was president and treasurer, and the latter was the secretary, of each company. Hugh K. Ritchie, of Montreal, Canada, was subse-

quently appointed a third trustee.

In the spring of 1884 serious dissatisfaction existed among the stock-holders of all the companies in regard to Hurd's management, and a bill for an injunction, an accounting, and the appointment of a receiver, was brought in the superior court for Fairfield county against Hurd and Mills. They represented the calamitous results which would happen from a receivership. David Trubee and H. C. Cogswell, both of Bridgeport, were appointed additional trustees, and the suit was withdrawn.

The dissatisfaction did not subside, and an advisory committee of stockholders was appointed, who reported, on August 19, 1885, that it was best to obtain from the legislature of some state a charter incorporating the stockholders of all the companies as one corporation, which should take all the cars, each stockholder in the new corporation receiving one share for each two shares in the old companies. The other assets of each trust were to be divided among the stockholders therein. A printed copy of this report was sent to each stockholder, with a printed form of assent to the proposed reorganization. This assent was directed to the trustees of the four companies, and was as follows: "The subscriber, a stockholder in one or more of the above companies, hereby consents to the reorganization and consolidation of said companies under the plan suggested in the report of the advisory committee."

About 99½ per cent. of the shareholders in the New England Company, about 99½ per cent. of the shareholders in the Boston & Maine Company, about 90 7-10 per cent. of the shareholders in the Bridgeport Company, and about 87 8-10 per cent. of the shareholders in the Housatonic Company, signed and forwarded these assents to Mr. Deacon, the book-keeper of said four companies. This plan of consolidation, under a charter, for the purpose of relieving said Hurd from the exclusive control of said business, and placing the control in the hands of the stock-holders, was thus received with favor by 92½ per cent. of all the stock-holders in said companies.

The general assembly of the state of Connecticut granted a charter, approved April 13, 1886, by which all the stockholders in said four companies were constituted one corporation, by the name of the Consolidated Rolling-stock Company. The charter provided, among other

things, as follows:

"Sec. 9. Upon the organization of this corporation, it shall be capable of receiving, and the trustees of the rolling-stock associations mentioned in the first section hereof are hereby authorized to transfer to this corporation, its successors and assigns, any or all the property of every kind of the said rolling-stock associations; and upon such transfer this corporation, its successors and assigns, shall become the owner of all said property, and shall thereby and thereupon acquire and be entitled, in law and in equity, to avail itself of every right, title, claim, and interest which before such transfer belonged, either in law or in equity, to either of said rolling-stock associations, or to the trustees thereof. Payment for said property may be made by this corporation issuing, to the holders of the shares of stock in either of said rolling-stock associations, its stock in the proportion of one share of stock of this corporation to two shares of stock in either of said rolling-stock associations."

"Sec. 11. All executors, administrators, conservators, guardians, and trustees may surrender and assign any stock in either of the associations mentioned in the first section hereof, held by them as such, to such new corporation, in exchange for its stock, in the manner above provided; and the trustees of any of said rolling-stock associations are hereby authorized and empowered to sell, assign, and convey to this corporation any assets in their hands, as such, for

cash, or the stock of this corporation."

Another section provided that the cash value of the stock of any non-assenting stockholder should be appraised by appraisers appointed by the superior court for Fairfield county, and, on tender of the sum fixed by the appraisal, such stock should be surrendered and assigned to the

corporation.

At a meeting of the corporators in Bridgeport, on August 11, 1886, the charter was accepted, by-laws were adopted, and directors were chosen, Mr. Mills being one of the number, who met on August 18, 1886, and elected the officers of said corporation, Mr. Mills being present. At a meeting of the trustees of each of said four companies, on May 19, 1886, the following vote was passed, three of said trustees voting in favor thereof, the said Mills not voting, and said Cogswell not being present:

"Resolved, that John Hurd be, and he is hereby, appointed agent of this company, to transfer to the Consolidated Rolling-stock Company, upon demand

by said company, so much of the money, choses in action, bills receivable, claims, demands, or rights of any and every kind whatsoever, as, with cars already transferred to said Consolidated Company, shall make the assets of this company transferred to said Consolidated Company, share for share, equal to the assets of the Housa. R. S. Co."

On October 8, 1886, at a meeting of the trustees of each of said associations, the following vote was passed by each board, said Mills not being present:

"Whereas, the legislature of the state of Connecticut has incorporated a company by the name of the Consolidated Rolling-stock Company, to obtain and receive from this association its rolling stock, and other property and assets, and to hereafter manage, control, and administer the same; and whereas, said corporation has been duly organized; and whereas, about ninety per cent. of the shareholders of this association has assented to the transfer of the as-

sets of this association to said corporation:

"Now, therefore, resolved that the possession and title of the assets of this association, hereafter mentioned, be, and the same hereby are, in consideration of the premises, transferred and made over to, and conveyed to and vested in, said Consolidated Rolling-stock Company, and its successors and assigns, forever, namely, all freight cars and rolling stock of every kind, and parts thereof, and the material for the repair or manufacture thereof; all buildings and structures; all leases, contracts, and agreements; so much of the other assets of this association as shall make the whole assets transferred to said corporation, as compared with its stock now issued and outstanding, of a value equal to the value of the assets as compared with their stock, of either the [in the vote of the trustees of each of the four associations the names of the other three associations than the one voting are here inserted] rolling-stock companies, which have been or may be transferred to said corporation, to carry out the purposes of its incorporation.

"Resolved, that John Hurd be, and he hereby is, appointed agent of this association, to make, execute, and deliver to said corporation, in due form, the conveyance and transfers herein provided for, and to take proper receipt

therefor."

On October 16, 1886, by authority of said votes, the said Hurd executed bills of sale by each of said companies to the new corporation. Each bill of sale contained a schedule of the cars which were transferred, and also conveyed "all contracts and agreements, leases, rights, buildings, and structures, and all interest in and to the same, all parts and portions of cars, and all materials of every kind for the construction or repair of cars." Said Consolidated Rolling-stock Company is now managing said cars, and the business connected therewith. All the assets of neither company were transferred. Each company has still to settle its account with said Hurd. On October 20, 1886, the subpcenas, bills, and restraining orders in these cases were served upon the defendants.

Until after the first meeting of said directors, on August 18, 1886, the said Mills had indicated no hostility to the formation of said new corporation, or dissatisfaction with the scheme of consolidation and reorganization, but, on the contrary, was actively in favor thereof. He owns 315 shares in said companies, and also claims to be a creditor of each company. The plaintiff's counsel state that another stockholder, who

owns 101 shares, wishes to become a co-plaintiff with Mills.

The prayer of each of the four bills is for an account by said Hurd of all his financial dealings with said respective companies; that a like accounting be taken of the dealings of the other trustees; that all the defendant trustees may be enjoined against selling or disposing of any of the assets of said companies to the new corporation, or to any other person, and from collecting any dues belonging to said companies; that the Consolidated Rolling-stock Company may be enjoined against purchasing or receiving the cars or other assets of said old companies. The bills further ask for the appointment of a receiver to take possession of all the property of said four companies, for a winding-up of their affairs, a sale of their property, and a distribution of the proceeds among the shareholders.

The bills allege, as the grounds of their prayers, the great mismanagement by said Hurd of the four companies, which improper conduct is described at length; that any transfer of their assets to the new corporation is without consideration, is an actual and intended fraud by said Hurd upon the stockholders of the said companies, in which intention the other trustees participate; that very few of the shareholders have any knowledge of or have consented to the proposed transfer; that no stock has as yet been surrendered; and that non-consenting stockholders will be injured by the transfer. In the argument the further points were made that the trustees had no rightful authority to make such a transfer, without previous assent of the stockholders thereto, and before surrender of all of the old stock; that no transfer ever had been made, because said Mills had neither joined in the votes nor in the bills of sale; and that the legislature of Connecticut had no authority to incorporate the members of four partnerships, which were located in another state; and that the charter was without validity as to any non-assenting shareholders. In the affidavit of said Mills it is stated as his belief that the scheme of reorganization was for the purpose of freeing said Hurd from liability to the old stockholders for his mismanagement, and of continuing his control in the future, under cover of a friendly board of directors. The looseness of the vote under which said Hurd made the transfer is also commented upon.

The Consolidated Rolling-stock Company and the said Ritchie, Trubee, and Cogswell, trustees of the old companies, take no issue with the plaintiff as to the mismanagement of said Hurd, and his improper conduct in

the past.

From the affidavits it clearly appears that the plan of reorganization through a consolidated company was devised and pushed through by those stockholders who were dissatisfied with Mr. Hurd, for the purpose of divesting him or any trustees from the supreme control which they could exercise under the articles of association, and of placing the control in the hands of the stockholders generally. The whole plan was adverse to Mr. Hurd; and, while the new directors judiciously retain the benefit of his knowledge of the details of management, they seem to be striving to conduct the business wisely, and for the benefit of all the owners of the property. The idea of fraud in the transfer, or of fraud in the new cor-

poration, is baseless. The general plan of reorganization was assented to by about 90 per cent. of the stockholders of the four companies, and has not been publicly dissented from, except by the plaintiff and one other stockholder.

It is true that the transfer to the new corporation was made before the old stock was called in to be exchanged. Ordinarily, a different order of procedure would have been the natural one, but it is manifest that the managers of the corporation had a great desire to obtain the title to and general control of the property, and to be in a position where they could have an audible voice and an energetic hand in the management; and, instead of waiting for 3,000 shareholders to send in their certificates, trusted to their previously expressed willingness to make the exchange. It seems not improbable that, having two evils to choose from, the directors selected the least.

I find from the affidavits no such equity on the part of the plaintiff as should lead to an arrest of the plan of reorganization, a sale of the assets, and a division of the avails among the stockholders. Thus far, nine-tenths of them apparently prefer an altogether different course, which now promises to be much better for their pecuniary advantage

than a sale under the authority of a receiver would be.

The plaintiff insists that the transfer, or any transfer which is not authorized by all the trustees, is void. "When a trust or authority is delegated for mere private purposes, the concurrence of all who are intrusted with the power is necessary for its due execution." Sinclair v. Jackson, 8 Cow. 548. This is the general and well-settled rule; but I am not prepared to say that the rule is applicable to a board of trustees, under these articles of association, which seem to treat the trustees as acting under the system which belongs to a board of directors of a corporation. I have serious doubts whether the technical rules in regard to trustees are applicable to these boards, and whether they do not act by resolution passed by the votes of those present at a legally called meeting, a quorum being present, rather than by unanimous action.

The next point is that the charter is a void instrument as to any non-assenting stockholders. If it is seen that danger of actual harm to stockholders will ensue, unless the action of the new corporation is arrested by an injunction, it would be proper, in deciding these motions, to pass upon the legal questions which may be made under the charter. But unless the occasion is more urgent than it appears to be in the present case, it would be unwise, upon these motions, without careful discussion of the subject by counsel, to go into the question of the validity of an act of the legislature, and to express an opinion upon a subject of such

importance.

The motions for injunction pendente lite, and for a receiver, are denied, and the restraining orders are dissolved.

AMERICAN LOAN & TRUST Co. v. Toledo, C. & S. Ry. Co. and others.

(Circuit Court, N. D. Ohio. December 6, 1886.)

1. RAILROAD COMPANIES—FORECLOSURE OF MORTGAGE—APPOINTING RECEIVERS.

Although there has been default in the payment of the interest coupons secured by a railroad mortgage, yet, if it appear that there is a fair and reasonable claim by the defendant company, growing out of contemporaneous contracts, that the time of payment has been extended, or that the plaintiffs are precluded from relying on the default,—a receiver will not be appointed, until the court shall determine that the right of foreclosure exists.

2. SAME-MISMANAGEMENT OF PROPERTY BY MORTGAGOR.

The mere disagreements of the parties as to the management of the property furnish no foundation for the appointment of a receiver. That can only be done as an incident to some relief falling within the jurisdiction of the court in relation to the contracts of the parties. The appointment of a receiver simply to manage the property is not within the power of a court of equity.

In Equity. On motion for the appointment of receivers.

The defendant Brown, being largely interested in a railroad then undergoing foreclosure in this court, entered into negotiations in New York with the American Finance Company, J. B. Mason, and F. G. Jillson for the purpose of raising the money to re-establish the en-These negotiations resulted in a contract between Brown and the American Finance Company whereby the latter undertook, for certain considerations, to raise the necessary funds to relieve the property, reorganize it under a new company which should operate the road already built, connect it with another road near to it, secure certain terminal facilities, and extend it to the Ohio river. The scheme comprehended the issuance of stock and bonds at so much of each per mile, a mortgage to secure the bonds, etc. Mason and Jillson agreed to lend the money immediately required to relieve the property from the pending suit to foreclose. This transaction, by what is called a tripartite agreement between Brown, the American Finance Company, and Mason and Jillson, took the form of a loan by the latter to Brown upon his notes, secured by the deposit as collateral, of his securities in the old company, to be substituted however by the securities in the new company when organized. In this way over \$300,000 was realized in cash, and the parties proceeded to carry out the scheme of reorganization. Brown went into control of the new enterprise, as it was contemplated he should, but subsequently the parties disagreed, and a struggle commenced for a control of the directory. Injunction suits were instituted, and Brown maintained his control, the bill charges, by fraudulent practices. This struggle depended upon a disputed right on each side to vote the collateral stock. Subsequently this bill was filed by the trustee in the mortgage, and asked the appointment of a receiver, and an injunction against negotiating any further bonds. It charges Brown and his associates with fraudulently obtaining control of the election for directors, with fraudulent traffic mismanagement in the interest of rival companies, with neglect to secure the terminal facilities and to extend the road, with misappropriation of the earnings, with making default in the payment of the interest coupons, and that he is wholly insolvent and unreliable. The answers of Brown and the company deny all these charges, set up counter-allegations of bad faith, and rely upon the contracts accompanying the mortgage to show that there has been under them no default in the payment of interest, and cannot be until his notes become due to Mason and Jillson. Numerous affidavits on both sides are filed relating to the management of the road and the conduct of the parties under these contracts. The case was heard before Welker and Hammond, JJ., on a motion to appoint a receiver.

S. A. Bowman and R. A. Harrison, for plaintiff.

Doyle & Scott and Burke, Ingersoll & Sanders, for defendants.

HAMMOND, J. The impressions made at the argument that this case does not present a state of facts justifying the appointment of a receiver have not been removed by a more careful consideration of the subject upon the elaborate printed briefs which have been filed. Undoubtedly there are cases where a court of equity may take hold of mortgaged property before default in the condition of the mortgage and protect the security against impending danger from fraudulent management, but this is not one of them. It would be intolerable to extend that principle so as to transfer to a court of equity every controversy over the management of mortgaged property, or to convert those courts into the supervisors of the control of every corporation where property is pledged to secure its mortgage debts. Take one feature of this case, dependent on the question whether it be wise to construct that extension of the railroad which was in contemplation of the parties to this mortgage and the other contracts connected with it, as a simple example. That involves a matter of discretion in the judicious management of the property which properly belongs to the directors in charge of the company, and it is not the function of a court of equity to direct the exercise of that discretion upon any judgment of the court that the extension should or should not be made. The court, as to that, may be no wiser than the directors, and the complainants no wiser than either. If loss occurs to the mortgagees from unwise action in that regard, it is one of the inevitable results of the mismanagement of property by its owners, and the remedy is not, certainly, to be found in usurpations of control by the court, through a receiver or otherwise.

But it is said the management is influenced improperly by the persuasive manipulations of a rival enterprise. This is a suspicion of bad faith that may be well or ill founded, but we do not see why a court of equity should, even if it be true, assume to determine either that the extension should or should not be made through the process

of appointing a receiver and undertaking the control of the property. This is an extension of the uses of courts beyond any reasonable limits, and a dangerous application of their power. Under that doctrine the whole business of building railroads might be readily committed to the courts of equity, and in the end, perhaps, be more disastrously But if it be conceded that a court of equity should interfere for relief in such cases, it seems to us that the proper remedy would be by a bill either to rescind the contract for the fraudulent breach of it, or else to compel its specific performance, if that were possible. This bill as originally constructed did not pray for any such relief or make any other appeal to the equitable considerations that govern the rights of the plaintiff in relation to its contracts with the defend-It simply asked for the appointment of a receiver who should manage the property and pay the mortgage debt according to the terms of the contracts. It did not ask us to complete the extension, or to execute the other stipulations of the contract, or to compel the defendant company to do so; nor did it ask to rescind it, nor yet to sell the road and foreclose the mortgage. It seemed to proceed on the theory that it is the right of dissatisfied creditors to have a receiverwhenever the management of the property does not suit them. do not understand the law to be so. Whatever may be the powers of a court of equity to construct railroads or to manage them through receivers, in form at least, those powers must be exercised as an adjunct to the jurisdiction of enforcing some of the well understood equitable rights of the parties in relation to their contracts. There is no such branch of equitable jurisprudence as the appointment of railroad receivers for the management of the property upon any and every disagreement of those interested as to the proper conduct of the business.

It is not wonderful that creditors imagine they are entitled to such relief, nor that disappointed speculators suppose there is such a method of mitigating their losses or correcting their mistakes of contract, considering the strides that have been made in using the courts for such schemes; but the case must fall within some one of the departments of equitable jurisprudence to entitle us to entertain it,

whatever we may do after we get hold of it.

On this suggestion of a defect in the bill the prayer was amended, and it now assumes the form of a bill to foreclose a mortgage upon default of payment of interest. Now, in this form, we cannot and should not proceed to rescind the contract, or to reform it, or to specifically execute it, or to substitute one board of directors for another, or to give guidance to the existing directory, or to transfer the management of the property to others who would like to be in charge, or, indeed, to do anything concerning it—appointing a receiver in the mean time—which the plaintiff would like to have done with it. We can only look at the suit as a bill to foreclose a mortgage, and nothing else, whatever the facts might, on a bill filed for some other purpose, justify. The difficulty of maintaining any other relief than

to rescind the contracts for the alleged frauds is manifest in reading the allegations of the bill and the contracts of the parties. As a bill to foreclose a mortgage the circumstance appears that, substantially, that is not really the ground of complaint, but dissatisfaction with the management of the road, disappointment in not being able to control the directory, or further back, a realization that the contract may not be as wise as it was supposed to have been, nor as carefully guarded to secure the interests of plaintiff's beneficiaries, as, perhaps, it might have been. But it is plain that a court of equity will not on such grounds as those take control of the property, and manage it through a receiver. If plaintiff has been overreached by fraud, possibly a bill to cancel the transaction would lie, possibly a bill to control the action of the company's directory, if there be any ground for that, but certainly not a bill to foreclose a mortgage not broken in its conditions when the bill was filed. And, as to occurrences since, there have been filed affidavits and counter-affidavits concerning the non-payment of Brown's notes in New York, but they do not alter the situation, since, if anything can be asked because of these occurrences, they must be pleaded by amended or supplemental bill.

This requirement of the case relieves us largely of the necessity of considering the force of the allegations of the bill in respect of any other relief than that which is asked, and confines us to those which are material to the subject of a foreclosure of the mortgage, and the determination of the dispute whether, as a fact, there has been such a breach of its conditions as entitles the plaintiff to a foreclosure. But before going to that we may say that, while we have conceded the general proposition that a court of equity will sometimes interfere by injunction to prevent a waste or destruction of the mortgaged property before the conditions of the instrument have been broken and a right to foreclose accrued, it does not thereby result that the court will appoint a receiver to manage the property until the mortgage can be foreclosed. That would come to the assumption of the management by the court of all mortgaged property where there was deterioration or fear of it. But in this case it is sufficient to say that. aside from disagreements as to the best mode of managing the property, there is no substantial charge of a waste of it; the controversy about the cross-ties, like the others, being a mere suggestion as to the better management of the affairs of the company, and at most too insignificant in its character to be applicable in support of this motion for a receiver. All this character of allegations in the bill amount to protests against the management of the company under its present control, and are such as a critical business judgment might make against the management of almost any railroad enterprise, -a mere conflict of opinions as to business operations.

We come now to the question whether there has been a breach of the conditions of the mortgage, so that the plaintiff is entitled to fore-

close it. It cannot be denied that the interest due upon the coupons has been in default, and strictly according to the terms of the mortgage there has been a breach of its conditions. But there are other facts connected with this, which, if they do not excuse that breach and amount to an extension of payment of the coupons, certainly furnish abundant reason for a refusal by a court of equity to appoint a receiver pending the dispute whether the plaintiff is entitled to a foreclosure because of it. Indeed, the very existence of a reasonable dispute as to whether the conditions of the mortgage have been broken is sufficient to cause the court to refuse a receiver: for one ought not, ordinarily, to be appointed unless the right of foreclosure is clear and indisputable, and this upon the general ground that one lawfully and by the contract of parties in possession of the property should not be disturbed in that possession except in a clear case of a right to do that. These railroad mortgages provide for this, as does that in this case, by enabling the bondholders to take possession, upon default, through a trustee; and while this is only cumulative to the remedy in equity, the existence of that provision in itself furnishes the main ground for the appointment of a receiver by the court on a bill to foreclose, for otherwise it is not an absolute right to dispossess the company pending a bill to foreclose. It is generally done because this and other stipulations of the mortgage, together with the fact that default itself evidences bad management and the necessity for a change of possession, justify it; but still the appointment of a receiver is not a matter of course in all cases upon a default and a bill to foreclose, nor if it appear that the company may excuse the default, or the plaintiff be estopped by contract or otherwise from relying on it. There, other considerations come into play, and the court should generally not disturb the possession until the right of foreclosure has been established at the hearing. It is, therefore, not only unnecessary, but improper, that on this motion, upon proof by affidavits and counter-affidavits only, we should undertake to construe these contracts, and say now that the plaintiff is entitled to a foreclosure, and by consequence of that to a receiver, preliminary to a decree of sale and foreclosure. It is sufficient here to say that by reason of the stipulations of the tripartite agreement, it may be fairly claimed by defendants that no default has taken place by the mere failure to pay the coupons, but that under those stipulations the right of payment has been extended by the plaintiff, or those it represents. The plaintiff denies this construction, and says that the contracts taken all together do not mean that; but we think the case presents a reasonable controversy over that point, and, until it is settled, we should not appoint a receiver, particularly since the plaintiff may renew the motion at any time if subsequently occurring facts have made it justifiable to do so, and the order overruling this motion will reserve to plaintiff the right to renew it.

We come to this conclusion the more readily because we can see

from the frame-work of this bill, the absence, originally, of any prayer to foreclose, the course of the argument, and the whole case, that plaintiff was driven to assume a right to foreclose as the best possible ground upon which to predicate the demand for a receiver; the real objection being dissatisfaction with its contract, as subsequent events developed its weakness, and its purpose and endeavor to escape the consequences of a misadventure in getting control of the enterprise. Railroad mortgages are sometimes used as an instrumentality of adventurous speculation rather than a safe security for money advanced, and while the courts should use every possible endeavor to save to the utmost the value of the security, when properly called on to do so, they should not suffer themselves to become likewise an instrumentality of adventurous speculators seeking to use the courts as weapons of offense in the warfare that goes on among themselves. Courts should be confined strictly to the domain of courts of law and equity engaged only in the busines of settling, according to the established rules of law and equity, the controversies that arise and come within the workshop of jurisprudence, but not those that lie outside and within the arena of gladiatorial struggles for business advantages and speculations. The plaintiff here does not like—and perhaps is alarmed, possibly, not without cause, at—the conduct of their joint enterprise by the defendants; but that dislike and alarm do not furnish any solid basis of interference by a court to appoint a receiver to quiet that alarm. We cannot look only to the mortgage, and shut our eyes to the other contracts and transactions between the parties from which it appears that they were joint adventurers in an enterprise of which this mortgage contains only a part of the agreements and stip-Looking at them all, we do not find that the plaintiff is certainly now entitled to foreclose the mortgage, and to a receiver pending that foreclosure.

Motion denied.

A. & W. Sprague Manue's Co. and another v. Hoyt and others.

(Circuit Court, D. Connecticut December 18, 1886.)

1. Partnership—Partnership Property—Title in Partner—Heirs Subject

TO PARTNERSHIP TRUST.

A. S. and W. S. were partners under the name of A. & W. S. A. S. died, and, by the agreement of his administratrix, his wife, the business was conand, by the agreement of his administratrix, his wire, the business was continued under the same name, with the joint capital, and as the joint property, under the management of W. S. W. S. purchased, with joint funds, for the partnership, the B. M. property, on which a factory was erected, on which was expended \$1,000,000 of the partnership funds, and took the deeds in his own name. After taking into the partnership his son and two nephews, he died, leaving, among others, four minor heirs, children of his daughter

Subsequently the partnership was changed into a corporation, and the various interests in the property conveyed to the corporation in exchange for stock, all by the consent and agreement of all interested; the minors being represented in the transaction by their legally appointed guardian. Afterwards the corporation failed, and its property was conveyed to plaintiff in trust for its creditors. Plaintiff, by this bill, seeks to restrain the said minor heirs from bringing ejectment on the ground that the conveyances as to them were unauthorized, and for a decree giving him the legal title. Held, that W. S. held the legal title subject to the partnership trust, and that the heirs received the same subject to the trust.

2. Same—Partnership Realty, for Partnership Purposes, Personalty.

Held, also, that, for the purposes of the partnership, the real property was personalty.

8. Same—Corporation Formed of Partnership Takes Its Equities in Realty. Held, also, that the corporation having been formed by consent out of the partnership, the corporation taking the property as well as the debts of the firm, and the owners having the same interest in the property of the corporation that they had had in the partnership, the transaction gave the corporation the same equitable estate in the property in question that the partnership had had.

4. EQUITY — DECREE — CONVEYANCE OF TITLE — POWER OF UNITED STATES COURTS.

Held, also, that courts of equity of the United States for the district of Connecticut, having the power to administer the remedies provided by a statute of the state of Connecticut, and by virtue of that statute to vest the title to real estate by decree, without any act of the respondent, the trustee is entitled to a decree vesting in him the legal title to the estate.

In Equity.

Charles E. Perkins, for plaintiffs.

James McKeen and Thomas E. Stillman, for defendants.

Shipman, J. The defendants William S. Hoyt, Edwin Hoyt, Sarah H. Lee, and Susan S. Francklyn, being the four children of Mrs. Susan Sprague Hoyt, who was a daughter of William Sprague, Sr., together with the husbands of Mrs. Lee and Mrs. Francklyn, brought in the superior court for New London county four actions of ejectment against the complainants, each suit demanding the seizin and peaceable possession of one undivided eighth part of certain tracts of land in the town of Sprague, in this state, forming what is known as the "Baltic Mill Property," together with the water-power and water-rights appurtenant thereto. Edwin Hoyt's suit was brought by his next friends, he being alleged to be a person of unsound mind. These suits were removed to this court, and are now pending therein.

This is a bill in equity by the defendants in the actions at law to enjoin the plaintiffs therein from further proceedings in said ejectment suits, and to compel the respondents to convey to the complainants the legal title in said real estate which is now vested in the respondents, or to have the same vested in the complainants by decree of this court.

Nearly all the facts in this case are stated in the opinion of the supreme court in *Hoyt* v. *Sprague*, 103 U. S. 613. The partnership, in the business of manufacturing, of Amasa Sprague and William Sprague, Sr., under the name of A. & W. Sprague, before the year 1843; the death of Amasa Sprague, in 1843, leaving a widow, Fanny Sprague, who was his

administratrix, and two sons, Amasa and William, and two daughters; the continuance, under the same name, of said business, with the joint capital, and the enlargement of the business, and of the joint property, under the active management of William Sprague, Sr.; his purchase of the interest of one of the daughters of Amasa; the taking into partnership, shortly before the death of William, Sr., of his son, Byron, and Amasa Sprague and William Sprague, the two sons of Amasa, Sr.; the death of William Sprague, Sr., intestate, in October, 1856, leaving a widow, Mary Sprague, who was his administratrix, one son, Byron Sprague, and the four children of his deceased daughter, Mrs. Hovt, who are the present defendants; the non-settlement of the estate of William Sprague, Sr.; the continuance of the firm of A. & W. Sprague by Byron, Amasa, and William, Jr., with the consent of the two administratrixes and Edwin Hoyt, the father of said children, that the partnership estate should be continued in the business of the firm as before; the purchase by Amasa and William, in 1862, of the interest of Byron and the other daughters of Amasa, Sr., so that the only persons thereafter interested in the firm property were the widows of Amasa, Sr., and William, Sr., Amasa, and William, Jr., and the defendants; the appointment, in February, 1857, by the probate court for the town of Warwick, of Mary Sprague, the grandmother of said four children, as their guardian; the chartering, in 1862, of the A. & W. Sprague Manufacturing Company; its organization, in 1865, for the purpose of holding and managing all the property of the firm, except that which was known as the "Quidnick Company Property;" the petition of Mary Sprague, guardian of the four defendants, and of Edwin Hoyt, their father, to the legislature of Rhode Island, asking authority to vest in the corporations to be formed the title of the said four children in the firm property of A. & W. Sprague; the resolution giving said authority; the important agreement of April 1, 1865, appointing Messrs. Thurston and Gardner referees to examine the entire property of said firm, ascertain its value, and the amount of each party's interest therein; the report of said referees; the order of the court of probate, upon the petition of Mary Sprague, guardian, empowering her to make conveyance to the A. & W. Sprague Manufacturing Company of all the right and title which said four children had in and to the property and assets of A. & W. Sprague other than the Quidnick property; the conveyance, on August 9, 1865, by Fanny Sprague, individually and as administratrix, by Amasa and William Sprague, and by Mary Sprague, individually and as administratrix,—and as guardian, of all the property of said firm, except the Quidnick property, to said corporation; the allotment of stock therein to said guardian in accordance with their interest in said property; the settlement of the guardian's account; the delivery to Sarah S. Hoyt of the amount of their interest in the estate; sundry facts in regard to the acquiescence of William S. Hoyt and his two sisters in the transfer of the property in Rhode Island to said corporation; the subsequent insolvency of said corporation, in 1873; and the conveyance to said Chafee, in trust for its creditors,—are stated in said opinion.

On April 17, 1847, Fanny Sprague, acting for herself and her minor children, and Mary Anna Sprague, one of her daughters, agreed with William Sprague, Sr., that he might retain the possession of all the partnership property, and use and employ the same in the prosecution of the business formerly carried on by said firm of A. & W. Sprague, using the firm name, and conducting the business for the mutual benefit of himself and of the widow and children of Amasa Sprague, until September 12, 1851. This contract was subsequently ratified by Almira Sprague, the daughter of said Amasa.

William Sprague, Sr., purchased, with copartnership or joint funds, and for the business of A. & W. Sprague, the lands now known as the "Baltic Mill Property," between June 20, 1856, and September 30, 1856, received deeds thereof in his own name, and commenced, in the summer of 1856, to build an extensive factory thereon as a part of the joint property. The mill was completed by the firm in 1857, after the death of said William, Sr., and about a million dollars of partnership money was expended thereon. The manufacture of print cloths was carried on there, both by the firm and by the corporation, until the failure of the latter, in 1873. These cloths were "finished" at the print-works of the firm, in Rhode Island.

The referees appraised the Baltic mill property, and included its valuation in the assets of the firm. The property went into the possession of the corporation under the conveyance of August 9, 1865, and was thereafter managed by it, as its own, until its failure, and was then conveyed to said Chafee, who entered into possession thereof, and expended upon it about \$250,000 in the repairs of extensive damages which were caused by a flood.

In deciding that, after the death of William Sprague, Sr., in 1856, the entire partnership estate continued in the business of the firm, as it had been before, with the consent of those primarily beneficially interested, and without fraud; and that by such continuance, with consent, "the property became liable to the partnership debts subsequently incurred, as well as to prior debts;" and that Mary Sprague, as guardian, was authorized by the legislature of Rhode Island, and by the probate court, to convey the interest of her wards in all property situate in Rhode Island to the A. & W. Sprague Manufacturing Company, by way of investing the said interest in its capital stock; and that her conduct was without fraud; and that the proceedings taken by the parties to effect a transfer of the partnership estate to the corporation were substantially regular,—the supreme court disposed of nearly all the important questions which exist in this case.

The defendants insist that the property which is the subject of this suit is real estate situate in Connecticut, and that neither the legislature of Rhode Island, nor the probate court, had the power to authorize Mrs. Mary Sprague, as guardian, to convey the real estate of her non-resident wards which was situate in another state. If the defendants, at the time of the conveyance, owned real estate in Connecticut, the plaintiffs concede that the deed of Mrs. Sprague, either as administratrix or as their

Rhode Island guardian, could not convey such land. It is furthermore conceded that they had the legal title, but it is contended that it was a bare legal title; that the land was partnership assets, and was and is, for all partnership purposes, to be treated as personal property; that the equitable title was vested in the corporation by the deed of the surviving partners and of Mrs. Mary Sprague, as administratrix; that Mr. Chafee is properly vested with the same title; and that the defendants should

be compelled to convey to him the legal title also.

The defendants insist that the English rule of an "out and out" conversion of real estate, which was purchased with partnership funds for partnership purposes, absolutely into personal estate, does not exist here, and that, by the established doctrine of the courts of this country, the tenure of partnership real estate which stands in the name of a deceased partner will not be disturbed in equity, except so far as is necessary to pay partnership debts, and adjust the rights of the partners between themselves, which was not attempted to be done in this case. say that neither the English nor the American rule is pertinent here, because the property was not, accurately speaking, partnership capital. It was purchased by William Sprague, Sr., and the entire business was carried on by him alone, for the benefit of himself and his brother's family. They further say that although, in its inception, this real estate was not, accurately speaking, partnership capital, they do not dispute that the same reasons which lead courts of equity to treat such capital invested in real estate as personalty, in settling partnership affairs, would have led to the treatment of this as personalty, in a suit which might have been instituted to wind up the business; but no such proceeding was taken. They further say that it may be that a valid adjustment of accounts could have been made between the administratrix and the surviving partners which would have involved a release, valid in equity, of her deceased husband's interest in the Baltic mill property, but nothing of that kind was done or attempted; that, in the contemplation of all the parties, the estate of the children in the mill was completely vested in them, and the attempt was to put the title thereto in the corporation by a direct transaction with the Rhode Island guardian. They say that, in so far as William Sprague, Sr., was the owner in his own right of this property, the title thereto, legal and equitable, went to his heirs; so far only as he was a trustee for others, to that extent his heirs are trustees.

I do not think that much importance can be given to the fact that when the mill-site was purchased William Sprague, Sr., was a sole surviving partner. The land was bought between June 20, 1856, and September 30, 1856, with the funds of A. & W. Sprague, for the enlargement of its manufacturing business, and became liable for its debts. Shortly before Mr. Sprague's death, which occurred October 19, 1856, he took his son, Byron, and his two nephews, into partnership. The precise date does not appear, but it was probably after October 1, 1856. The mill and all its appurtenances were afterwards completed by the surviving partners, at a total expense of \$1,000,000, paid from partnership

funds; and was managed as a part of the extensive manufacturing business of the firm. There was no separation of the Baltic property, as possessing a distinct character, from the rest of their property, and no valid distinction can be made between this mill and the Rhode Island mills of the firm, which were built between 1843 and 1856. All were equally and alike partnership assets; and the interest of the Hoyt children in the Connecticut property was, both at and before the transfer to the corporation, properly regarded as of the same character as their interest in the Rhode Island estate; that is, it was an interest in partnership stock.

The next question is as to the effect of the conveyance by the surviving partners and Mary Sprague, as administratrix, upon the children's interest in the Baltic mill property. It is not necessary to consider whether the English rule in regard to partnership real estate has been or can be adopted in its entirety in this country. The principle which underlies the decisions of the supreme court and of state courts of

high authority is sufficient to control the case.

In Shanks v. Klein, 104 U.S. 19, which was a bill in equity to restrain the executor of the deceased partner from prosecuting actions of ejectment against the purchasers of partnership land from the surviving partner, which had been sold by him to pay partnership debts, the court says that the right of the surviving partner is an equitable right, accompanied by an equitable title, and is an interest in the property which courts of chancery will recognize and support; and in reply to the question, "What is the right?" the court further says, "Not only that the court will, when necessary, see that the real estate so situated is appropriated to the satisfaction of the partnership debts, but that for that purpose, and to that extent, it shall be treated as personal property of the partnership, and, like other personal property, pass under the control of the surviving partner. This control extends to the right to sell it, or so much of it as is necessary to pay the partnership debts, or to satisfy the just claims of the surviving partner." It is not to be supposed that the court meant that the land is to be treated as personalty only when its avails are required to pay partnership debts, or to satisfy the claims of the surviving partner. The language is used with reference to the facts of the case which was under discussion, and the principle is of somewhat broader scope. Accordingly, in Allen v. Withrow, 110 U. S. 119, S. C. 3 Sup. Ct. Rep. 517, the court say: "Real property owned by a partnership, and purchased with partnership funds, is, for the purpose of settling the debts of the partnership, and distributing its effects, treated in equity as personal estate." In Foster's Appeal, 74 Pa. St. 391, the court says that the reconversion of partnership real estate to its condition as land takes place when the partnership is dissolved, wound up, and completely ended.

The principle of the various cases is that real estate bought for and applied to partnership uses, with partnership funds, is, after the death of one of the partners, to be treated in equity as personal property, for all the proper and necessary purposes, needs, and requirements of the partnership. How the part which remains after the partnership needs are

satisfied is to be distributed it is not necessary to consider. Pars. Partn. (1st Ed.) 371-373; Buchan v. Sumner, 2 Barb. Ch. 167; Tillinghast v. Champlin, 4 R. I. 173; Way v. Stebbins, 47 Mich. 296; S. C. 11 N. W.

Rep. 166; Shearer v. Shearer, 98 Mass. 107.

The partnership property, business, and debts of A. & W. Sprague had become too large, in the year 1865, to be continued in the name of individuals, whose lives must terminate. The assets of the firm were over \$6,700,000, the liabilities were \$2,870,000, leaving the net value of the estate about \$3,860,000. The business of the firm was manufacturing, which required the ownership of mills and real estate. It was manifestly impracticable to continue, as a firm, to manage real property of this magnitude, some of which stood in the name of deceased partners, and the rest of which must stand in the name of individuals. If the business was to be continued, the partnership must be converted into, and the assets must be transferred to, a corporation, and the various interests of the members of the copartnership, of the administratrixes, and of the tenants in common of the real estate, must be represented by stock.

All the persons interested in the estate, who were capable of contracting, agreed that the business should be continued, and that a corporation should be formed. The minors were represented by their guardian and their father, both of whom, as is manifest by their petition to the general assembly of Rhode Island, were desirous that the partnership should be turned into a corporation, and that the property of the minors should be continued therein, and should be represented by stock. fact that the two persons who represented the children, and were in a position to act in their behalf, united, earnestly and honestly, with all the persons of full age who had any interest in the partnership, in its conversion to a corporation, is a fact of vital importance; for it is not by any means supposed that surviving partners can, by their own unaided act, transfer the real estate of the minor heirs of a deceased partner to a corporation, and compel them to become stockholders therein. The same consent was, in this case, given to the transfer of the real estate to the corporation which was given to the continuance of the partnership estate in the business of the firm after the death of William Sprague, Sr., and was given for the same reason, viz., the supposed benefit of the minors.

The corporation was organized for the purpose of placing and vesting in it the property of the firm subject to its liabilities. By the deed of the surviving partners, and of the administratrixes of the deceased partners, the equitable title to the real estate was conveyed to the corporation, and it assumed debts of nearly \$3,000,000 which rested upon the estate. The respective interests of the partners and owners in the assets, less the amount of the debts, were manifested in the form of stock, of which each received his or her proportional share. The transaction was the formation, by consent, of a corporation out of a copartnership; the corporation taking the property as well as the debts of the firm, the owners having the same interest in the property of the corporation that they formerly had in the partnership property. The equitable title thus

transferred remained in the corporation until its failure, in 1873, when it made an assignment of all its property to Mr. Chafee for the benefit of its creditors.

The grandchildren attained their majority as follows: Mr. Lee in October, 1866; Mrs. Francklyn in October, 1866; William T. Hoyt in January, 1868; and Edwin Hoyt in July, 1870. The actions of ejectment were brought on October 1, 1879.

I do not deem it necessary to consider any questions of estoppel against the right of the three elder children to maintain their actions of ejectment, growing out of the fact that they accepted the dividends upon their stock, and might have known, "had they used the means and opportunities directly at their command," that the Baltic property, situate in Connecticut, was claimed to be a part of the assets of the corporation, nor shall I consider the questions growing out of the alleged incompetency of Edwin Hoyt to acquiesce in any disposition of his property, because my conclusion is that the Baltic property was, from the time of its purchase, partnership property, and liable for its debts, and that, subject to the payment of the debts of the firm, it properly became a part of the assets of the corporation in 1865, and that thereafter only a bare legal title remained in the four children of Mrs. Hoyt, which title it is competent for a court of equity to direct to be released to its equitable owner.

A statute of Connecticut provides that "courts of equity may pass the title to real estate by decree, without any act on the part of the respondent, when, in their judgment, it shall be the proper mode to carry the decree into effect; and such decree, having been recorded in the records of lands in the town where such real estate is situated, shall, while in force, be as effectual to transfer the same as the deed of the respondent or respondents." Courts of equity of the United States for this district have the power to administer this remedy. Fitch v. Creighton, 24 How. 159; In re Broderick's Will, 21 Wall. 503; Central Pac. R. Co. v. Dyer, 1 Sawy. 641.

Let there be a decree enjoining against the prosecution of said actions of ejectment, and vesting in Mr. Chafee the legal title to said estate.

BURR v. KIMBARK.

(Circuit Court, N. D. Illinois. January 17, 1887.)

1. Injunction — Breach — Contempt — Infringement of Patent — Bond — Knowledge of Filing.

Where a preliminary injunction to restrain the infringement of patentrights is granted, on condition that a bond be filed by the plaintiff, and the defendant was present in court at the time the order was read and approved, and the complainant then exhibited the form of bond which he was required to give, and stated that the bond would be filed as soon as the surety's signature could be obtained, and it was in fact filed on the same day, the defendant cannot, in proceedings to punish him for contempt in committing a breach of

the injunction, plead in justification that he was ignorant of the filing of she bond, it being his duty, without notification, to ascertain whether the bond had been filed or not.

2. Same—Manufacture of Articles Involving Principle in Issue.

Where the principle involved in a patent is the point in issue in a suit to restrain its infringement, the defendant will commit a breach of a preliminary injunction, and be punishable for contempt, where, for the purpose of evading the injunction, he continues to manufacture articles involving the same principle, with but slight modifications of structure.

Rule to Show Cause.

Munday, Evarts & Adcock, for complainant.

Coburn & Thacher, for defendant.

BLODGETT, J. This is a proceeding to punish the defendant for an alleged contempt of the injunctional order entered in this case on the second day of August last. 28 Fed. Rep. 574. The bill was filed on the fourteenth of May last, and alleged that complainant was then the owner of Patent No. 142,989, duly issued to himself from the patent-office of the United States in September, 1873, for certain "improvements in wagon-bodies;" Patent No. 187,452, issued from the patent-office of the United States to himself in February, 1877, for "improvements in wagonbody irons," and patent No. 187,450, issued to himself from the patentoffice of the United States in February, 1877, for "improvements in dash-boards." The bill charged defendant with the infringement of the invention set forth and claimed in all of the said patents, and that he was then, at the time of the filing of the bill, engaged in the business of manufacturing and selling wagon bodies containing devices covered by claims in all of these patents. A motion for an injunction pendente lite was made in the case, and, after hearing and considering the same, the court, on the second day of August last, entered an order commanding and enjoining "the defendant, his clerks, and attorneys, agents, servants, and workmen, that they forthwith and, until the further judgment and decree of the court, desist from directly or indirectly, in any way or manner, making, using, or selling any wagon bodies, or dash-boards, or wagon-body irons, substantially as described and claimed in said letters patent, or either of them;" reserving, however, to the defendant the right to sell, at current prices, the completed bodies he then had on hand, to the number 112, and no more. It is now charged that defendant has wholly disregarded the said injunction, and has continued to make and sell wagon bodies and dash-boards, and to use wagon-body irons, covered by and included in the claims of the said several patents, and the court is asked to punish such alleged contempt of its process and orders. rule to show cause why the defendant should not be dealt with for the alleged contempt was duly issued, and the defendant has made return to said rule

This return assigns various reasons why the defendant should not be punished for the contempt charged:

(1) That the injunction and order was granted on condition that the complainant should file a bond, with surety to be approved by the clerk in the

sum of \$5,000, conditioned for the payment of such damages as might be awarded the defendant in case of the dissolution of the injunction, and that defendant never had, until on or after August 16th, any notice that such bond had been filed and approved.

(2) That the defendant, after the issue of such order, completed only 10 wagon bodies containing the improvements covered by the patents in question, and that said 10 wagon bodies were in process of manufacture, and

nearly finished, at the time the injunction was ordered.

(3) That all the wagon bodies made since the injunction was ordered, with the exception of the 10 first mentioned, have not contained any of the devices covered by the patents.

(4) That the wagon bodies made by the defendant since the granting of said order have not infringed upon any of the valid claims of either of said patents, when said claims are considered in the light of the state of the art.

In regard to the first point, it is sufficient, I think, to say that the defendant was present in chambers at the time the injunctional order was read and approved, and the complainant at that time exhibited the form of bond which he was required to give in pursuance of that order, and stated who the surety was to be, and also stated that the bond would be filed as soon as he could go to the surety's place of business in this city, and obtain his signature; and the complainant, or his solicitor, left the chambers as soon as the order was directed to be entered, for the purpose of having the bond filed; and the records of the court show the bond was filed and approved by the clerk on the same day that the injunctional order was entered.

I have no doubt from what occurred in the chambers at the time the injunctional order was made that the defendant knew that the bond would be filed on that day, or, at least, had good reason and reasonable cause to suppose and believe that the bond would be filed on that day; and it was therefore his duty to have seen to it, and to have taken notice of the fact, that it was so filed. Being a party to the record and to this suit, he is chargeable with notice of all steps that are taken in it; and it is not necessary, to bind him by the terms of the order, that he should be specially notified of the fact that the bond had been approved and filed. It was his business to ascertain from the clerk, if he was anxious upon the subject, whether a bond had been filed or not. He was bound to assume it would be filed, as notice had been practically given in the court-room that the surety was acceptable, and the form of bond approved.

The defendant admits that, in violation of this injunction, he did proceed and finish 10 wagon bodies which were in process of manufacture at the time the injunction was issued. Having obtained from the court a concession of the right to sell the 112 then manufactured, and in his warehouse for sale, it seems to me the defendant ought to have been content with this privilege, and not have proceeded to finish the 10 that were then under way. Certainly, in doing so, he took the responsibility and risk of violating the process of the court; and, without going farther than this, it is enough to say that the defendant's own affidavit discloses, it seems to me, a deliberate, contumacious intent to violate this order of

the court.

It is also admitted that after the defendant had finished the 10 wagon bodies which were completed, after the entry of the injunctional order, he continued to construct wagon bodies with center-posts containing sockets, but filed notches in the centre-posts, so that the slats or ribs could be notched or halved into the same, in such manner as to make some portion of the slats continuous. As it will be undoubtedly a question presented at the final hearing of the case whether the first, second, and third claims of complainant's patent No. 187,452, for wagonbody irons, necessarily require that the horizontal ribs, D, shall be out off, and terminate at the intersecting sockets in the upright standard, E, and whether, by making a portion of this standard, E, continuous, the defendant has evaded the claims of this patent, it may be better to withhold any adjudication or opinion upon that point at this time; but it is conceded that the change in question was made by the defendant for the express purpose, and with the intention, of continuing the construction of wagon bodies in external appearance substantially like those covered by the complainant's patent, and which could and would be sold upon the market as and for such wagon bodies.

As to the fourth defense, that the claims of the complainant's patent are void for want of novelty, it is sufficient to say that this is the very question to be tried in this case. The defendant is expressly enjoined from manufacturing and selling any wagon bodies, dash-boards, or wagonbody irons substantially as described in the claims in said letters patent, or either of them. One of the claims of the complainant's patent for 1873 is "for a wagon body or box constructed of a frame-work, when the several parts are connected together without mortice or tenon, substantially as specified." This claim broadly covers the idea of making a wagon body or box without connecting the parts by mortice or tenon, but connecting them with irons, substantially as shown in this patent; and it is conceded the defendant has continued the manufacture of wagon bodies the parts of which were connected without mortice or tenon, and by means of angle irons and brackets and bolts, substantially as shown in this patent. It is true that the defendant's affidavits show that he has made four mortices and tenons in the construction of the wagon bodies which he has made since this injunction; but he has connected all the other parts of his bodies together without mortices and A complete wagon body, without the use of these connecting irons, would involve a very large number of mortices and tenons in each body. All these the defendant has used, with the exception of the mortices and tenons which connected the end-sills with the side-sills. Here the complainant has a broad claim for wagon bodies constructed in a special manner, and the defendant, notwithstanding this claim, and notwithstanding this injunction, has continued the construction of wagon bodies substantially, as I must say, in accordance with the claims of this patent, making only colorable changes.

So, in regard to the patent upon the dash-board. The complainant's patent covers a dash-board the ends of which are inclosed by socket pieces of metal. The defendant has constructed dash-boards of this

character, having the same appearance and general characteristics as those covered by the patent, but has riveted or fastened a piece of iron upon a metal casting, so as to make the socket by riveting this strap of iron upon the casting, instead of casting the socket whole, as was shown in the patent.

It seems to me, then, in summing up the whole of defendant's conduct since the entry of this restraining order, the proof shows a deliberate intention to violate the process of the court, and the rights of this complainant pendente lite, without regard to the injunction under which he was acting. It is no defense, under the circumstances, for the defendant to say that, so far as he has attempted to evade this patent, he has been acting under the advice of counsel. The defendant is himself an unusually intelligent man, having long been engaged in the manufacture of this kind of work, and knows very well the value of the exclusive right to this class of manufacture which is secured to the complainant by his patent; and when the injunction was granted it was his duty to submit to the injunction in the language in which it was stated, and "wholly refrain from the manufacture of wagon bodies and dashboards," which were covered by any of the claims of these patents. The validity of these claims, and the question of how far the change in the construction would enable the defendant to manufacture other wagon bodies involving substantially the same principle, with but slight modifications of structure, were questions to be determined at the hearing of the case; and it was the defendant's duty to await the results of that hearing, and not seek, even by the advice of counsel, for means to evade the order which was entered. A bond sufficient, in the judgment of the court, to indemnify the defendant, was exacted from the complainant as the condition of awarding him this injunction, and there was also reserved to the defendant the right to move for a further bond, if the one mentioned in the order should be found to be insufficient. Under these circumstances, the defendant could afford, and it was his duty, to wholly suspend the manufacture of this class of wagon bodies until his case was heard, and properly decided upon the proofs. Much, therefore, as I regret the necessity, a due regard to the dignity and efficacy of the process and decrees of the court requires, I think, such an exemplary punishment as will teach this defendant, and all others similarly situated, that they cannot violate the decrees of the court with impunity. The defendant is therefore ordered to pay a fine of \$500, and the costs of this motion, including \$50 to complainant's solicitor; the defendant to be arrested and committed to the jail of Cook county unless the fine and costs are paid within 10 days from the entry of the order.

Control (1975) (

Kohn and another v. Melcher.

(Circuit Court, S. D. Iowa, W. D. January 3, 1887.)

1. Intextcating Liquors—Constitutionality of Iowa Code, §§ 1523, 1526.

Iowa Code, §§ 1523, 1526, limiting the giving of licenses to certain classes of citizens of Iowa to buy and sell intoxicating liquors for mechanical, medicinal, culinary, and sacramental purposes only, do not, by preventing citizens of other states from selling liquors in other states, interfere with the freedom of interstate commerce, violate the constitutional guaranty to the citizen of each state all the privileges and immunities of citizens in the several states, and do not "abridge the privileges or immunities of citizens of the United States," since the purpose and effect of the act is to make a safeguard against the unlawful selling of liquors, and not to discriminate against citizens of other states.

2. Same—Seller Citizen of Another State—Iowa Code, § 1550.

Iowa Code, § 1550, provides that all "payments or compensation for intoxicating liquors sold in violation of this chapter shall be held to have been received in violation of law, and against equity and good conscience, and to have been received upon a valid promise and agreement of the receiver, in consideration of the receipt thereof, to pay, on demand, to the person furnishing such consideration, the amount of said money." Held, not to apply to payments on a sale for lawful purposes, but invalid by reason of the fact that the seller was a citizen of another state.

At Law. Demurrer to answer and counter-claim.

Wright, Baldwin & Haldane, for plaintiffs.

Lehmann & Park and Rockafellow & Scott, for defendants.

Shiras, J. From the averments of the pleadings in this cause, it appears that plaintiffs reside and do business in Rock Island, Illinois, as rectifiers and wholesale dealers in spirituous liquor; that the defendant is and has been a properly qualified and registered pharmacist at Atlantic, Iowa, holding a permit from the board of supervisors of Cass county, authorizing him to buy and sell intoxicating liquors for purposes not prohibited by the statutes of Iowa; that during the years 1881, 1882, 1883, and 1884 the plaintiffs sold to defendant about \$6,500 worth of intoxicating liquors; that plaintiffs claim there is due from defendant the sum of \$1,000, to recover which suit is brought.

In the answer and counter-claim filed in the case it is averred that the liquors were sold in violation of the statute in Iowa, in that the same were sold by plaintiffs at the town of Atlantic, Iowa, the plaintiffs not being authorized under the laws of Iowa to sell intoxicating liquors for any purpose. The counter-claim is brought for the purpose of recovering back from plaintiffs the amounts heretofore paid upon the account in question, under the provisions of section 1550 of the Code of Iowa.

The demurrer to the answer and counter-claim presents the question whether, under the statutes of Iowa in force during the years 1881 to 1884, inclusive, persons residing and carrying on business as rectifiers and wholesale dealers in states other than Iowa could lawfully sell intoxicating liquors to be resold for culinary, sacramental, medicinal, and mechanical purposes, to a registered pharmacist doing business in Iowa, and holding a proper permit authorizing him to sell liquors for the pur-

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pose named, provided the contract of sale between the non-resident wholesale dealer and the registered pharmacist was made within the state of

Iowa, and at the residence of the latter party.

By section 1523 of the Code it is provided that "no person shall manufacture or sell, by himself, his clerk, steward, or agent, directly or indirectly, any intoxicating liquors, except as hereinafter provided." Section 1526 enacts that "any citizen of the state, except hotel keepers, keepers of saloons, eating-houses, grocery keepers, and confectioners, is hereby permitted, within the county of his residence, to buy and sell intoxicating liquors for mechanical, medicinal, culinary, and sacramental purposes only, provided he shall first obtain permission from the board of supervisors of the county in which such business is conducted, as follows." Sections 1527 to 1532, inclusive, define the steps to be taken to procure the permit named in section 1526, one of the requirements being that the applicant must be a citizen of the state of Iowa.

These several sections of the Code were in force when the liquors in question were sold by plaintiffs to defendant; and as it is admitted by the demurrer that the liquors were sold in Iowa, and that the plaintiffs did not have a permit authorizing them to sell such liquors, it follows that the sale was contrary to the express provision of the statute, and therefore invalid, provided such provisions are legal and applicable.

Upon behalf of plaintiffs it is argued that the statute expressly recognizes the use of liquors, for medicinal, mechanical, culinary, and sacramental purposes, as being entirely proper, and does not forbid citizens of Iowa from manufacturing and selling liquors for such purposes; and that while the state may have the right to regulate the sale thereof, still such regulations must not discriminate in favor of the citizens of the state as against the citizens of other states; that the right to sell liquors for the purposes named cannot be permitted to citizens of Iowa, and be wholly refused to citizens of other states, without interfering with the freedom of interstate commerce, and violating that provision of the federal constitution which guaranties to the citizen of each state all the privileges and immunities of citizens in the several states, and also the provision which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

If the provisions of the statute above cited are intended to control the commerce in liquors to be used for mechanical and other legal purposes, so as to secure the traffic therein to citizens of Iowa, and exclude all others from participation therein, thus intentionally discriminating in favor of the citizens of Iowa, it would seem clear that the sections of the statute providing for the exclusion of all, save citizens of Iowa, from the right to engage in such traffic, would be unconstitutional and void. Commerce between the states cannot be said to be free, if, by the laws of a state, the sale of a commodity is forbidden if produced or manufactured in another state, but is permitted if of home production or manufacture; or if citizens of other states are forbidden, by reason of such citizenship, to engage in the manufacture or sale of a commodity within a state, while the right to engage therein is permitted to the citizens of the latter

state. Laws regulating trade and commerce, and which are intended to secure to the citizens or products of one state exclusive or superior rights and advantages, at the expense of the citizens of other states, cannot be sustained. Ward v. Maryland, 12 Wall. 418; Welton v. Missouri, 91 U. S. 275; Tiernan v. Rinker, 102 U. S. 123; County of Mobile v. Kimball, Id.

691; Webber v. Virginia, 103 U. S. 351.

The mere fact, however, that certain state laws may, more or less directly, affect interstate commerce, or persons engaged therein, is not always proof that such laws are beyond the power of the state to enact, or that they violate any of the provisions of the federal constitution. There is reserved to the several states the right of police regulation; that is to say, the power to enact laws promotive of domestic order, morals, health, and safety. State statutes solely intended for the promotion of these objects would not be rendered invalid by the fact that thereby interstate commerce might be somewhat restricted. In the language of the supreme court in *Sherlock* v. *Alling*, 93 U. S. 99-103:

"In conferring upon congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce, and persons engaged in it, without constituting a regulation of it, within the meaning of the constitution."

That the states, for the purpose of restricting and eradicating the evils arising from the traffic in intoxicating liquors as a beverage, have the right to enact laws prohibitory thereof, cannot be questioned. License Cases, 5 How. 504; Bartemeyer v. Iowa, 18 Wall. 129; Beer Co. v. Massachusetts, 97 U. S. 25; Foster v. Kansas, 112 U. S. 201; S. C. 5 Sup. Ct. Rep. 8.

If, however, in such acts, provisions are inserted which discriminate in favor of liquors manufactured in the state as against those manufactured in other states, or which protect the home dealer, by exacting a tax or license fee from the non-resident dealer, and not from the home dealer, then such provisions would be contrary to the federal constitution. Thus in Walling v. People, 116 U. S. 446, S. C. 6 Sup. Ct. Rep. 454, it was held that a state statute imposing a tax upon persons, not residents of Michigan, who should engage in that state in the business of selling intoxicating liquors to be shipped into the state, but which did not impose a similar tax upon the sale of liquors manufactured in Michigan, was repugnant to the constitution of the United States.

Section 1555 of the Code of Iowa declares that, "whenever the words 'intoxicating liquors' occur in this chapter, the same shall be construed to mean alcohol, and all spirituous and vinous liquors: provided, that nothing herein shall be so construed as to forbid the manufacture and sale of beer, cider from apples, or wine from grapes, currants, or other

fruits grown in this state."

The effect of this section is to enact that the sale of wine is forbidden, unless it is manufactured from the products of this state. This provision is clearly an attempt to discriminate in favor of the products of the

state as against those of other states; and no reason is perceived why it does not fall within the rule, so often announced by the supreme court, that legislation forbidding the sale of a commodity if of foreign production, but permitting it if of home production, cannot be sustained as a police regulation, but is clearly an attempt to restrict interstate commerce, and to discriminate against the products and citizens of other states. So long, therefore, as the proviso in section 1555 continued in force, authorizing the sale of wine manufactured from the products of the state, so long was the inhibition against the sale of wine manufactured in other states inoperative and void.

The principal question presented by the demurrer, i. e., whether the provisions of the statute restricting the right to sell liquors in Iowa, for mechanical and other legal purposes, to citizens of the state are or are not a violation of the federal constitution, is not so readily answered. In the language of the supreme court, in Railroad Co. v. Husen, 95 U. S. 465, "the police power of a state cannot obstruct foreign or interstate commerce beyond the necessity for its exercise, and under color of it, objects, not within its scope, cannot be secured at the expense of the protection afforded by the federal constitution;" and yet, as is said in the same case, "many acts of a state may, indeed, affect commerce, without amounting to a 'regulation' of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule for conduct."

In the statutes in force up to the year 1884 no provision is found which prevents persons holding a permit to sell liquors in Iowa from purchasing those manufactured in other states, nor from making purchases thereof from citizens of other states at places outside the boundaries of Iowa. No prohibition or discrimination is based upon the place of their manufacture. So far, therefore, as the products of other states are concerned, they are placed upon an equality with those of the state. The discrimination complained of arises from the fact that the statute provides that no one can sell in Iowa unless he has a permit, and that no one save a citizen of Iowa can procure such permit.

It will be noticed that the limitation on the right to sell affects the citizens of the state as well as those of other states, in that the permit can only be procured by a resident of a county in which the permit is issued, and limits the right to sell to a particular house to be named in the permit. There is no doubt that the result of the statute is to entirely deprive citizens of other states of the right to sell in Iowa intoxicating liquors to be used for mechanical and the other legal purposes. It also practically confines the right to sell to a small part of the citizens of the state. Was it the intent of the legislature in enacting these provisions of the statute to grant greater privileges to the citizens of the state than are granted to those of other states, in carrying on the business of buying and selling liquors for legal purposes, or were these provisions enacted as safeguards against violations of the law prohibiting sales of liquors to be used as a beverage?

The difficulty of preventing evasions of the prohibitory law is well known, and it is apparent that the permission to sell for medical and other legal purposes, unless carefully guarded and restricted, might prove to be a ready means for defeating the object and purpose of the statute. The state has the right to adopt all proper police regulations necessary to prevent evasions or violations of the prohibitory statute, and to that end, and for that purpose, has the right to restrict the sale for legal uses to such places, and by such persons, as it may be deemed safe to intrust with the right to sell. In cases in which it has been held that the state legislation could not be upheld, it will be found that the provisions of the statute were not intended to guard the community against evils arising from some traffic deemed injurious to the common weal, but were intended to secure to the citizens or products of the state an undue advantage; or, in other words, under the pretext or guise of a police regulation, the true intent of the legislation was to place the products or citizens of other states at a disadvantage in carrying on commerce or business, and thereby secure the profits thereof to the citizens of the state enacting the particular law complained of. If the argument of counsel for plaintiffs is well founded, it would follow that under the fourteenth amendment to the constitution of the United States, prohibiting the abridgment of the privileges or immunities of citizens of the United States, it would be beyond the power of the states to limit, as among its own citizens, the right to sell liquors for legal purposes, or to limit the right to sell poisons of any kind, or to require that steam-boilers or other dangerous machinery can only be operated by skilled engineers.

The fourteenth amendment was not adopted for the purpose of limiting the fair and proper exercise of the power of police regulation on part of the states. An impartial examination of the several sections of the statute of Iowa on the subject of the sale of liquors for legal purposes, shows that the restrictions complained of were adopted, not for the purpose of securing an undue advantage to the citizens of the state, but for the purpose of preventing violations of the prohibitory law of the state; and although, in effect, the citizens of other states, as well as the larger part of the citizens of Iowa, are debarred from selling in Iowa liquors to be resold for legal purposes, and in that sense commerce between the states may be affected, yet this is but an incidental result; and as the intent and purpose of the restrictions, i. e., preventing violations of the prohibitory law, are within the police power of the state, it cannot be held that the sections of the statute under consideration violate any of the provisions of the federal constitution; and, being therefore valid and binding, it follows that a sale of intoxicating liquors made in Iowa for any purpose, by a person not holding a permit to sell, is unlawful, and no action can be maintained to recover the price of such liquors. The demurrer to the answer must therefore be overruled, and it is so ordered.

The demurrer also applies to the counter-claim in which defendant seeks to recover judgment for the amounts paid on account for the liquors sold under the circumstances hereinbefore stated. Counsel seem to have assumed that the decision of the question presented by the demurrer to the answer would also settle the question as to the right of the party to recover back the sums paid on account, and hence have not discussed this question in argument. It may be that this assumption is entirely well founded, and it certainly finds support in the opinion of the supreme court of Iowa in the case of Becker v. Betten, 39 Iowa, 668. The question arises on the construction of section 1550 of the Code, which provides that "all payments or compensation for intoxicating liquors sold in violation of this chapter * * * shall be held to have been received in violation of law, and against equity and good conscience, and to have been received upon a valid promise and agreement of the receiver, in consideration of the receipt thereof, to pay on demand, to the person fur-

nishing such consideration, the amount of said money."

When liquors are sold to a person in Iowa to be resold for use as a beverage, there is no question that the parties intend to violate the prohibitory law of the state, and the vendor knows that the liquors which he furnishes for this purpose to the vendee are contraband, and, in effect, have no legal value in the hands of the vendee, as he has no right to sell them in Iowa for use as a beverage, and cannot make them the subject of a legal sale. In all such cases there is a foundation for the theory of the statute that, as the vendor of the liquors did not transfer to the vendee anything of legal value, all payments made therefor are without consideration, and the vendee may recover back the payments thus made because he received no consideration therefor; that is, nothing of any legal value. In cases, however, where the liquors are sold to be used for legal purposes, to a person having the right to sell the same, the vendee received from the vendor something having in his hands a legal as well as actual value. The statute of Iowa, in order to close the avenues to evasions of the prohibitory law, has enacted that no one in Iowa shall have the right to sell liquors, even for legal uses, except parties holding permits. The sales made in the present case were made in violation of the law of Iowa, not because the liquors were sold to be used as a beverage, but because, while the purpose for which they were sold was entirely legal, the party selling had not the legal right so to do. The inhibition applies to the person, and not to the property.

The plaintiff, not having the legal right to sell, could not make a legal contract of sale in Iowa, and hence, coming into Iowa to seek a recovery for the liquors sold, he cannot maintain the action, because he cannot show a legal contract with defendant. Suppose, however, the defendant should go to Illinois, and, while there, should pay, in Illinois, to the plaintiff, the value of the liquors sold in Iowa, and then, upon his return to Iowa, should bring suit to recover back the money thus paid in Illinois. In this case, the vendor of the liquors would not be seeking the aid of the law of Iowa to enforce a contract of sale for liquors. The vendee would be seeking to recover back, in Iowa, money paid, not in Iowa, but in Illinois. The consideration for which he paid the money was liquors which had a legal and actual value in his hands. True, they were sold under such circumstances as that, in Iowa, an ac-

tion for their value could not be maintained by the vendor; but when they passed into the possession of the vendee he had a right to sell the same. In his hands, for the purpose for which they were bought, they were property having a legal value. Having thus received the same, if the vendee should then go to Illinois, and the parties, recognizing the fact that the contract of sale was void, should in Illinois make a new contract in regard to the same, would not the latter contract be valid?

If a person sells liquors to a saloon-keeper in Iowa, with the intent that the same should be resold as a beverage in violation of the law, and should deliver the same, he cannot maintain an action for the price or value thereof, nor could he maintain an action of replevin to recover back the possession of the goods. The courts of Iowa would afford him no aid to recover liquors, the possession of which he parted with, with the intent that the same should be used in violation of the laws of the state. Would the same rule apply if a resident of Illinois should, in Iowa, sell liquors to be used for legal purposes only, to a person authorized to sell in Iowa? In such case, the contract of sale would be void, because the resident of Illinois had not authority to sell without a permit, which he is debarred from getting because the same can only be issued to a citizen Could not the vendor, under these circumstances, demand back the liquors, as long as they remained in possession of the vendee, and, if necessary, retake possession by proceedings in replevin? True, he had violated the law of Iowa by selling without a permit, but the violation of the statute did not consist in selling liquors to be used as a beverage, or in introducing liquors into the state to be used or sold by others for an illegal purpose, but in selling to an authorized person, for legal purposes, without having a permit.

The liquors, when delivered to the vendee, would not be liable to be seized and confiscated under the sections of the statute authorizing the seizure and destruction of liquors intended to be used in violation of the statute. In whom would be the legal title to the liquor? Would it not be in the vendor? If so, why may he not retake the possession of the property? However this may be, if the vendee, having received the liquors, and sold the same in Iowa, for a lawful purpose, should then, in Illinois, pay the value thereof to the vendor, could he maintain an action in Iowa to recover back the money thus paid, even under the provision of section 1550? In what respect could it fairly be said that the vendor, in receiving payment in Illinois, violated any law of Iowa? The liquors he had delivered to the vendee had not been used for any purpose prohibited by the statutes of Iowa. They lawfully belonged to the vendor, were property in his hands, and were property when delivered to the vendee, and were not delivered to the vendee to be used for any

illegal purpose.

Under such circumstances, while the vendor could not maintain an action in Iowa on the contract for sale, was there anything unlawful in receiving, and in the vendee paying him, the value of the goods? If not, then upon what ground can the vendee seek to recover back the sums voluntarily paid? The only answer is that the statute of Iowa so

provides, and it cannot be denied that the section is very broad in its terms; yet, as is said by the supreme court of Iowa in *Monty* v. *Arueson*, 25 Iowa, 383, "the act must not receive a construction that will render its provisions absurd in effect, or cause it to work manifest injustice and absolute dishonesty and crime."

In the case of Becker v. Betten, 39 Iowa, 668, the parties were both residents of Iowa, and it was therein held that payments made for liquors sold to one who was authorized to sell for legal purposes might be recovered back. The payments were made in Iowa, to one who was then subject to the laws of the state, and who knew that the laws of the state forbade his receiving such payments. In case, however, the vendor does not live in the state, and the payments are not made in Iowa, should or should not a different rule apply? If the money paid under such circumstances can be recovered back, it is equivalent to saying that it was the legal duty of the vendor living in Illinois, to refuse to receive in Illinois the money value of the liquors which he had delivered to the vendee living in Iowa, to be used and sold for legal purposes, because the contract for sale could not be enforced by reason of the fact that the vendor had not a permit authorizing him to sell.

The want of a permit rendered the vendor legally incompetent to make a valid contract of sale, but he did not deliver the goods for the purpose of aiding the vendee in using and selling the same for any purpose forbidden by the law of Iowa, and he is not, therefore, open to the charge of attempting to introduce liquors into Iowa to be used as a beverage, which use it is the sole purpose of the prohibitory law to prevent. He had delivered to the vendee liquors which had a legal and actual value in Iowa in the hands of the vendee, to be used for lawful purposes. The contract of sale he could not enforce in Iowa, but did the invalidity of the contract caused by the lack of a permit to sell on part of the vendor so far destroy his rights in the liquors that he might not afterwards lawfully receive payment therefor, voluntarily made in the state of Illinois? If he could lawfully receive payments, certainly the amount paid cannot be recovered back in an action brought by the payor.

It seems to me that the proper construction of section 1550 does not justify a right of recovery under such circumstances, and that this section is intended to apply only to payments made for liquors sold to be used as a beverage. The latter view of the section, however, is not sustained under the decision in *Becker* v. *Betten*, and the query is whether the doctrine therein announced is to be extended to cover payments made beyond the boundaries of the state to parties not subject to the laws of the state. This exact question arises upon the record in this case, because it is shown by the pleadings that the plaintiffs are citizens of Illinois, and that the payments sought to be recovered back were made to them, and therefore presumably in Illinois.

Understanding that counsel purpose carrying the constitutional question presented by the demurrer to the answer to the court of final resort, it would seem best to have all the questions in the case decided at once, and to that end the demurrer to the counter-claim will be sustained.

BECKER v. HAYNES.

(Circuit Court, D. Massachusetts, January 14, 1887.)

1 INNKEEPERS—LIABILITY—GOODS FOR SALE—SPECIAL DEPOSIT FOR SAFE-KEEPING—Pub. St. Mass. CH. 102, § 12.

Under Pub. St. Mass. c. 102, § 12, where there is no evidence tending to show that the loss resulted from the willful default or neglect of the innkeeper or his servants, the innkeeper is not liable for the loss of a trunk belonging to a commercial traveler, and containing goods for sale, unless there was the special agreement or deposit for safe-keeping contemplated by the statute.

2. WITNESS-IMPEACHMENT-FAILURE TO MAKE CONSISTENT STATEMENT. The admissibility of testimony, for the purpose of impeaching a witness, by showing his failure to make statements consistent with his testimony, is in the discretion of the trial judge, subject to the power of the court to grant a new trial, if it should appear on a review of the testimony that there was no ground for the inference that the witness whose credibility was in issue would have made the statements in question to the impeaching witnesses, if

At Law.

they had been true.

Ball, Storey & Tower, for plaintiff. Prentiss Cummings, for defendant.

CARPENTER, J. This is the plaintiff's motion for a new trial of an action at law brought against the defendant, who is an innkeeper, to recover damages for the loss of a package of merchandise. The statutes of Massachusetts exempt innholders from liability for the loss of goods, which are not personal baggage and effects, unless such goods shall be delivered by the traveler to the innholder for sake-keeping. 102, § 12. The testimony showed, without contradiction, that one Weilli, the servant of the plaintiff, came to Boston by rail, having in his possession a trunk full of valuable goods of the plaintiff for sale; that he delivered the trunk to the agent of an express company to be transported to the defendant's inn, taking therefor a paper, check, or receipt; that he proceeded to the defendant's inn, and registered his name, and was assigned to a room, and delivered to the clerk the paper, check, or receipt, with the statement that it was a check for his trunk which would shortly arrive; that the agent of the express company brought the trunk to the inn, and deposited it with others on the sidewalk in front of the inn, having first summoned the porter by ringing a bell; that this method of delivering the trunk at the inn was the method which was usually practiced in such cases, as was well known to the defendant: and that the trunk was never brought into the inn, but was stolen from the sidewalk. Weilli testified that when he delivered the check to the clerk he told him that it was the check for a trunk containing valuable goods, and put the trunk under his care for safe-keeping, and that the clerk accepted the trust. The clerk denied that the trunk was so intrusted to him. The jury found a verdict for the defendant.

The first ground of the motion is that the presiding judge instructed the jury that the plaintiff must prove a special agreement for the safekeeping of the trunk, whereas the jury should have been instructed that, if the trunk was lost by the carelessness or negligence of the defendant, the plaintiff is entitled to recover. In answer to this, it is sufficient to say that the trunk came into the custody of the defendant only in his capacity as an innkeeper, and therefore with no other liability except such as attached to him in that capacity. He was not liable for the loss, however incurred, unless there was the special agreement or deposit contemplated by the statute. There was no evidence tending to show that the loss resulted from the willful default or neglect of the defendant or of his servants.

The second ground of the motion is that "the court misdirected the jury in matter of law, in that the court should have instructed the jury that, if they should find that the trunk was delivered at the hotel, and the plaintiff's agent. Weilli, had no opportunity after the arrival of the trunk to deliver it to the hotel people for safe-keeping, the plaintiff is entitled to recover. But the court, though thereto requested by the plaintiff, declined so to rule." There is, doubtless, good authority for holding that in a case like this the innkeeper is holden under his general liability until a reasonable time has elapsed within which the traveler may deliver the goods for safe-keeping. But the plaintiff is not entitled to the benefit of this rule. The jury were instructed that, on the undisputed evidence in the case, the trunk was delivered to the defendant. The only question left to them was whether or not it was delivered under a special deposit for safe-keeping. There was, as has been stated, a dispute between the witnesses as to whether such special deposit has been made; but there was no doubt that there was ample time and opportunity in which such a deposit might have been made. The jury were instructed that the plaintiff was entitled to the verdict if they believed that Weilli, when he delivered the check to the clerk, stated to him, as he testified he did, that it was a check for a valuable package, which he desired to be held in safe-keeping, and that the clerk accepted the trust.

The third ground of the motion is that "the court should have ruled that, upon the undisputed testimony in the case, the trunk was delivered to the hotel." This statement is, perhaps, grounded on a misapprehension of the charge. The jury were instructed on this point precisely as desired by the plaintiff. The credibility of the witnesses, indeed, was left to the jury; but they were told that, if they believed the uncontradicted witnesses, they should find that the trunk was delivered to the defendant. I think this instruction is as favorable as the plaintiff could rightly ask.

The fourth ground of the motion is stated in the motion as follows:

Fourth. That the court admitted incompetent testimony in behalf of the defendant therein, in that Weilli, a witness in the plaintiff's behalf, having testified that, on the night of his arrival at the defendant's hotel, he had a conversation with McKeen, the defendant's clerk, in substance as follows: "I told him that I (Weilli) was in the hair business; that I would like a stock room. McKeen replied that several hair men stopped there,—Mr. Kimball and Mr. Weiss,—and suggested that I take a reception room in front of the office, stating that the goods would be perfectly safe in there; that he would

assign me a room on the first floor, temporarily, as I decided that I would not let him know until morning. McKeen said that they had other sample-rooms; but that the trunk was very safe in there. I had some conversation with him as to who were the best dealers. I said that I had a valuable stock, and that I wanted it to be perfectly safe; that it might be sent to my room or kept in the office. He said he would take care of it. I don't think I stated any special amount. I stated that they were very valuable goods. He said he knew that, because both Kimball and Weiss stopped there. He said that they were perfectly safe in that room. There was conversation that the trunk was to be sent to my room or to the office. It depended on how soon it got there. If brought before a short time, I should like to have it sent to my room; if not, he would take care of it during the night." That, Weilli having so testified, the court, against the plaintiff's objection, permitted the defendant to show, by certain witnesses called in the defendant's behalf, namely, Webber and McKeen and McCausland and Frank, the two latter being police officers in the employ of the city of Boston, that, while they were endeavoring to find the contents of the trunk, and to discover the persons supposed to have stolen it, they had conversations with Weilli in relation to the loss of the trunk, and that Weilli did not mention to them the conversation with the clerk above set forth to which Weilli had testified; but they were unable to recall what those conversations between themselves, respectively, and Weilli were.

The contention of the plaintiff is that, although it is competent to contradict a witness by proving statements made by him inconsistent with his statements on the stand, yet it is not admissible to prove his failure to make consistent statements, unless it appears that the circumstances were such that the witness, if his testimony were true, would naturally have stated the facts. Perry v. Breed, 117 Mass. 155. I take the doctrine of that case to be that the admission of evidence such as that here stated is in the discretion of the trial judge, subject to the power of the court on motion to grant a new trial, if it should appear, on a review of the testimony, that there was no ground for the inference that the witness would have made the statement in question, if it had been true. seemed to me when I tried the case that there was good ground in the testimony for such an inference. I have now carefully reconsidered the whole case, referring to such parts of the testimony as are reported to me by the plaintiff, and also to my own notes and recollection, and I see no reason to change my opinion.

The fifth ground of the motion is that the verdict is against the evidence and the weight of evidence. The whole testimony, as already intimated, is not reported to me; but there can be no doubt, I think, that the only question on which the jury could have hesitated was the question of veracity between Weilli and McKeen. On this question it seems to me there was, to say the least of it, no preponderance of evidence for the plaintiff.

The motion must therefore be denied.

United States v. Bergenthal.

(District Court, E. D. Pennsylvania. December 18, 1886.)

INTERNAL REVENUE-BOND OF INDEMNITY-JUDGMENT.

The goods of A. were seized for a breach of the revenue laws. He gave a bond conditioned to abide the judgment of the court, and pay the amount named therein, or the appraised value of the goods, upon condemnation. He was convicted of the criminal offense which caused the seizure, and subsequently pardoned. In a proceeding to condemn the goods, the pardon was pleaded as a full and sufficient answer to the claim. This was denied, and a judgment of condemnation entered. A. did not comply with the judgment of the court, and pay the amount of money required, and judgment was consequently entered upon the bond. Defendant moved to open the judgment on the ground that the court erred indenying the sufficiency of the pardon. Held, that that question could not be raised in a suit upon the bond, and that while the judgment of condemnation stands unsatisfied, the obligation to pay is absolute, and cannot be avoided.

Sur Motion to open judgment, and let the defendant into a defense. John K. Valentine, U. S. Dist. Atty., for plaintiff. David W. Sellers, for defendant.

BUTLER, J. The object of the bond of the petitioner was the release of the property seized, and the substitution for it of the money secured. The condition of the bond is that the principal, Bergenthal, shall abide the judgment of the court, and, on condemnation of the property, shall forthwith pay the money secured by the bond, or the appraised value of the property condemned. This condition was broken. The property was condemned, and Bergenthal did not abide the judgment of the court, and pay the money required. Judgment was consequently entered on the bond in pursuance of the authority accompanying it. petitioner now seeks relief, principally on the ground (in effect) that the property should not have been condemned; that the pardon granted Bergenthal for the criminal offense of which he was convicted in the state of Wisconsin (and on account of which the property was seized and the condemnation claimed) was a full and sufficient answer to the claim. This answer was, however, set up as a defense in the forfeiture proceedings, was fully considered by the court, and its sufficiency denied. is now urged that this decision was erroneous,—shown to be so by more recent decisions of the courts. It would seem quite plain, however, that the question could not be raised in a suit upon the bond, and cannot, therefore, properly be considered in this application. The remedy for such error, if it existed, was by review in the circuit court. While the judgment of forfeiture stands unsatisfied, the petitioner's obligation to pay is absolute, and cannot be avoided. The judgment cannot be attacked collaterally.

The alleged understanding and expectation with which the bond was signed, based upon conversations with the collector or others, could not

¹ Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

be heard as a defense to the bond, and consequently cannot be considered The petitioner was dealing with the government, and his contract is written in the bond. This contract can neither be diminished nor enlarged by anything that may have been said respecting its object or effect, or the subsequent disposition of the property or course of proceeding. Neither fraud nor mistake is alleged. The contract, as we have seen, requires payment on condemnation of the property, (no matter for what cause condemned.) and failure of Bergenthal to satisfy the judgment. The circumstance that the property released was immediately again seized for taxes due by Bergenthal elsewhere is not important. It was released in pursuance of the acts of the parties, and in consequence of the execution of the bond; but was immediately reseized on account of the indebtedness referred to, and applied to Bergenthal's relief in that respect. Of this seizure and application of the property neither Bergenthal nor the petitioner can complain. The petitioner's disappointment, from failure to obtain control of it, as he expected, no matter how the expectation arose, constitutes no answer to the government's claim on the bond.

The rule must be discharged.

STILES v. RICE and others.

(Circuit Court, D Massachusetts. January 13, 1887.)

PATENTS: FOR INVENTIONS—REISSUE No. 2,542—CLAIM BROADER THAN ORIGINAL—OMISSION OF LIMITING ELEMENTS.

Held that the first claim of reissued patent No. 2,542, issued April 2, 1867, to Norman C. Stiles, for metal punch, is invalid by reason of making a broader claim by omitting two of the limiting elements of the original patent, (No. 41,403, dated January 24, 1864,) viz., the pitman to which the adjusting pitman is attached, and the clamp by which the eccentric is held in place.

Action at law to recover damages for the infringement of letters patent. J. L. S. Roberts, for complainant. J. E. Maynadier, for defendant.

CARPENTER, J. In my consideration of this case I have had occasion to examine three questions. The first relates to the validity of the reissued patent on which the action is brought; and this question must be determined in accordance with the finding on the subsidiary question whether the reissue can bear the narrow construction for which the plaintiff contends. The second question is whether, assuming the plaintiff's construction of the patent, there be patentable novelty in the invention. These questions have been argued with much learning and force, and with the assistance of ingenious statements of expert witnesses. The consideration of the case has occupied more time than would have been required if I had earlier reached a conclusion on the single point, on which, I am now satisfied, the case must be decided.

The case is an action at law, heard by the court, without a jury, and is brought to recover damages for the infringement of the first claim of reissued patent No. 2,542, issued April 2, 1867, to Norman C. Stiles, for metal punch. The original patent was numbered 41,403, and dated January 24, 1864; and the first reissue was numbered 2,139, and dated December 26, 1865. The claim in question, as it is contained successively in the original and in the two reissues, is as follows:

First. The compound eccentric, D, consisting of an eccentric wrist pin, a, adjustable disk, b, and clamp, d, or its equivalent, in combination with the pitman, F, constructed and operating in the manner and for the purpose sub-

stantially as set forth.

First. The compound eccentric, D, consisting of an eccentric wrist pin, a, adjustable disk, b, and clamp, d, or its equivalent, constructed and operated

in the manner and for the purpose substantially as set forth.

1. I claim the eccentric wrist pin, α , and turning part, b, or its equivalent, constructed and combined as described, to operate the punch at different levels, substantially as and for the purpose herein set forth.

The first defense is that the reissue is not valid, because it is for an invention broader than that claimed in the original patent. The first reissue, as will be seen by a comparison of the claims, omits from the combination the pitman to which the adjusting eccentric is attached: and the second reissue omits also the clamp by which the eccentric is held in place. The case, therefore, on its face, presents an example of a reissue which makes a broader claim by omitting two of the limiting elements of the original patent. In the present state of the law, such a reissue must, of course, be held to be invalid. But the plaintiff contends that the descriptive part of the specification in the reissue makes the pitman and the clamping device an operative part of the combination: and he then contends that the claim contains such a reference to the descriptive part of the specification as will carry these elements into the claim. It is a little difficult to understand precisely on what part of the claim this contention is based. The words, "constructed and combined as described, to operate the punch at different levels," seem to me to refer solely to the construction and combination of the elements which are explicitly stated in the claim. I think, however, that the plaintiff means to be understood that the pitman and clamping device, exactly as described by him, are to be imported into the claim by construction, as being necessary to the functional operation of the device which is described in the claim. Against such a construction there are two objections either of which appears to me to be fatal.

First. I am not prepared to hold that the patentee, after he has omitted the elements from his claim by a reissue, can be permitted to insist

that they be brought back by construction.

Secondly. The construction for which the plaintiff asks is a construction by necessity, and cannot be carried further than is called for by the necessity. He says that his claim must be limited by taking such elements from the specification as will make his claim cover an operative device. But even if he can prevail to this extent, he certainly cannot be permitted to limit his claim any further than is necessary to make it

describe an operative mechanism. Looking, then, at the pitman alone, and assuming that the plaintiff may import that element into the claim to the extent above indicated, it is evident that he can be permitted only to hold that the eccentric is attached to a pitman or equivalent device. He cannot be permitted to say that the claim implies that the eccentric is placed at either end of the pitman to the exclusion of the other end. His patent will therefore cover an eccentric attached to a pitman.

Having thus determined the construction to which, in the most favorable view for him, the plaintiff is entitled, it becomes necessary to look at the prior state of the art, as shown by the evidence. It is proved, without contradiction, that punching-machines had been built by Timothy F. Taft, and had been in public use as early as the year 1862, in which there was an adjusting eccentric attached to the wrist pin, or slide pin at the lower end of the pitman. These machines undoubtedly anticipate the claim, if the claim be construed as I think it must be construed.

In view of the whole case, in short, the plaintiff cannot prevail, unless he can be permitted, by construction,—First, to import a limitation into his claim, in order to bring the device which he claims within the class of operative devices, according to the description in the specification; and, secondly, to import a further limitation into the claim in order to bring his device within the class of patentable novelties, in view of the prior state of the art. This last limitation seems to be clearly inadmissible. A limitation introduced by construction must be based on the express words of the instrument, and must stand in the same terms in which it is introduced. If it were permitted to base one constructive limitation on another constructive limitation, the process might be repeated indefinitely, and the claim of every patent would thus be limited, not by the terms of the claim, but solely by the limits of possible invention in the particular class of devices to which the patent relates.

I hold, therefore, that the first claim of the reissued patent is invalid,

and that judgment must be for the defendant.

STEAM-GAUGE & LANTERN Co. and another v. St. Louis Ry. Supplies Manuf'G Co. 1

(Circuit Court, E. D. Missouri. December 13, 1886.)

PATENTS FOR INVENTIONS—INFRINGEMENT—LANTERNS.

Lanterns constructed according to the specification of letters patent No. 246,774, granted to Joseph Heith for an improvement in lanterns, do not infringe either letters patent No. 104,318, granted June 14, 1870, to John H. Irwin, for an improvement in lanterns, or letters patent No. 151,703, granted June 9, 1874, to the same person, for an improvement in lamps.

In Equity.

¹ Edited by Benj. F. Rex, Esq., of the St. Louis bar.

Suit for the alleged infringement of letters patent No. 104,318, granted June 14, 1870, to John H. Irwin, for an improvement in lanterns, and letters patent No. 151,703, granted to the same person, June 9, 1874, for an improvement in lamps. The defendant's lantern is constructed in accordance with the specification of letters patent No. 246,774, granted September 6, 1881, to Heith.

B. F. Thurston, E. S. Jenny, and Hough, Overall & Judson, for com-

plainants.

Paul Bakewell and J. G. Chandler, for defendant.

TREAT, J. This case has been kept under consideration, not from any intrinsic difficulty, but in the expectation that many other cases involving like controversies might be presented, so that all of them might be determined without needless repetition. Inasmuch, however, as that result cannot be effected, it becomes the duty of the court to decide the only case now submitted to it. There is really no question as to the validity of the patents on which complainants rest their demand. original conception by Irwin looked to the use of an ascensive current from the globe, with a supply of atmospheric air which would feed the air cup. This arrangement would prevent the extinguishment of the flame by puffs of air, vertically or otherwise, and still preserve a fresh supply of air to the burner. It is obvious, however, that that plan caused the partially-consumed air to enter into the feed supply, thus diminishing its requisite force. The problem was to have in a globe lantern the ascensive current operate with an injector, so as to feed the flame by an irreversible current. It having been ascertained that the object to be effected could not thus be accomplished, patent No. 104,-318, dated June 14, 1870, was obtained. That patent specified an annular chamber, with fresh-air inlets as described therein. In it the ascensive current is discharged into the open air with deflecting plates, to prevent the extinguishment of the flame in the globe. It is supposed by the patentee that the fresh-air supply below the annular chamber, in its connection with the deflecting plates of the hot-air discharge, should occupy relative distances each to the other. The annular chamber, with its relative distances as to the air discharge and the cold-air feed, seems, in the progress of the art, to have been deemed not essential. Hence a new patent was had, viz., No. 151,703, dated June 9, 1874, for an open-air supply, disconnected from an annular chamber, with an injector at the end of each tube.

It is obvious that all these experiments by Irwin and others looked to two results: First, the non-extinguishment of the light in the lantern by vertical or lateral puffs; and, second, by a full supply of fresh air to feed the flame, while its non-extinguishment was secured. The first patent, No. 89,770, dated May 4, 1869, not being effective, the second patent, No. 104,318, dated June 14, 1870, was obtained, with its annular chamber; and, that not being practically operative, patent No. 151,703, dated June 9, 1874, was had. Without disputing the validity of the aforesaid patents, this court is called upon to decide whether the defend-

ant's devices infringe upon either the first claim of patent No. 104,318, or the first and second claims of patent No. 151,703. Certainly, the defendant's lantern does not have the annular chamber. The devices by defendant to effect the desired end are mechanically and otherwise entirely distinct from complainants' patents. Hence, as complainants' right of action depends upon the infringement by the defendant of their patented devices, it becomes necessary to ascertain whether the defendant's devices are mechanical equivalents of the complainants'. There may be many modes of effecting a desired result, and each patent, like these, must rest on their mechanical devices therefor. The two ends to be sought were the non-extinguishment of the flame through the globe while the lantern was oscillated, and at the same time furnish a full air supply for the flame. As already indicated, Irwin received patents for devices to effect those ends. The defendant, however, uses none of those devices: it effects the desired result by other and different methods from those indicated in the complainants' respective patents. Hence the cause is dismissed.

CONSOLIDATED BUNGING APPARATUS Co. v. WOERLE.

(Circuit Court, N. D. Illinois. January 4, 1887.)

1. PATENTS FOR INVENTIONS—JOINT INVENTION—EVIDENCE.

The mere fact that two or more persons unite in an application for a patent, as the product of their joint inventive efforts, creates a very strong presumption that the device sought to be patented is the result of their united ingenuity, and to overthrow this presumption the evidence should be clear and unequivocal; citing Gottfried v. Phillip Best Brewing Co., 5 Ban. & A. 9.

2. SAME—FORMAL DEFENSE.

The defense that two persons to whom a patent has been issued were not in fact joint inventors, is so purely formal that it cannot be regarded with favor, unless it be shown that the action of the patentees in that regard was disingenuous, or calculated to mislead the defendants; citing Butler v. Bainbridge, 29 Fed. Rep. 142.

8. Same—Who are Joint Inventors.

If one conceives the entire invention, and another makes a suggestion of practical value which the first one failed to think of, but which is needed to make the conception a success, this will be sufficient to constitute them joint inventors.

4. Same—Prior Use—Patent Relates Back.

Where the defendant attempts to defeat a patent by showing that the patentee was not the original discoverer of the thing claimed, the patent will, for the purpose of meeting of such proof, be considered as relating back to the date of the original discovery; citing Dixon v. Moyer, 4 Washb. C. C. 68, and other cases.

5. SAME-WHAT CONSTITUTES.

An old device will not be considered sufficient to defeat a patent, when its construction is such that radical changes and additions would be required before it could be made to perform the work of the patented device satisfactorily.

6. SAME-THE ZWIETUSCH AND HEITMAN PATENT.

The distinguishing feature of the Zwietusch and Heitman patent of December 23, 1879, for automatic pressure relief apparatus for beer vessels, stated to be its water chamber or chambers, and such patent held to be valid, and to be infringed by the Woerle bungs.

v.29f.no.10-29

In Equity.

Banning & Banning, for complainant.

West & Bond, for defendant.

BLODGETT, J. The bill in this case charges infringement of patent No. 222,975, granted December 23, 1879, to Otto Zwietusch and Edward Heitman, (Zweitusch being assignee of Heitman,) for an "improvement in automatic pressure relief apparatus for beer vessels." The object and scope of the invention, as set out in the specifications, is said to be "to provide an automatic pressure relief valve, adapted to be used on fermenting casks containing beer and like material, which will not foul, and whereby the automatic action of the valve is made more certain; and our invention consists—First, in a pressure relief apparatus provided with a mechanical fit valve, surrounded by a body of water; and, secondly, in a pressure relief apparatus having a body of water interposed between the pressure generator and a mechanical fit valve in the line of the escaping gas, and through which it passes. * * * In the overflow from beer barrels under fermentation is a thick adhesive material called 'hop tar,' which seriously interferes with the operations of any ordinary valve mechanism to which it has access. Our device is particularly adapted to obviate this difficulty, for we surround the valve with a liquid medium, preferably water, whereby the hop tar is diluted, so as not to stick the * * * We make no claim broadly, in this application, to holding beer, during the process of brewing, under an automatically controlled pressure, for any purpose, for such is not our invention."

Briefly described, the apparatus covered by the patent is an arrangement of pipes and water chambers, so that the gas from the fermenting beer will pass through a body of water on its way to the valve, and into and through another body of water, as it escapes through the valve, by which, as is claimed, the hop tar is so diluted as to prevent it from adhering to the valve and valve-seat, and thus obstructing that delicate and nice operation required to properly regulate the fermenting pressure.

Infringement is only insisted upon as to the first claim of the patent, which is:

"In an automatic pressure relief apparatus, a mechanical fit valve, in combination with a surrounding chamber, K, for containing water to prevent the valve fouling, for the purpose set forth."

The defenses interposed are (1) that the patentees were not joint inventors; (2) two years prior' public use; (3) that the first claim is void for want of novelty.

As to the first defense, the proof shows that Heitman conceived the idea of a device to accomplish the object of the apparatus, and had some experimental valves made which embodied the general features of the apparatus, but they did not work satisfactorily; the main difficulty being in getting the valve so seated that it would not leak when weighted only to resist the comparatively slight pressure of the gas in a fermenting cask. To aid in overcoming the practical difficulties he had encountered, Heitman called in the assistance of Zwietusch, who suggested

a valve with a knife-edge bearing, working against a rubber packing in place of the flat or broad-seated bearing used by Heitman, and the proof shows that, by the adoption of Zwietusch's suggestion, the difficulty was

overcome, and the apparatus worked successfully.

When two persons are jointly engaged in the work of invention, it must always be extremely difficult to determine how much of the successful result is due to each. The mere fact that two or more persons unite in an application for a patent as the product of their joint inventive efforts, certainly creates a very strong presumption that the device is the result of their united ingenuity. It may be that the conception of the entire device is due to but one of them; but the other makes a suggestion of practical value in working out the idea, and making it operative. But that suggestion may be the very thing the first one failed to think of, and which was needed to make the conception a success. pertinently said by Judge Dyer in Gottfried v. Phillip Best Brewing Co., 5 Ban. & A. 9: "To overthrow the presumption of joint invention created by the filing of a joint application upon a joint oath, the evidence should be clear and unequivocal." So in the case of Butler v. Bainbridge, 29 Fed. Rep. 142, lately decided by Judge Coxe, it is said: "The defense that two persons to whom a patent has been issued were not in fact joint inventors, is so purely formal that it cannot be regarded with favor, unless it be shown that the action of the patentees in that regard was disingenuous, or calculated to mislead the defendants."

It is urged that Zwietusch invented nothing, because, it is said, he took the mechanical fit valve or the knife-edge bearing valve found in the Slandeman patent of June 11, 1878, which was owned by himself, and put it into the Heitman device; but this seems to me to be enough. It is not claimed that Zwietusch invented the knife-edge bearing valve, and the claim of the patent is for the combination of such a valve with the water chambers which Heitman had invented. Heitman's water chamber alone, or with such a valve as he had used, was inoperative, although it may be said that the valuable feature of the invention was the water chambers; but it required the knife-edged valve, and the combination of this valve with what Heitman had done, to make the operative device shown in the patent. This seems to me to be clear proof of the joint efforts of the two patentees in the production of the complete machine.

The defense of two years' prior use rests on proof tending to show the use of valves operating with a water chamber to regulate the escape of gas from beer casks at Brand's brewery, in or near this city, and the proof only carries such use back to the eleventh of November, 1878, while the complainant's proof shows that the device covered by the patent was complete and in use as early as the twenty-first of September, 1878, and the application for the patent was filed December 7, 1878. This proof brings the case within the rule that, if the defendant attempts to defeat the patent by showing that the patentee was not the original discoverer of the thing patented, the patent will, for the purpose of meeting such proof, be considered as relating back to the original discovery. Dixon

v. Moyer, 4 Washb. C. C. 68; Smith v. Goodyear D. V. Co., 93 U. S. 486; Bates v. Coe, 98 U. S. 34. Reeves v. Keystone Bridge Co., 5 Fish. 462;

Draper v. Potomska Mills Corp., 3 Ban. & A, 215.

I will also add that this proof of prior use at Brand's brewery is extremely unsatisfactory, resting only in the unassisted recollection of the witness Walther. The valve which is shown to have been used at Brand's was evidently not organized or intended to be used with water in the pipes; and if Walther put water in the pipes of the valves so used at Brand's, as he swears he did, I think it must have been merely for experiment. At the time he says he so used this relief valve with water, the Zwietusch and Heitman device had become known to brewers, and was in use in Milwaukee, and probably had been shown to brewers in Chicago, and I think the effort was to make this old relief valve do the work for which the complainant's valve was intended.

As to the last point, that the first claim of the patent is void for want The distinguishing feature of this patent, and what gives it utility, is the water chamber or chambers, through which the gas and other overflow of fermentation is passed on its way through the valve, by which the pressure is regulated, and thereby prevents the valve from sticking, and secures the nice and sensitive operation of the valve which is needed in order to secure the proper fermentation and finish of the None of the devices referred to as anticipatory of this patent show this feature as a part of their construction. The old "relief valve" with which water may have been used, as I have before said, as an experiment after the complainant's device had become known, and the utility of water, or some liquid, to preserve the fluidity of the hop tar had become known, was evidently not designed or intended for the use of water. That to some extent it approximates to the form of complainant's device is obvious, but it is equally obvious that, had the idea of using water in connection with the valve for the purpose designed by this patent been in the mind of the constructor of this old valve, the form and arrangement of some of its parts would have been materially changed. structed and used to regulate the pressure of steam or water in a boiler or tank, it did not require a water chamber; and the suggestion that it becomes the complainant's device by filling the escape-pipes with water is one that only comes after the utility of the complainant's water chamber is shown by this patent. So that this relief valve, as constructed for use on a steam-boiler, or to relieve a water or steam pressure, does not, in my opinion, anticipate the complainant's device, and would undoubtedly require radical changes and additions before it could perform the work of the patented device satisfactorily.

As has been before said, this first claim is for a mechanical fit valve, in combination with the water chamber, and the record is barren of proof that a water chamber was ever used, or arranged to be used, around a valve for the purpose of this device, or that a water chamber and valve were ever used for the purposes of this patent, before Heitman began his experiments, which resulted in the Heitman-Zweitusch invention. With the proof before me, I think there can be only one finding

on this point, and that is that the combination of the valve and water chamber covered by this first claim was the invention of these two

patentees.

From the tenor of the argument in behalf of the defendant, I conclude that it is, at least, tacitly admitted that the defendant's device is an infringement of complainant's patent. Complainant's proof shows the infringement, and I think it needs but an inspection by even an unskilled person to see that it contains a mechanical fit valve acting in combination with a water chamber. It is true the defendant's device contains only one water chamber, into which the gas escapes as it passes the lips of the valve, while the patent describes a device with a water chamber below and above the valve; but I think the change is merely colorable, and the defendant's device is certainly within the first claim of the patent. It certainly shows a mechanical fit valve in combination with a surrounding chamber for containing water, and this claim seems to me a valid claim under the proof.

There will be a decree finding that defendant infringes the complainant's patent as charged, and for an injunction and accounting as prayed.

STEAM-GAUGE & LANTERN Co. and others v. Rogers and others.

(Circuit Court, D. Massachusetts. December 27, 1886.)

1. Patents for Inventions—Infringement—No. 244,944.

Patent No. 244,944, to Joseph B. Stetson, dated July 26, 1881, for device raising the glass globes of lanterns, contains an upper plate above the globe, with a central draft-tube that bends over and comes down to the bottom of the lantern, as two tubes, one on each side. Beneath the glass globe is a perforated plate, connected with the upper plate by wires supported laterally by guides on the side draft-tubes, so that, when the upper plate is raised, the globe is raised with it. The raising and lowering are effected by a wire spring attached to the upper plate, and curved to form a thumb-piece. Defendant's lantern has the side-wires hooked into the perforated plate, instead of wound round or under it; and, in place of guides, they are supported laterally by being bent partly round the side tubes. The spring connecting the upper plate to the globe is somewhat different in form; otherwise it is an exact counterpart. Held, an infringement.

SAME—NOVELTY COMPARED WITH OTHER PATENTS.
 The above patent compared with Ford's, No. 117,899, dated July 25, 1871;
 Colony's, No. 200,176, February 12, 1878; Betts', No. 218,917, August 26, 1879;
 Irwin's, No. 89,770, May 4, 1869; and Beidler's, No. 187,085, February 6, 1877;

and held not void for want of novelty.

In Equity.

E. S. Jenney, for complainant.

E. J. O'Brien, for defendant.

Nelson, J. The plaintiff's patent, No. 244,944, granted to Joseph B. Stetson and his assignees, July 26, 1881, is for new and useful improvements in lanterns, and relates to devices for raising, supporting,

lowering, and securing the glass globe or shade of a lantern, in order to fill, trim, light, or extinguish the lamp. In the language of the specification, the invention "consists in a portable lantern having a globe-supporting frame, and provided with wire, or other suitable connections, adapted to raise and lower the globe relatively to the surrounding frame. It also consists in such devices, in combination with a spring or lock adapted to support the lantern-globe in its raised position, and to secure it in its lowered condition. It also consists in the further devices, and combinations of devices, set forth in the appended claims." The more important features of the invention, as they are set forth in the specification and drawings, and appear in the exhibits in the case, are these: The upper concave plate or disk of the lantern, which serves to direct the current of heated air upwards, is attached to the upper part of the globe by a wire spring, and has a vertical movement on the central The upper plate and the lower perforated plate on which the globe rests, are connected together by wires supported laterally by guides on the side draft-tubes, so that when the upper plate is raised the globe is raised with it. The raising and lowering is effected by a wire spring attached to the upper plate, and curved to form a thumb-piece. This spring, and the friction of the parts, serve to hold the globe in position when raised. The globe is made removable by means of the spring connecting it with the upper plate. The combination of the lifting device with the other parts of the lantern is what is secured by the The first and second claims are as follows:

(1) In a lantern having a globe-supporting frame, the vertically adjustable plate, C, carrying a spring, E, adapted to hold or release the globe, as desired, in combination with the globe, the perforated plate on which it rests, the connecting rods, F, F, serving to unite the top and bottom plates, and suitable guides, adapted to give lateral support to the lower part of the globe, substantially as set forth.

(2) The tubular frame, D, D, and the globe, G, in combination with the plates, C, p, the connecting rods, F, and the guides, H, whereby said globe is raised and lowered by a suitable lever, and guided or steadied laterally in

its movements, for the purpose set forth.

The great utility of the invention is obvious upon inspection. It is also proved by the immense number of the lanterns sold by the plaintiffs, exceeding 65,000 dozen annually, as also by the extensive imitations by other manufacturers. It is not a mere aggregation of parts, as claimed by the defendants, but a patentable combination, in which all the parts co-operate to produce a new and useful result. A single one of the parts being absent, the raising of the globe, and the retaining it in position when raised, which is the result to be obtained, would be impracticable with the others.

There is no pretense that the invention is invalid for want of novelty, unless it is showed in one or more of the five following patents: Ford's, No. 117,399, dated July 25, 1871; Colony's, No. 200,176, February 12, 1878; Betts', No. 218,917, August 26, 1879; Irwin's, No. 89,770, May 4, 1869; and Beidler's, No. 187,085, February 6, 1877. So far as I have been able to discover from an examination of the specifications and

drawings of these patents, without the help of exhibits embodying the inventions described in them, no one of them contains the Stetson lifting apparatus, or anything resembling it. Some of the parts of the combination appear in all the patents, but the sliding upper disk, and the side-wires supported on guides, are not to be found in any one of them. So far as these patents are concerned, the Stetson invention is certainly new.

The defendants' lantern differs from the plaintiffs' only in the following particulars: In the former the side-wires are hooked into the lower perforated plate, instead of being wound round or under it; and, in place of guides, they are supported laterally by being bent partly round the side-tubes. The spring connecting the upper plate to the globe is also somewhat different in form from that showed in the drawings of the patent. In all other respects it is an exact counterpart. These differences are evidently variations in form only, and not in substance. They are mechanical equivalents for the corresponding parts in the Stetson lantern, and perform the same functions, in substantially the same way. They are not sufficient to save the defendants' lantern from being an infringement of the first and second claims of the plaintiffs' patent.

Decree for the plaintiffs.

ELECTRIC GAS-LIGHTING Co. v. BOSTON ELECTRIC Co.

(Circuit Court, D. Massachusetts. December 24, 1886.)

 PATENTS FOR INVENTIONS—REISSUE No. 9,743—ELECTRICAL APPARATUS FOR LIGHTING STREET LAMPS.

Claims 2 and 5 of reissued patent No. 9,743, granted to Jacob P. Tirrell, assignee, dated January 7, 1881, for electrical apparatus for lighting street lamps, held void, because broader than those of the original patent. Electric Gaslighting Co. v. Tillotson, 21 Fed. Rep. 568, and Same v. Smith & Rhodes Electric Co., 28 Fed. Rep. 195, followed.

2. SAME—INFRINGEMENT.

In a suit for infringement of the above patent the plaintiff claimed: "In an apparatus for lighting gas by electricity, in combination with a circuit-breaker located at the gas burner, a lever adapted and arranged to open and close the stop-cock or valve of the burner, and carrying the circuit-breaker." In defendant's apparatus two armatures operate to open and close the gas valve, but there is no separate lever to open and close the valve and carrying the circuit breaker. Held, no infringement; the construction and mode of operation of the two devices being entirely different.

In Equity.

E. P. Payson, for complainant.

J. E. Abbott, for defendant.

COLT, J. This suit is brought on the Tirrell reissue patent, dated June, 7, 1881, and numbered 9,743. In *Electric Gas-lighting Co.* v. Tillotson, 21 Fed. Rep. 568, and in *Electric Gas-lighting Co.* v. Smith & Rhodes Electric

Co., 23 Fed. Rep. 195, Judge Wheeler held the second and fifth claims of the reissue to be void, on the ground that these claims were broader than those of the original patent. I have carefully considered these opinions, and concur in the views therein expressed. The new evidence brought forward by complainant in this case does not tend to overthrow the conclusions of Judge Wheeler, because it is apparent, upon a comparison of the original patent with the reissue, that these claims are void under the authority of Miller v. Brass Co., 104 U. S. 350, and subsequent cases.

The only remaining question is whether defendant infringes claim 4 of the reissue, which is in substance the same as claim 2 of the original.

The claim is as follows:

"In an apparatus for lighting gas by electricity, in combination with a circuit-breaker located at the gas-burner, a lever adapted and arranged to open and close the stop-cock or valve of the burner, and carrying the circuit-breaker, substantially as herein described."

In defendant's apparatus, which is made after the Crockett patent, bearing date July 17, 1883, the two armatures operate to open and close the gas-valve, but there is found no separate lever to open and close the valve and carrying the circuit-breaker such as is described in the Tirrell patent. The defendant's device is so different in construction and mode of operation from that described in the fourth claim that it is clear there is no infringement. The bill must be dismissed, with costs.

CROCKER v. CUTTER TOWER Co.

(Circuit Court, D. Massachusetts. December 23, 1886.)

PATENTS FOR INVENTIONS—INFRINGEMENT—No. 16,312—Easel Design.

In an action for infringing patent No. 16,312, dated October 6, 1885, for a design for easels, the plaintiff's design consisted in the upright standards crossing at the upper ends, representing the stems and flowers of the cat-tail plant. Fasels made of the natural cat-tails thus crossing are old. In defendant's design, the standards are not crossed, but held together by a band. Held, no infringement, since the plaintiff was not the first to use cat-tails, and defendant's design did not infringe his specific device of crossing them.

In Equity.

C. H. Drew and W. B. Durant, for complainant.

C. C. Morgan and O. M. Shaw, for defendant.

Before Colt and CARPENTER, JJ.

COLT, J. This suit is brought upon letters patent No. 16,812, dated October 6, 1885, granted to the complainant for a design for easels. The leading feature of the design consists in the upright standards of the easel crossed near their upper ends, and representing the stems and flowers of the cat-tail plant or flag. The claim is as follows:

"The design for an easel herein shown and described, the same consisting of the upright standards of an easel crossing each other near their upper ends, and representing the stems and flowers of the cat-tail plant or flag."

Easels made of natural cat-tails crossing each other near their upper ends are old. In view of this, the Crocker design must be limited to the mode of crossing the standards described in the patent. In defendant's design the standards are not crossed, but they are held together near the top by a band, from which point, by bending, they are spread out so as to present a fan-like appearance. If Crocker had been the first to design an easel made of cat-tails crossing each other, it might properly be held that the defendant's design infringed from the general resemblance between the two. In view, however, of what was old, we have grave doubts whether the claim of the patent constitutes any invention; but, assuming the patentability of the design, we are clear that it must be limited to the mode of crossing the standards found in the specification and drawing, and, the defendant not using any form of crossing the standards, there can be no infringement, and the bill must be dismissed.

THE HATTIE M. SPRAKER.1

STEBBINS v. THE HATTIE M. SPRAKER, etc.

(District Court, S. D. New York. December 27, 1886.)

1. COLLISION—EAST RIVER NAVIGATION—TWO TUGS—TUG AND PIER—STATE STATUTES—FAILURE TO KEEP IN MID RIVER—OVERTAKING BOAT—CLOSE APPROACH TO OTHER STEAM-VESSEL—SHEER—CROWDING.

The tug S., going up the East river with a car-float in tow along-side, sheered to within 100 feet of the New York piers, preparatory to rounding to on the Brookly shore against the tide. The tug N., which was also coming up river nearer the New York shore, had followed the sheer of the S. towards New York, and, when close to the latter shore, found herself in a pocket, between the S. and the piers; and, being unable to back, for fear of being thrown against the piers, went ahead full speed, and ran into the end of Pier 42, whereby both the tug herself and the tow were damaged. Held, that the N. was in fault for violating the state statute, which required her to go as near mid river as may be; and also the statute which forbids a steam-vessel under way from approaching and passing another nearer than 20 yards. Held, further, that the S. was in fault for unjustifiably sheering, and crowding the N., without even a warning whistle. The damages were therefore divided.

2 EVIDENCE—SETTLEMENT OF CLAIM—SUBROGATION.

The settlement by a tug of her tow's claim for damages is evidence of fault on her part, in a subsequent suit by her against another vessel. Without fault or liability, there would be no subrogation on payment of the tow's demand. Being held liable, as in fault, she is entitled to recover half of the tow's damages.

In Admiralty.

A. B. Stewart, for libelant.

Carpenter & Mosher, for claimants.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

Brown, J. On the twenty-third October, 1885, the steam-tug Hattie M. Spraker, with a car-float about 200 feet long, lashed on her port side, was going up the East river, with a strong flood-tide, bound for Adams street, Brooklyn. She had passed under the Brooklyn bridge about onethird of the distance across from the New York shore, and, as she did so, sheered towards the New York shore, until at about Pier 36, she had run up to within 100 feet of the piers, when she put her helm hard a-port, for the purpose of rounding to on the opposite side of the river, against the tide. The libelant's tug, the D. K. Neal, had taken a canal-boat along-side at Pier 6, for the purpose of towing her to Newtown creek, and came up river at the same time as the Spraker, but a little nearer the New York shore. She had followed the Spraker's sheer to the westward, and, when abreast of Pier 38, partly lapping the Spraker, and within some four feet of her, and being also very near the New York piers, she found herself unable to back, lest she might be thrown against the piers with the strong set of the tide; and, in attempting to go ahead full speed, while the Spraker was rounding, ran against the end of Pier 42, which projected further into the river than the piers below it, and by the force of the blow parted the lines which held the tow, in consequence of which the latter drifted ahead, and was damaged, as well as the The owner of the tug subsequently settled with the tow for her damages, taking a receipt in full, and claims to recover for both against the Spraker.

The evidence presents an entire contradiction between the witnesses of the two tugs as to whether, below the Brooklyn bridge, the Neal, or the Spraker, was astern, and was the overtaking boat. The circumstance, however, that the Spraker slowed shortly before reaching the Brooklyn bridge, which the pleadings as well as the witnesses assert, and the testimony of the claimants' witnesses that the slowing was caused by a Brooklyn ferry-boat passing ahead of the Spraker towards the New York slip, in the absence of any other explanation of her slowing, satisfies me that the claimants' contention in this respect is correct, and that the Spraker had before that been ahead, and that the Neal came up so as just about to reach the Spraker's stern while the Spraker was slowing; and that the Neal's witnesses did not remember anything about the ferry-boat, because she did not interfere with the Neal, which was further astern, and the circumstance would therefore not be recollected by the Neal's witnesses.

Upon this finding of facts, it is impossible for me to hold the Neal without fault. She was bound for Newtown creek. The state statute required her to go as near the middle of the river as may be. There was nothing to prevent her doing so. Instead of that, she continued from Pier 8 up nearly to the Brooklyn bridge, as her witnesses say, only about 200 feet from the New York shore, and, as I find, probably not exceeding 400 feet, at most; and when the Spraker sheered towards the New York shore, instead of moving towards the center of the river, as she might and should have done, she kept upon the inside of the Spraker, and gradually overhauled her, but very slowly, until she was in a pocket,

whence she could not escape. Her going near the piers and violating the statute led directly to the accident, and she must therefore be held in fault. She was further in fault, also, for violating the state statute which prohibits a steam-vessel under way approaching and passing another nearer than 20 yards. There were no special circumstances to render this statute inapplicable. When the Spraker's continued sheer brought the Neal first within that limit, there was still time and room for the Neal to stop and obey the statute.

The settlement by the Neal, moreover, of the tow's claim for damages, is a strong practical admission of her own fault. The libel alleges an assignment and subrogation of the tow's claim, but no assignment is proved. The evidence does not show a purchase of the claim, but simply a settlement, with a receipt in full for all claims of damages. There can be no subrogation in favor of a mere volunteer; but only in favor of one who pays under some legal liability, and there could be no liability of the Neal unless there was fault. The U. S. Grant, 7 Ben. 337; Acer

v. Hotchkiss, 97 N. Y. 395.

The fault of the Neal does not, however, excuse the Spraker from her own clear faults. From the time the two passed under the Brooklyn bridge, the Neal was somewhat lapping the starboard quarter of the Spraker, and gradually gaining upon the latter. The Neal was in the the situation of an overtaking and passing vessel; and, while the Spraker was entitled to keep her course, she was prohibited from crowding. She continued her sheer without any attention to the Neal, so as to come unjustifiably and unnecessarily near the New York shore. The Neal could not have anticipated such a continuance of this sheer. I am entirely satisfied that the Spraker could have rounded to perfectly well, without occupying practically the whole of the river to make her turn. It is quite possible, as suggested by libelant's counsel, that the Spraker went nearer to the piers than she intended to, in consequence of the strong set of the flood-tide towards the New York shore. She is answerable for any such miscalculation. It is not admissible that a vessel may swing in this way across the river, without paying any attention to other boats on her quarter; and, had she intended to go so near to the New York piers as to make it dangerous to other boats inside and abreast of her, it was at least her duty to give some signal of danger to other vessels thus put unexpectedly in jeopardy. No signals were given by either vessel, and no steps were taken by either to avoid danger until too late. Both were in fault, and the libelant is therefore entitled to half the damages to the Neal and her tow, and a reference may be taken to compute the amount.

THE VENETIAN.1

THE REVERE.

(District Court, D. Massachusetts. December 28, 1886.)

1. Collision—Steamer and Ferry-Boat—Crossing and Following Vessel. Distinguished—Failure to Signal.

The ferry-boat R. started out of her slip when the steamer V. was directly opposite. The speed of the steamer had been checked by the stopping of her engines, but her headway had not entirely ceased. Her ability to maneuver was further diminished by the presence, close aboard, of one or more vessels which it was her duty to keep clear of. When the ferry-boat started out of her slip, her bow was pointing astern of the steamer. When clear of the slip she proceeded to cross the steamer's bows in a circling course, at full speed. With the exception of the starting whistle of the ferry-boat, no signal was made by either vessel. Both vessels, when a collision became imminent, endeavored to avoid it by reversing their engines. Held, that the steamer had done all that devolved upon her under the circumstances; that, as the ferry-boat was a following vessel when the situation first opened, the steamer was not bound to foresee that, by a violation of the rules of the road, the ferry-boat would become a crossing vessel; and that no duty to signal the latter as a crossing vessel devolved upon the former.

2. Same—Steamer and Ferry-Boat.

A ferry-boat must not cross a steamer's path, when the latter is abreast of her slip, and is hampered in her ability to maneuver. If, upon starting out of the slip, the ferry-boat's bow is astern of the steamer, and if she subsequently crosses the bows of the latter vessel, she will be considered as a following, not as a crossing, vessel.

Collision. Cross libels.

L. S. Dabney, for the Venetian.

T. M. Babson, for the Revere.

Nelson, J. These cases were cross-libels for a collision between the British steam-ship Venetian, of the Leyland line, and the steam ferryboat Revere, owned by the city of Boston, and employed on the East Boston ferry, of which the city is the proprietor. The Venetian arrived in Boston on the morning of March 25, 1886, from Liverpool. At half past 6 A. M. she was proceeding up the channel, between Boston and East Boston, in charge of a pilot, on the way to her dock in Charles-Her course lay on the starboard or East Boston side of the channel. Her speed through the water, against an ebb-tide, was then about four knots. When abreast of the Elevator dock, which is the third dock below the ferry slip, on the East Boston side, her engines were stopped, and, by the time she was opposite the ferry slip, she was moving slowly, though her motion ahead had not entirely ceased. Another ferry-boat had just before crossed her bow, coming from the Boston side. A ship also lay at anchor in the channel within a hundred feet of her, on her port bow. While she was in this position, just opposite the East Boston ferry slip, the Revere started out of the slip on a trip across the

¹Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

channel to Boston, headed down stream, with her bow pointing astern of the Venetian. As soon as she was clear of the slip, her wheel was put hard a-port, a full head of steam was let on, and she proceeded at full speed up stream, in a circling course, directly across the bows of the Venetian. The instant those in charge of the Venetian saw what she was about, the engines were reversed full speed. The Revere also, when within a few feet of the Venetian, reversed. This was done, however, too late to prevent the accident. The forward port-guard of the Revere struck the Venetian on the starboard bow, and in the collision the guard and upper works of the former were torn away, and the iron plates of the latter's hull broken in. The weather was clear and still. The Venetian could not have been more than 500 feet from the ferry slip when the collision occurred, and was probably nearer. Neither vessel sounded

any whistle, except that the Revere gave her starting whistle.

Upon these facts, which are abundantly proved by the evidence, the culpability of the Revere is too obvious to require comment. into the Venetian without the slightest necessity or excuse, when the latter was in a position where she had a right to be, and could do nothing to get out of the way. The master of the Revere states that when he started out, the Venetian was opposite the Elevator dock, 900 feet below the slip, and seemed to be stopped; that as he proceeded he saw that she was moving slowly, but supposed he had sufficient room to pass her; and that she suddenly increased her speed, and ran across his bows. Other witnesses called by the Revere give the same account of the accident. That they are mistaken is showed by all the probabilities of the case. The point off the Elevator dock, where the master of the Revere says he saw the Venetian apparently stopped, was at least 1,000 feet below the place of collision. The tide was about half ebb. The Venetian was a screw steam-ship of 2,733 tons register, 435 feet long, and loaded with It is incredible that such a ship, in the situation described by this witness, could have increased her speed so as to pass over a space of 1,000 feet, against the tide, while the light side-wheel ferry-boat, quickly started and of high speed, under full steam, was going a distance of 500 feet across the tide. The extreme unlikelihood of this theory tends strongly to confirm the testimony of the master and pilot of the Venetian. and of others on board, who all agree that the steam-ship was going slowly past the ferry slip as the Revere came out.

The theory of the ferry-boat's defense is that she was a crossing vessel, and, being on the starboard side of the Venetian, had the right of way. Supposing this to be so, it would not afford an excuse for her not sooner stopping and reversing, though it would condemn the Venetian also. But the fact seems to be wholly different. The Revere was not a crossing vessel, but a following one, when the situation first opened. The Venetian was not bound to foresee that the Revere was about to change the situation in violation of the sailing rules. She did see all that her position rendered it possible for her to do in reversing her engines. For the same reason the complaint of the Revere that the Venetian gave no signal is not well grounded. There was no occasion for a signal from

the Venetian, the Revere having made the collision inevitable by her own misconduct. The Revere must be held solely responsible.

The libel of the city of Boston will be dismissed, with costs; and, in that of the owner of the Venetian, an interlocutory decree will be entered for the libelant. Ordered accordingly.

THE SWIFTSURE.

CHAPMAN v. THE SWIFTSURE.

(District Court, E. D. New York. June 2, 1886.)

SALVAGE — SPECIFIC SUM AGREED UPON — DISPUTE AS TO AMOUNT—UNREASON-

As the tug W. was cruising in the neighborhood of Sandy Hook she learned that the steamer S. was lying disabled some 15 miles down the Jersey coast, and proceeded to her assistance. The S., with a valuable cargo on board, was lying some eight miles from the beach, unable to proceed, an accident having happened to her machinery. The weather was intensely cold, both vessels were covered with ice, and a thick fog prevailed. A bargain was made between the masters of the tug and the steam-ship to tow the latter to New York. The libel alleged that the agreed compensation was \$4,000; the answer alleged that it was \$400. The value of the tug was claimed to be \$30,000; the value of the S. \$75,000 or \$100,000, her cargo \$80,000, and her freight about \$11,000 or \$12,000. Held, on the evidence, that the sum agreed on was \$4,000; and, as this was not such an unreasonable price for the salvage service as to require the court to set aside a contract deliberately made to pay that sum, the libelants should recover \$4,000, but without costs.

In Admiralty.

Goodrich, Deady & Goodrich, for libelant.

Butler, Stillman & Hubbard, for claimant.

Benedict, J. The clear weight of evidence is to the effect that the master of the Swiftsure agreed with the master of the libelant's tug that a salvage compensation of \$4,000 should be paid for the services of the tug in relieving the steamer. The only question open to discussion is whether the price so agreed on was unreasonable. Upon the evidence, and taking into consideration the value of the steamer and her condition, I am not prepared to say that \$4,000 is a sum so out of proportion to the benefit received as to require the court to set aside a contract deliberately made to pay that sum. The libelants may therefore have a decree for \$4,000.

I give no costs, because I consider the sum awarded a very liberal salvage compensation for the work and labor that the libelant's tug was called on to perform. A distribution of the salvage will be made on application of the parties interested.

Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

THE HELEN HASBROUCK.1

SOPER v. PAREIS.

PAREIS v. THE HELEN HASBROUCK.

(District Court, E. D. New York. July 23, 1886.)

Collision—Schooner and Tug—Overtaking Vessel—Liability.

Where a collision occurred in the North river between a schooner and a tug, whereby the latter was run down by the sailing vessel, it was held, on the evidence, that the schooner was the overtaking vessel, should therefore have avoided the tug, and was in fault for the collision.

In Admiralty.

Owen & Gray, for Soper and the Helen Hasbrouck.

Alexander & Ash, for Pareis.

Benedict, J. The course of the schooner is proved to have been directly up the North river, or one point to the eastward of the course of the river. The difference of one point would not be important. The case turns upon the course of the tug; for if the course of the tug was the same as that of the schooner, or within one point of the course of the schooner, the schooner, which broke ground below the tug, was the following vessel, and bound to avoid the tug. If, on the other hand, the tug's course was crossing that of the schooner, the obligation to avoid the schooner rested upon the tug, and she was in fault for not having done so. Upon this question my opinion is with the tug. The testimony from the schooner as to the course of the tug is too strong, for they make the tug heading towards Central Ferry, Jersey City. Bound, as the tug was, for Sixty-eighth street, in New York, it seems to me incredible that she should have been sailing towards Central Ferry, Jersey City. Her natural course would be the course given by those in charge of her, viz., up the river. Upon that course it is evident that, with a proper lookout, which she says she had, the approach of the schooner from astern might not have been observed. Upon that course she might have been struck Upon the course given her by those on the as she was struck. schooner, such a blow as the schooner delivered her, the schooner bringing up on the tug's fantail, and her martingale jamming the pilot-house door, does not appear to me possible.

The evidence from the respective vessels cannot be reconciled. The testimony of some of the witnesses must therefore be disregarded. The probabilities of the case, the distance of the tug, and the blow that was delivered, lead me to disregard the testimony from the schooner that the tug was seen by them upon a course for Central

Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

Ferry, and to adopt the testimony of those witnesses who say that the tug was going up the river, and was run over by the schooner overtaking her from below. The libelant, John J. Pareis, must therefore recover for the loss of his tug, and the libel of Soper for the injury to the schooner must be dismissed.

THE BURGUNDIA.1

CARTARSSO, Guardian, etc., v. The Burgundia.

(District Court, S. D. New York. December 27, 1886.)

Negligence — Neglect of Those in Charge of Infant — Improper Place—Liability of Vessel—Rudder Chains.

Libelant's ward, an infant three years old, was injured on board of the steam-ship Burgundia, by the rudder chain, which ran in an open box on the main deck. Previous to the accident, the infant's nurse had left him to himself, and, when hurt, he was in a part of the ship where he had no right to be. *Held*, that the fault rested with those who had charge of the child, and that the vessel was not liable for the injury.

In Admiralty. A. B. Stewart, for libelant. Benedict, Taft & Benedict, for claimants.

Brown, J. The libelant's ward, Louis Cartarsso, a child of three years old, while on a voyage to this port from Naples, on the second day out, had its fingers crushed in putting them into the trough that carries the rudder chain across one of the pulleys upon the main deck. The child, being uneasy, had been set down by the nurse a few minutes before, and ran aft of the place where the steerage passengers were allowed; and, as the evidence shows, a few minutes afterwards its screams were the first notice that the nurse had that it was meddling with the chain. The wooden groove or box was such as is usual upon nearly all steam-ships, and no customary precaution was neglected. It is necessary that such chains shall be subject to constant and immediate inspection. It is plain that the child was where it had no business to be, and was improperly left to run into what dangers it might find. There is no law that requires a ship to prevent the possibility of accidents to infants incapable of taking care of themselves, who are suffered by those in charge of them to The box provided in this instance was a reasonroam about the ship. ably sufficient precaution against liability to accident, and the blame is wholly on those in charge of the child.

The libel must be dismissed.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

SCHNADIG v. FLESCHER.

(Circuit Court, D. Colorado. January 3, 1887.)

REMOVAL OF CAUSE—REV. St. § 639, SUBD. 8—DIVERSITY OF CITIZENSHIP. It is a condition requisite to removal under Rev. St. U. S., § 639, subd. 3, that the diversity of citizenship must exist, both when the suit was begun and when the petition for removal is filed. Gibson v. Bruce, 2 Sup. Ct. Rep. 878. S. C. 108 U. S. 561, followed.

On Motion to Remand case to state court. Markham & Dillon, for plaintiff. Geo. W. Allen, for defendant.

Brewer, J. The motion to remand is sustained on the authority of Gibson v. Bruce, 108 U. S. 561, S. C. 2 Sup. Ct. Rep. 873, and Frelinghuysen v. Baldwin, 19 Fed. Rep. 49. The first case is an authoritative declaration that, under the removal act of 1875, the requisite citizenship must exist, both at the time of commencing the suit and also at the time of filing the petition for removal. The language of the act of 1867 is not identical with that of the act of 1875, but the difference is not such as to indicate a different intent on the part of congress. See the opinion of Circuit Judge WALLACE in the second case.

Hone v. Dillon.

(Circuit Court, S. D. Georgia, E. D. November 30, 1886.)

1. REMOVAL OF CAUSES—CITIZENSHIP—ACT OF CONGRESS OF MARCH 3, 1875. Under the act of March 3, 1875, a suit cannot be removed from a state court unless the requisite citizenship of the parties existed both when the suit was begun and when the petition for removal was filed.

2. SAME—Act of Congress of March 2, 1867.

Under the act of March 2, 1867, it is not necessary that the parties should have been citizens of different states at the time when the suit was brought. if they are citizens of different states when the petition for removal is filed.

8. Same—Final Hearing—Demurrer Overruled—State Equity Rules.
Where the rules of procedure in equity of a state provide that a demurrer shall be disposed of at the first term, and the second shall be the trial term, the hearing of a demurrer to a bill, and an order overruling it, is not such a final hearing of the cause as will defeat a removal.

4. Same - Death of Non-Resident Defendant-Bill of Revivor by Exec-

UTOR.

A bill of revivor is a mere continuation of the original suit, and, where the jurisdiction of the court had completely attached to the controversy, it cannot be divested by the death of the non-resident defendant, and his executor has the right to defend the suit without regard to his own citizenship.

(Syllabus by the Court.)

In Equity. Motion to remand. R. R. Richards, for movant. John M. Guerard and Charles N. West, contra. v.29f.no.11-30

Speer, J. This bill was originally filed in the superior court of Chatham county. It was removed to this court by the proceeding under the act of March 2, 1867, relating to local prejudice, on the fourteenth day of February, 1882. Since that time various orders have been taken in its progress here. An amendment has been filed to the bill; a demurrer to the bill as amended; this demurrer has been overruled; an answer to the bill as amended has been filed; and the defendant having died, his death has been suggested, and a bill of revivor has been filed against his executor. A motion to remand the cause to the state court is now made by the complainant, William Hone. It is insisted by the movant, himself a citizen of Georgia, that at the time the suit was begun David R. Dillon was a citizen of the same state; and, notwithstanding the fact that he had become a citizen of the state of New York, and was a citizen of the latter state at the time the cause was removed to this court, that Dillon was not entitled to remove the cause.

This question is not free from difficulty. It has been repeatedly held that a suit cannot be removed from a state court under the act of March 3, 1875, unless the requisite citizenship for removal existed when the suit was begun as well as when the application for removal was made. Akers v. Akers, 117 U. S. 197; S. C. 6 Sup. Ct. Rep. 669; Gibson v. Bruce, 108 U.S. 562; S. C. 2 Sup. Ct. Rep. 873. In the latter case Mr. Chief Justice Waite, delivering the opinion of the court, considers section 12 of the judiciary act of 1789, and the act of 1875. With relation to the act of 1875, he declares that it is "radically different from any which preceded it. Under that act, either party may petition for removal, and neither party need be a citizen of the state in which the suit was brought. The material language is as follows: 'That any suit of a civil nature, at law or in equity, now pending, or hereafter brought, in any state court, in which there shall be a controversy between citizens of different states. * * either party may remove said suit into the circuit court of the United States for the proper district.' In order to obtain the removal, a petition therefor must be filed in the state court at or before the term at which the cause could be first tried, and before the trial. In the present case the petition was not filed until nearly two years after the commencement of the suit. The construction of the act is by no means free from doubt, but, on full consideration, we are of opinion that the requirements of the old law. that the necessary citizenship should exist when the suit was brought, was not abolished. We cannot believe it was intended to allow a party to deprive a state court of the jurisdiction it once has rightfully acquired over him by changing his citizenship after a suit is begun; and that would be the effect of the law if the right of removal is made to depend only on the citizenship existing at the time a removal is applied for. But we are also of opinion that because of the extension of the time for applying for a removal, and because neither party need be a citizen of the state in which the suit is brought, and either party may apply, it was the intention to provide that the controversy should be between citizens of different states at the time of the removal. In this way the jurisdiction of the circuit court of the United States will only attach when there shall be a controversy between citizens of different states at the time the suit is transferred, and the right to the transfer will depend on the citizenship when the suit was begun, and when the petition for removal is filed. We therefore hold that a suit cannot be removed from a state court under the act of 1875, unless the requisite citizenship of the parties exist both when the suit was begun and when the petition for removal is filed."

It will be observed that in the foregoing decision the act of March 2, 1867, was not considered by the court. They decide the effect of the act of March 3, 1875. When reference is made by the chief justice to the old law, allusion I think is had to the act of 1789, which is mentioned in a preceding paragraph of the opinion. he referred to the act of March 2, 1867, the question would not be open. There has been no decision by the supreme court of the United States upon the precise question in this case; but the supreme court of Georgia in Hammond v. Buchanan, 68 Ga. 729, have held that it is not essential that the applicant should have been a non-resident of the state at the date of the commencement of the suit, to entitle him to remove a cause to the United States court on the ground of local prejudice, under the act of congress of 1867. This conclusion is entitled to great respect, and is supported by repeated decisions of the federal courts. When that case itself reached the circuit court of the United States for the Northern district of Georgia, a motion to remand was made before his honor Judge McCay; and, after very exhaustive argument, was overruled by that eminent jurist. The decision was not reported, but I was at that time a member of the bar of that court, and heard the argument and the decis-

In Cook v. Whitney, 3 Woods, 715, it was held that to warrant a removal of a cause from the state to the federal court, under the act of March 2, 1867, it is not necessary that the parties should have been citizens of different states at the time when the suit was brought, provided they are citizens of different states when the petition for removal is filed; citing the opinion of Mr. Justice Miller in Johnson v. Monell, 1 Woolw. 390.

The reason of the act would seem strongly support this conclusion. It became the law at a period of angry sectional feeling, and great prejudice in certain localities against citizens of other portions of the country. It might have been frequently true that one who had been a citizen of a state became involved in litigation, and, as a consequence, found it desirable and beneficial to change his domicile. It is not impossible that the law-making power had under contemplation exiles of this enforced character. Unlike the act of 1875, the

act of 1867 did not make it competent for a citizen of the state where a suit is brought to remove the cause; this is the privilege of the non-resident plaintiff or defendant. A removable suit under the latter act is one "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state." Can it be supposed that it was intended by congress to deprive of the right to remove their causes to the national courts a large class of individuals who, at this unsettled period of the country's history, found it necessary, pending litigation in which they were interested, to remove to other states? I think not. Besides, the statute was remedial, and should therefore have a liberal construction.

It is said, however, that the final hearing had been begun, because a demurrer had been disposed of in the state court, and the cause there referred to a master. From an examination of the record, it appears that the demurrer was special, in that it assigned defects in the statement of certain sums in the bill; it was general, in that it declared that the complainant "hath not in and by his said bill stated such a case as doth or ought entitle him to any such relief as is thereby sought," etc. The demurrer was overruled on both grounds by his honor Judge Fleming, presiding in the state court. The act declares that the cause may be removed if the petition of the party is filed at any time before the trial or final hearing. Is a demurrer to a bill in equity, and the decision overruling the same, under the equity procedure of Georgia, such a final hearing as that contemplated by the statute above quoted?

"The trial term of all equity causes shall be the second term after service has been perfected on all the parties." Code Ga. § 4205; Cook v. Board of Commissioners, 54 Ga. 166. "A defendant may either demur, plead, or answer in a cause in equity, or may file two or all these defenses at once, without waiving the benefit of either. In all cases, demurrers, pleas, and answers shall be disposed of in the order named, and all demurrers and pleas shall be filed and determined at the first term," etc. Code Ga. § 4191.

In view of the statutes, clearly the hearing of a demurrer cannot be the final hearing. Insurance Co. v. Dunn, 19 Wall. 224, 225; Vannevar v. Bryant, 21 Wall. 41-43. Both of these cases arose under the act of March 2, 1867, and are clearly distinguishable from Alley v. Nott, 111 U. S. 474, S. C. 4 Sup. Ct. Rep. 495, and Gregory v. Hartley, 113 U. S. 742, S. C. 5 Sup. Ct. Rep. 743, which arose under the act of 1875.

But it is said that the present defendant is the executor of Dillon, and is himself a citizen of Georgia, and for that reason the cause must be remanded. A sufficient reply to this proposition is found in the decision of Clarke v. Mathewson, 42 Pet. 170. There, as in the case under consideration, a bill of revivor had been filed in continuation of the original suit; and the court held, Mr. Justice Story delivering the opinion, that, if the plaintiff was competent to sue the

defendant in the circuit court, his representative, though a citizen of the same state, may revive it,—the court holding, against the argument of Daniel Webster, who was of counsel for the appellees, that the bill of revivor was in no just sense the original suit, but was a mere continuance of the original suit, and, where the jurisdiction of the court had completely attached to the controversy, it could not be divested by any subsequent events, and that the administrator or executor of a deceased party, under the thirty-first section of the judiciary act, (1 St. at Large, 90,) has power to prosecute or defend an action by or against the deceased, without regard to his own citizenship. It may be of consolation to counsel of movant here to reflect that Judge Story held with him in the circuit court, and not until mature reflection did he change his opinion.

For the reasons given the motion to remand is denied.

MAY v. Buchanan Co., Iowa.

(Circuit Court, N. D. Iowa, E. D. November Term, 1886.)

1. COURTS—OF UNITED STATES—STATE STATUTE OF LIMITATIONS—PATENTS—
REV. St. U. S. § 721.

Under Rev. St. U. S. § 721, providing that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply," an action in a federal court to recover damages for infringement of a patent is not subject to a state statute of limitations.

2. Same—Claim against County—State Statute.

But such action is subject to a state statute requiring a demand against a county for unliquidated damages to be presented to the board of supervisors of the county, and payment demanded, before bringing action upon it.

Action for damages for infringement of a patent. Demurrer to petition.

Runnells & Walker, for plaintiff.

J. E. Cook, for defendant.

Shiras, J. In the petition filed in this cause, it is averred that on the fourth day of October, 1859, letters patent, in due form, were issued to one Edwin May for an improvement in the construction of prison cells, and on the fourth day of October, 1873, an extension of said patent for a further term of seven years was duly granted to said May; that in February, 1880, said Edwin May died, in the state of Indiana, and that plaintiff, by proper proceedings had in the probate court, and conveyances executed under the orders thereof, has become and is the owner of all the rights conferred by and growing out of said letters patent to said Edwin May; that between the fourth day of October, 1873, and the same

mented upon.

day in 1880, the defendant, without right or authority so to do, did make and use sundry apparatus and machinery which infringed upon the exclusive rights secured by said letters patent to said Edwin May, whereby the plaintiff has been deprived of the reasonable royalty upon said infringing apparatus, to the damage of plaintiff in the sum of \$3,000.

To this petition a demurrer is interposed, on the grounds that the petion shows on its face that the cause of action is barred by the statute of limitations of the state of Iowa,—the action having been brought after the expiration of five years from and after the date when the extended patent expired; and because it is not averred that the demand, being for unliquidated damages, had been presented to the board of supervisors, and payment demanded, as required by section 2610 of the Code of Iowa.

This action is brought under the provisions of section 4919 of the Revised Statutes, which enacts that "damages for the infringement of any patent may be recovered by action on the case, in the name of the party interested, either as patentee, assignee, or grantee." By section 55 of the patent act of 1870 it was provided that "all actions shall be brought during the term for which the letters patent were granted or extended, or within six years after the expiration thereof." As to causes of action arising after June 22, 1874, this limitation was repealed by the adoption of the Revised Statutes, according to the provisions of section 5596 thereof, but, by section 5599, was continued in force as to all causes of action then in existence. If, then, the cause of action in the present case had arisen before June 22, 1874, it would be barred by the limitation of six years found in the act of congress of 1870.

The petition avers more than one act of infringement, and as to those committed after June 22, 1874, the question is whether the action to recover for these is or is not subject to the limitation of the state statute. This question has not been finally settled by the supreme court of the United States, and the decisions of the circuit courts are not in harmony. See Walk. Patents, § 477, where the cases are cited and com-

Where, as in this case, the action is based upon the rights conferred by the statute of the United States, then the better rule seems to be that the state statute of limitations, ex proprio vigore, does not apply. The right to a patent, and to the exclusive use of the rights conferred thereby, is wholly of federal creation, and the state cannot either extend or limit the time within which an action for the protection of these rights may be brought under the federal statute. It is, however, within the power of congress to declare that actions brought under the provisions of the United States laws shall be subject to the limitations enacted in state statutes. In other words, congress may adopt the provisions of the state statute, and make the same applicable to actions for the enforcement or protection of rights wholly created by federal legislation, and of which actions jurisdiction is exclusively in the federal courts.

The question is whether congress has thus adopted and made appli-

cable the provisions of the state statute. It is argued that section 721 of the Revised Statutes, which declares that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply," should be held to include the state statute of limitations, and to render the same applicable in all cases wherein the United States statute does not prescribe a period of limitations. In the absence of an authoritative construction of this section by the supreme court, it cannot be denied that the extent and scope of the section is in doubt.

In the case of *U. S. v. Reid*, 12 How. 361, referring to the similar section in the act of 1789, the supreme court held, "that the language of this section cannot, upon any fair construction, be extended beyond civil cases at common law, as contradistinguished from suits in equity. So far as concerns rights of property, it is the only rule that could be adopted by the courts of the United States, and the only one congress had the power to establish; and the section above quoted was merely intended to confer on the courts of the United States the jurisdiction necessary to enable them to administer the laws of the state."

In McNiel v. Holbrook, 12 Pet. 84, the court held that, under this section, the rules of evidence prescribed by the laws of the state were applicable in trials at common law in the United States court; saying that, "indeed, it would be difficult to make the laws of the state, in relation to the rights of property, the rule of decision in the circuit courts, without associating with them the laws of the same state, prescribing the rules of evidence by which the rights of property must be decided."

It is manifest that the laws of a state, to be of force, and to control the decision of any court, state or federal, must be laws rightfully enacted; that is to say, laws within the power of the state legislature to The state laws, therefore, which are intended to be included within section 721 of the Revised Statutes, as rules of decision to be followed by the federal courts, must be laws within the power of the state to enact. The state, having the right to deal with the subject-matter in the way of legislation, can, through its legislature, adopt laws defining the rights of persons in connection therewith; and these laws, creating or defining the rights of persons in the premises, or the rights of property, and the laws providing for the mode of enforcing or protecting these rights, including those prescribing the time within which actions may be brought, and the rules of evidence to be followed, will constitute rules of decision which the courts of the United States must, in dealing with rights thus created, defined, or limited, observe and enforce. But the laws of a state cannot constitute rules of decision, binding and obligatory upon courts of the United States, in matters or rights which are wholly without state control, and wholly within federal control; and the true construction of section 721, therefore, is that it makes applicable as rules of decision in the federal courts those laws of the states which, dealing with subjects within state control, create or define rights in or to property,

and provide the mode of protecting or enforcing these rights. When the state legislature adopted a statute of limitations, it was intended to apply to proceedings brought to enforce causes of action cognizable in the courts of the state, and, when the cause of action lies without the jurisdiction of the state, then the state statute of limitations cannot be made applicable thereto by any declaration, express or implied, of the state legislature.

If the laws of congress on the subject of patents were repealed, there would not exist any right to a patent; or, in other words, the inventor would not have any enforceable right of property in his invention, or the fruits thereof. This right of property is created by the acts of congress, and state legislation does not deal therewith. Thus, it is clear that the state legislature could not legally enact that none of its citizens should apply for and obtain a patent for an invention, unless he should apply for the same within six months, or any other time; and the right to protect the property created by the patent laws, by bringing an action at law or in equity, conferred by the act of congress, cannot be limited or affected by state legislation. When, therefore, the state adopted its statute of limitations, it did not have the right, nor can it be supposed that it was the intent of the legislature to attempt, to limit the time within which actions might be brought, under the provisions of the act of congress, for the protection of the patent-rights created by the laws of the United States. To make the state statute of limitations, therefore, applicable to an action to recover damages for an infringement of a patent, it must appear that congress has, by law, adopted and made applicable the state statute; and this is not the effect of section 721, if the view expressed of that section is correct, to-wit, that it includes only the laws of the state which deal with subjects within state control.

In Sayles v. Dubuque & S. C. R. R. Co., 5 Dill. 561, heard before Dillon and Love, JJ., it is stated: "We are inclined to the opinion that the state statute of limitations has no application to suits in respect of the rights granted by letters patent for inventions, but we leave the question open to further discussion."

While this case left the question open, still it gives a clear intimation of the view entertained by the court, and sustains the conclusions reached in the present case, which may be summed up as follows: (1) That as it is not within the power of the state legislature, by direct enactment, to define or limit the time within which an action to recover damages for an infringement of a patent may be brought in the United States courts, it follows that the general statute of limitations of the state does not, ex proprio vigore, apply to or control such an action. (2) That, to limit the time within which an action under section 4919 of the Revised Statutes of the United States may be brought, it must appear that the congress of the United States has fixed a limitation of time; which may be done by showing that congress has, as in the patent act of 1870, precribed the time within which such actions must be brought, or that it has expressly adopted, and made applicable thereto, the provisions of the state statute. In the latter case, as well as in the former, it is, how-

ever, the act of congress which creates the limitation. (3) That section 721 of the Revised Statutes declares that the laws of the state shall be followed as rules of decision "in cases where they apply;" that is, in cases which involve matters or rights within the legislative jurisdiction of the state. (4) That as the subject of granting letters patent, and authorizing actions to be brought for the protection of the rights thus created, is wholly without state control, the general statute of limitations of the state does not, ex proprio vigore, apply thereto, and, not applying, is not made a rule of decision governing the United States court, by the provisions of section 721.

So far, therefore, as the demurrer is based upon the ground that the action is barred by reason of the provisions of the state statute of limita-

tions, it is not well taken, and is overruled.

The other ground of demurrer is that it is not averred that the claim for damages, being unliquidated, was presented to the board of supervisors, and a demand for payment thereof made, before bringing suit, as required by the provisions of section 2610 of the Code of Iowa. Counsel for plaintiff claim that this provision of the state law is not applicable to actions in the United States courts brought to recover damages for infringement of a patent, because the subject-matter of such actions is beyond state control, and cannot be affected by state legislation. If the section of the Code in question dealt with the subject of patents, or sought to limit or control the proceedings authorized by the act of congress for the enforcement or protection of the rights created by the issuance of a patent, the argument of counsel would be applicable; but such is not the object or purport of this section. The right to sue a county of the state and recover judgment against the same is a right dependent upon the laws of the state. The powers, rights, and liabilities of a county, including the liability to be sued, are wholly derived from the state legislation; and the legislature may, in imposing upon the county the liability to be sued, surround such liability with such safeguards as it may deem wise and proper. If the laws of Iowa did not confer upon the county the right to sue and be sued, the plaintiff could not maintain the present action; and as the plaintiff, in bringing suit against the county, is availing himself of a right created by the state, he must take the right with the limitations placed thereon by the power which creates the right. Having the right to create the municipal subdivision known as a "county," and to prescribe the rights, powers, and liabilities pertaining thereto, the state has the right to enact that the county cannot be sued until a proper demand for payment or settlement has been made; and this enactment is one which the United States courts are bound to follow and enforce.

Upon this ground the demurrer to the petition is well taken, and is sustained.

JACKSON & SHARP Co. and another v. Burlington & L. R. Co. and

(Circuit Court, D. Vermont. January 5, 1887.)

1. COURTS—FEDERAL—FORECLOSURE SUIT—PARTIES—PROCEDURE.

To a suit to foreclose a mortgage, brought in a federal court in one state against a corporation of that state, by bondholders, citizens of another state, other bondholders who are citizens of the state where the suit is brought cannot be made parties plaintiff, the jurisdiction being dependent upon citizenthis but added to the mortgage. ship; but, under such circumstances, the plaintiffs can foreclose the mortgage separately, and the proceeds of sale, if a sale is made, will be distributed according to the rights of all.

2. Same—Time to Redeem—Practice in State and Federal Courts.

A right of a mortgagor to have time to redeem on suit to foreclose recognized by the laws of a state where the mortgage was made, is a property right, which will be regarded in a suit to foreclose brought in a federal court. Held, accordingly, in the case of a Vermont mortgage foreclosed in a federal court, that defendant would be allowed a year from the first day of the term in which to redeem, in accordance with the practice of the state courts, and (it being doubtful whether a sale should be ordered) that meanwhile no decree for sale would be made, and no decision as to whether plaintiffs were entitled to a sale.

3. INTEREST-AFTER MATURITY-BONDS.

Under the Vermont law, bonds will bear interest after maturity, as well as before, at a special rate of interest mentioned in them.

In Equity.

Luke P. Poland, for orators.

Eleazer R. Hard, for defendants.

WHEELER, J. This bill is brought by the orators, in behalf of themselves and all others in like interest, to foreclose a mortgage of the railroad of the defendant railroad company, made to trustees to secure \$200,-000 of its bonds, payable to bearer in five years from date, which was November 1, 1878, with interest at 7 per cent. per annum, payable semi-The orators are citizens of New Jersey. The defendant railroad company is a citizen of Vermont, and the railroad is situated there. It is alleged in the bill that the bonds became due, and the condition of the mortgage broken, by non-payment, and that the orators afterwards applied to the trustees to foreclose the mortgage and enforce the security, and that they refused to do so. This is admitted in the answer; and no question is made about the validity of the mortgage or the bonds, nor but that they were due and unpaid at the bringing of the suit.

The case has been to a master to take an account of the mortgage debt. and he has made report. From his report it appears that the orator the Jackson & Sharp Company is the owner and holder of \$13,000 of the principal of the bonds, on which there is due, -reckoning the interest at 7 per cent. from the time they fell due as well as before, and interest on the installments of interest at 6 per cent., the usual legal rate in Vermont, from the time they respectively fell due,—in all, \$18,109.65; and that the orator the Diamond State Iron Company is the owner and holder of \$9,000 of the principal of the bonds, on which there is due, reckoning interest in like manner, \$13,791.19. All the holders of the other bonds, respectively, presented them, and proved the amount due before the master, and he has reported the names of the holders, and the amounts due to them on the bonds. Some of them have asked and obtained leave of court to become parties as orators to the suit, on contributing a ratable proportion of its expense. It does not appear, however, that any of them have so in fact availed themselves of the leave of court as yet to have become such parties. The report does not show but that some or all of them are citizens of Vermont. Such citizens cannot be parties plaintiff in the prosecution of this suit in this court, limited as it is, in suits of this kind, in jurisdiction, to suits in which there is a controversy between citizens of different states. Act March 3, 1875, (18 St. 470; Supp. Rev. St. 173.) Therefore this leave of court should be so modified as to permit the owners and holders of such bonds only as are not citizens of this state to become parties plaintiff in this suit on the terms mentioned. These proceedings before the master by the others may, however, be useful, in case there shall be a sale of the property, and distribution of its avails in the course of the suit. The orators are entitled, under the circumstances, separately to foreclose the mortgage, independently of the other bondholders, and, if the foreclosure results in a sale, the proceeds are to be distributed according to the rights of all in the property. Chicago & V. R. Co. v. Fosdick, 106 U.S. 47; S.C. 1 Sup. Ct. Rep. 10.

The orators have not, in the prayer for relief, prayed a sale, but at the hearing have asked a sale under the general prayer for any proper relief. By the laws of Vermont, as recognized and administered by the courts of the state, mortgagors are entitled to time to redeem on foreclosure, and to one year, unless the security is inadequate, or there are other special reasons why the time should be shortened. This is a right of property which attaches to the mortgage, and must be regarded and preserved in a suit for foreclosure in the courts of the United States, although the procedure in such a case is according to the practice of courts of the United States, and not according to the practice of the courts of the state, in equity, if the practice differs. Brine v. Insurance Co., 96 U. S. 627; Connecticut Mut. Life Ins. Co. v. Cushman, 108 U. S. 51; S. C. 2 Sup. Ct. Rep. 236. The usual course of the courts of the United States appears to be to decree a sale in the end, on foreclosure, as is shown by these cases, care being taken to so carry out the proceedings as to protect all the rights of the mortgagor. This cannot be done in this case without giving time to redeem before sale, and, as the security is not shown to be inadequate, a year must be given, which, as is sometimes done in the state courts, may be reckoned from the first day of the term, to which time the computations of the master have been made. If the sum due the orators, with the costs, is paid within that time, including those, if any, who come in and become parties plaintiff, under the leave of court as modified, all right to a sale, or to further proceedings in this cause, will be ended. Therefore no decree for a sale, or decision as to whether the orators are entitled to a decree for a sale under the prayer of the bill as framed, is now made, but the cause is retained for further proceedings and directions in that respect, on failure, if any, to redeem.

Question has been made as to the right to the special rate of 7 per cent. interest after the falling due of the bonds. This is a Vermont contract, to be construed by the laws of Vermont. This question arose upon bonds and mortgages of the Rutland & Burlington Railroad in Cheever v. Rutland & B. R. Co., in the supreme court of Vermont, the highest court of the state, at the general term, 1869, not reported in the state reports. In that case it was held that the principal of the bonds bore interest at the special rate after they were due, as well as before, and the interest coupons at the usual rate allowed by law, from the time when they fell due. Opinion by STEELE, J., Pamph. 18, 19.

The reckoning stated from the master's report is in accordance with

this decision, which is controlling upon this question.

These are all the points about which any question has arisen.

The master's report is accepted and confirmed. The leave heretofore granted to bondholders to become parties plaintiff is so modified that bondholders not citizens of Vermont may become such parties at any time before the first day of March, 1887, by entering an appearance for that purpose, with consent to share ratably the expenses of this suit. And let a decree be entered to the effect that, unless the defendants. within one year from the fifth day of October, 1886, pay to the orator the Jackson & Sharp Company the sum of \$18,109.65, and to the orator the Diamond State Iron Company the sum of \$13,791.19, and to such other bondholders as shall become parties plaintiff, pursuant to the leave granted, the several sums due them respectively, as shown by the master's report, with interest on all of the sums, respectively, from the fifth day of October, 1886, to the time of payment, together with the costs of this suit, they be foreclosed of all equity of redemption in the premises; and this suit is retained for further proceedings and directions, in case of such failure.

Jaffrey and others v. Brown and others.

(Circuit Court, S. D. Georgia, W. D. October 26, 1886.)

COURTS—FEDERAL—APPOINTMENT OF RECEIVERS.
 When, under the statute of Georgia, it is right to appoint a receiver, the equity courts of the United States may administer and enforce that right, where they have jurisdiction.

2. EQUITY—MASTER'S REPORT—EXCEPTIONS—PRESUMPTIONS.

In the determination of exceptions to a master's report, the presumptions are in favor of the findings of the master, and such findings will not be disturbed, unless shown to be erroneous.

8 SAME—TREATMENT OF EXCEPTIONS.

Exceptions to the master's report are regarded so far only as they are supported by the statements of the master, or by evidence to which the attention of the court is called by reference to the particular testimony.

4. Same—Setting Aside Report—Weight of Evidence.

The power of the court to set aside the report of the master is not to be exercised, except for good cause, and mere difference of opinion as to the weight of the evidence, when there is a substantial conflict, is not such good cause.

5. Same—Sales under Order of Court—Interference by Parties — Dis-

TRIBUTION OF PROCEEDS.

When parties to the bill, having claims against a stock of goods in the hands of a receiver, unwarrantably interfere at a sale of such goods under the order of the court, and, by pretended bids, occasion a loss to the fund arising therefrom, the amounts otherwise due to them on the general distribution will be mulcted by the court, to protect other creditors from loss on account of their conduct.

6. Mortgage—Validity—Description of Property Covered—Code Ga. § 1955. A mortgage must clearly indicate the property upon which it is to take ef-

fect. Code Ga. \$ 1955.

7. SAME—GENERAL DESCRIPTION INSUFFICIENT—"ENTIRE STOCK," etc.
The following description: "Our entire stock of dry goods, boots, shoes, hats, clothing, and notions, and such other goods as are usually kept in a first-class country store,"—without any indication as to the whereabouts of the goods, or without any other language of identification,—is not a sufficient description.

8. SALE - RIGHTS OF VENDOR-RESCISSION FOR FRAUD - RECAPTION-GENERAL

Where goods are obtained by fraud, the sale is void, and passes no title, and the right of the vendor to retake the goods in the hands of the fraudulent vendee, who is insolvent, is superior to the claim of a general creditor of the

9. SAME-PURCHASE WITH INTENT NOT TO PAY.

A contract for the purchase of goods on credit, made by the purchaser with intent not to pay for them, is fraudulent; and, if he has no reasonable expectation of being able to pay, it is equivalent to an intent not to pay.

The facts of this case abundantly show such fraud as will vitiate the sale, under the rules above given.

(Syllabus by the Court.)

In Equity.

Alex. Proudst, Willingham & Patterson, Hardeman & Davis, Dessau & Bartlett, A. C. Riley, and Duncan & Miller, for complainants. Bacon & Rutherford and Hill & Harris, for respondents.

Brown Bros. were dealers in dry goods and kindred Speer, J. merchandise, at Fort Valley, in this district. On the seventeenth of October, 1885, they made an assignment, having previously, by divers deeds of mortgage purporting to incumber their stock in trade, attempted to prefer certain favored persons whom they pretended were creditors. The remnant of the goods, assigned for the general creditors, was not adequate for the payment of the firm's liabilities; in fact, it was a scarcely appreciable moiety of a large and valuable assortment of merchandise, which had been composed of the identical articles to procure which the debts of the defaulting firm had been created.

^{. 1} See note at end of case.

On October 20, 1885, Jaffrey & Co. and Hochstatder Bros. filed a bill against Brown Bros., (Emile and Charles Brown, partners;) Henry C. Harris, their assignee; Rosalie and Pelagia Brown, their wives; Gustave Brown, their cousin; and Pauline Binswanger, their Complainants averred that, by false and deceitful representations of their solvency, Brown Bros., insolvent at the time, obtained credit; these representations were made with the intention to defraud complainants; that the assignment is null and void; that the assignee holds the goods so bought as a trustee for complainants; that all the mortgages purporting to secure the assignee and relatives of Brown Bros. in the sum of \$11,361.50 were fraudulent, and made to delay and defraud the creditors, and were without consideration. They charge Harris, the assignee, with collusion in the fraud. pray that he and the co-respondents be enjoined from proceeding under the assignment; that a receiver be appointed, and that he be required to keep the goods bought from Jaffrey & Co. and Hochstatder Bros. separately from the rest; and that the proceeds arising from the sale of such goods be specially appropriated to pay the claims of this class of creditors for the purchase money. They also pray that the assignment and mortgages so fraudulently executed be declared null and void, and ask for general judgments, and for general relief. Discovery is waived.

The respondents, in answering the bill, deny its criminatory allegations; assert the validity of the assignment; of all the debts evidenced by mortgages to the kindred of Brown Bros., and the other preferences.

The receiver, having been appointed under order of the court, took possession of the assets of the firm, sold the stock, made collections, and has paid into the registry of the court \$6,144.44, which he reports to be the proceeds. He also reports that one D. J. Baer, an intervening party to the bill, and a creditor of Brown Bros., is indebted to him as receiver in the sum of \$1,576; this sum being the difference between the price brought by a portion of the stock at the receiver's sale and the price bid for it by Gustave Brown, at the instigation of Baer, and who was bidding for and in concert with the latter.

Many parties complainant were made by intervention. These were general creditors. W.R. Singleton & Co. and Lyon & Co. also claim a special lien on a portion of the goods for their purchase price, with allegations equivalent to those of Jaffrey & Co. and Hochstatder Bros.

At the last term the entire cause was referred to a master, with directions to report the "nature, extent, validity, and dignity of all liens, and to ascertain what amounts should be paid out of the fund in court to each of said liens; also what amounts are due and to be paid to each party not claiming a lien, whether they claim title to specific goods or not." The controversy between the receiver and D.

J. Baer was specially excepted from the reference, and reserved for determination by the court.

The master filed his report in accordance with the order of the (1) That the assignment to H. C. Harris is He reports: void. (2) That Brown Bros. were not insolvent on the eleventh day of August, 1885. (3) The mortgages and the claims of Rosalie and Pelagia Brown are void, because of their fraudulent character, and because of their imperfect execution. (4) The claim of Gustave Brown, for services rendered as a clerk, is rejected, and the mortgage purporting to secure it is found void. The claim of Gustave Brown for \$750, due on two notes made in February, 1884, is allowed to be paid pro rata with other general creditors. (5) The claim of Pauline Binswanger for \$1,200, and the mortgage to secure it, is rejected. (6) The claim of Morris Willard for \$1,000 is allowed, but the mortgage to secure it is rejected. (7) The claim of Henry Harris for \$600 on the note dated March 11, 1885, and for \$611.56 on another note of the same date, are allowed, but the mortgage to secure them is held invalid. Another claim of Henry C. Harris, with note dated February 1, 1885, and payable on the ninth of November of that year, with a mortgage to secure it, is reported to be a valid claim, and the mortgage is also held valid. (8) The claims of E. S. Jaffrey & Co. and Hochstatder Bros. are recognized as valid, but the specific claims made that the fund arising from the sale of the goods sold by them are disallowed, and they are placed on the same footing as the general creditors; and so with the claims of W. H. Lyon & Co. and of W. R. Singleton & Co. (9) The master finds that D. J. Baer and Gustave Brown are liable, and should pay the receiver the sum of \$1,576 for their refusal to take the bid made by Gustave Brown for Baer at the receiver's sale.

To this report exceptions are filed by D. J. Baer, E. S. Jaffrey & Co., W. R. Singleton & Co., W. H. Lyon & Co., W. D. Nottingham, receiver, Morris Willard, Cohen, Feibleman & Co., and Henry C. Harris.

In the determination of exceptions to a report of this character, the presumptions are in favor of the findings of the master. They will not be disturbed unless shown to be erroneous. Lockhart v. Horn, 3 Woods, 542. It is generally not the province of the court to investigate the items of account. The report of the master is received as true, where no exceptions are taken, and the exceptions are to be regarded so far only as they are supported by the special statements of the master, or by evidence which ought to be brought before the court by a reference to the particular testimony. Harding v. Handy, 11 Wheat. marg. p. 126.

In Bridges v. Sheldon, 7 Fed. Rep. 34, 35, Judge Wheeler, of the district of Vermont, holds:

"There is no doubt about the power of a court of equity to revise the report of a master, by supplying facts material, which are shown by the evidence,

but not stated in the report, by setting aside the finding of facts, not shown by any evidence, or which are contrary to the evidence, and when errors in law have controlled or influenced the finding of material facts; but this revisory power of the court has never been considered as covering a right for a party to appeal from the master to the court upon disputed questions of fact determined by the master as matters of fact, upon conflicting testimony;" citing Green v. Bishop, 1 Cliff. 186.

The power of the court to set aside the report of the master is undeniable, but it is not to be exercised except for good cause; and mere differences of opinion as to the weight of evidence, where there is a substantial conflict, is not such good cause. Bridges v. Sheldon, 18 Blatchf. 295, 507; S. C. 7 Fed. Rep. 17.

The report of the master under consideration evinces very exhaustive, and conscientious effort to ascertain the truth of the issues involved, and his findings not excepted to will be approved as a matter of course.

With relation to the claim of the receiver, to the effect that his trust was injured either by the meddlesome interference of Baer at the sale, or his refusal to pay his bid, made for him by Gustave Brown, we hold that the master had no jurisdiction of this question. By the order of reference it was reserved for the finding of the court. The receiver, by order of the court, was directed to protect the integrity of the fund in his hand. He presents a petition after the sale, in which he advises the court that Baer, in co-operation with Gustave Brown, by their unwarrantable officiousness at the sale, and by their refusal to take and pay for the goods bid off by them at 71 cents on the hundred, occasioned the loss to the fund of more than \$1,600. The master finds the precise amount, \$1,576, and finds a liability against them in this amount. Baer denies the facts, and there is in relation to this issue much conflicting evidence. I think, however, that the prependerance of the proof is sufficient to warrant the court in finding that Baer and Gustave Brown had arranged to bid off the portion of the stock indicated by the receiver; that Brown did the bidding; and that they afterwards refused to comply with their bid, causing the receiver to resell at the reduced price of 50 cents on the dollar. These meddling persons are parties to the bill. They are, and were at the time, before the court,—one as a complainant, and the other as a respondent. They assert the validity of their claims against the fund, which, by their interference, is reduced in an amount greater than the sum of their demands. There had been a valid and bona fide bid of 70 cents before their pretended bid of 71 Can it be possible that the court is powerless to protect the fund in its custody from such reckless and damaging conduct by and at the instance of parties to the record before it? I think not. Messrs. Baer and Brown, in the opinion of the court, are jointly and severally liable to the receiver for the full amount of the damage occasioned by their conduct. There are, however, no suitable allegations in the bill to justify a decree against them for this sum. But they

have an interest, as creditors, in the fund before the court; and since they, and not the other creditors, caused the diminution of this fund, there is no equity in the proposition to require the others to pay their pro rata share of this loss, and Messrs. Baer and Brown must pay it, as far as their distributive shares will go; that is to say, since the damage which they occasioned is greater than the amount of their claims, they must contribute the sum which otherwise they would receive on those claims, to the other creditors, that they may not suffer from the unwarrantable conduct of Baer and Brown. To this extent the report of the master must be modified.

The finding that the assignment to H. C. Harris is void; that the mortgages and claims of Rosalie and Pelagia Brown, the claim of Gustave Brown for services as a clerk, the claim of Pauline Binswanger, and the mortgage of Henry C. Harris, to secure his claim evidenced by two notes,—one for \$600 and the other for \$611,—is confirmed. So, also, is the finding that the claim of E. S. Jaffrey & Co., and Hochstatder Bros., and all the general ereditors, valid. The finding that the \$1,600 claim of H. C. Harris, with the mortgage to secure it, are valid, is confirmed. The two notes of H. C. Harris, before mentioned, and found not secured, will be classed and paid pro rata with the general indebtedness of the firm. To the mortgage for \$1,600 will be

added 10 per cent. for counsel fees.

Morris Willard presents a claim for \$1,000, evidenced by a note of Brown Bros., dated February 11, 1885, and payable one day after date: also, a mortgage intended to secure it. This mortgage was dated February 20, 1885, but was not recorded until the fourteenth day of October of that year. It remained in the possession of the wife of one of the firm. The property which it purports to convey is described as follows: "Our entire stock of dry goods, boots, shoes, hats, clothing, and notions, and such other goods as are usually kept in a first-class country store." There is no further indication of the property, nor is there any sort of designation of the whereabouts of this personalty. A mortgage must clearly indicate the property upon which it is to take effect. Code Ga. § 1955. The cases relied on by respondents' counsel, (Nichols v. Hampton, 46 Ga. 253, and Welsh v. Lewis, 71 Ga. 388.) both contain descriptions more explicit and definite. Nor do we think there is any sufficient delivery of the mortgage to make it operative against the debts of other creditors. It was not delivered to Morris Willard, but to the wife. As a feme covert, she must be regarded as sub potestate viri, and her possession was the possession of her husband. There is no sufficient proof of the consent of the husband to this pretended agency on her part. Morris Willard is the brother-inlaw of Brown, and the whole aspect of the affair has a fraudulent coloring. The mortgages to all the relatives of the defaulting firm, viz., to Pelagia, Rosalie, and Gustave Brown, to Pauline Binswanger, to Morris Willard, and to H. C. Harris, the assignee, were recorded Ocv.29r.no.11-31

tober 14th, three days before the assignment. The suppression of these mortgages until this critical moment is a badge of fraud as to creditors, and they will be denied validity and effectiveness as liens upon the property of debtors. The report of the master as to the Morris Willard matter is therefore confirmed. He will be entitled, as a general creditor, pro rata with the others, for the principal and interest of his claim, but he has no lien on the stock.

It is for the same reasons, and for the additional reason that it was not recorded as required by law, that the report of the master disallowing the mortgage given by Brown Bros. to H. C. Harris, on

the eleventh day of March, 1885, is confirmed.

The complainants Jaffrey & Co., Hochstatder Bros., Lyon & Co., and W. R. Singleton & Co. insist that they were induced by the false, fraudulent statements and conduct of Brown Bros. to sell them certain goods on credit: that at the time Brown Bros. were insolvent. had neither the ability nor the intention to pay for the goods so purchased. They therefore insist that no title passes by such a sale, and they pray that the receiver keep a separate account of the proceeds arising from the sale of the goods sold by each of them, respectively. This was done under order of the court. It remains to be determined whether these complainants are entitled to the specific relief they The master reported against the special claims set up by this class of complainants. He finds first that Brown Bros. were not insolvent at the time of the alleged fraudulent purchase. He further finds that these complainants stand upon the same footing as other creditors, and that their special claim is without validity. In the determination of the exceptions to this portion of the master's finding there is necessitated a review of the law controlling claims of this character.

In Landauer v. Cochran, 54 Ga. 533, the supreme court of this state held "that, where goods are obtained from a party by fraud, no title passes, and the right of the vendor to retake the same by a claim is superior to the lien of an attachment against the fraudulent vendee, levied at the instance of one of his creditors."

In Crittenden v. Coleman, 70 Ga. 295, the facts are very similar to the evidence before the master in the case under consideration. The court held "that title never passed because fraud procured the sale, and that the complainants might recover the goods so sold from a purchaser from the assignee of the fraudulent debtor, where the circumstances were sufficient to put such purchaser on notice."

In Talcott v. Henderson, 27 Amer. Rep. 501, it is held that "a contract for the purchase of goods on credit, made with intent on the part of the purchaser not to pay for them, is fraudulent; and, if the purchaser has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay. But when the purchaser intends to pay, and has reasonable expectations of being able to do so, the contract is not fraudulent, although the purchaser knows himself

to be insolvent, and does not disclose it to the vendor, who is ignorant of the fact." See, also, note, 504.

In Donaldson v. Farwell, 93 U. S. 633, the supreme court of the United States, Mr. Justice Davis delivering the opinion, holds as follows:

"The doctrine is now established by a preponderance of authority that a party not intending to pay, who, as in this instance, induced the owner to sell him goods on credit by fraudulently concealing his insolvency, and his intent not to pay for them, is guilty of fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract, and recover the goods. Byrd v. Hall, 41* N. Y. 647; Johnson v. Monell, Id. 655; Noble v. Adams, 7 Taunt. 59; Kilby v. Wilson, Ryan & M. 178; Bristol v. Wilsmore, 1 Barn. & C. 514; Stewart v. Emerson, 52 N. H. 301; Benj. Sales, § 440, note of the American editor, and cases there cited."

It appears from the evidence that Emile Brown, one of the firm of Brown Bros., for the purpose of obtaining credit from Jaffrey & Co. and Hochstatder Bros., gave them a statement of the financial condition of the firm, and referred them to a statement previously made to Bates, Reed, and Cooley, all showing a prosperous solvency. Reference to the numerous mortgages to various relatives of the Brown Bros. and to H. C. Harris was studiously avoided. These mortgages aggregated many thousand dollars. No reference was made to the indebtedness to Harris. When Harris was telegraphed an inquiry about their solvency, he replied with vague generality, but made no mention of his liens on their stock. It was their duty to disclose the existence of these incumbrances. Such suppression of important facts, when direct inquiry was made, was actual fraud. The New York merchants were entitled to know of the existence of these mort-It is not to be supposed that had they known what a cloud rested on the prospects of the house of Brown Bros. that credit would have been extended to them. The concealment of material facts which the vendor was entitled to know was fraudulent, and in this case will vitiate the sale. The assignment was made on the fourteenth of Oc-The assets of the firm, including all the goods unpaid for, amounted to \$16,627.79. Their indebtedness was over \$29,000. Mortgages to the extent of \$9,000, some of them to enable Rosalie and Pelagia, their wives, to consummate the felicity contemplated in antenuptial contracts entered into many years ago in far away Alsace and Lorraine, were prepared. The mortgages were never recorded until the eve of the assignment. At the same time defendants went through their books, and marked many of their large solvent debts as paid, and deposited their notes with their brother and their banker for their own benefit, and never delivered them to the assignee, or to the receiver, under the order of the court.

Gustave Brown, to whom one of the mortgages found to be fraudulent was given, after the receiver was appointed was found in the possession of a large amount in notes and accounts, which he was secretly collecting, but which, under a threat of punishment, were

turned over to the receiver. Can it be doubted that this state of facts was fraudulent as to creditors, and, if the goods were still in the possession of the defaulting debtors, that the sales might be rescinded, and the goods retaken by the vendors? All sales procured by fraud are voidable, at the option of the vendor. Code Ga. §§ 2751, 3178.

While fraud may not be presumed, slight circumstances may be sufficient to carry conviction of its existence. Here the evidence leads the mind irresistibly to the conclusion that there was a deliberate purpose on the part of Brown Bros. to pile up goods, the property of their creditors, and, having made sufficient accumulations, to convey the same to their relatives, and thus to "break full-handed,"—a scandalous performance, for which the powers of criminal courts

alone afford adequate punishment.

The claim of W. R. Singleton & Co. stands upon precisely the same footing, except that the defendants made no express representations of their solvency at the time of the last purchase. They had, for a long time, been customers of Singleton & Co. They had repeatedly represented themselves as perfectly solvent. Theretofore they went in person to Macon, where was Singleton & Co.'s house, to make all purchases. On the fifth of October they forwarded the money to pay a small account already due. They were too busy, they said, to visit Macon, but desired Singleton & Co. to send down a line of samples, as they wished to make a large purchase. The samples were sent, and the superior class of goods selected were shipped to the busy, and indeed overworked, firm. This was done on the seventh of October. Seven days thereafter these exemplars of industry and probity assigned, and the unbroken packages of Singleton & Co.'s goods were found in their possession by the receiver. Singleton & Co. are entitled to retake their goods. Lyon & Co. stand upon the same footing, and the sums realized under the order of the court, by the sale of these separate lots of goods belonging to this class of creditors, must be appropriated to pay the purchase money thereof.

All of the facts which tend to show fraud, when taken in connection with the great preponderance of liabilities over assets, also tend to show the insolvency of Brown Bros. at the time of these purchases. I think that the master drew an erroneous conclusion from admitted facts when he found them solvent. Nor do I find that there was undue delay in the offer to rescind these contracts by complainants. They could not be held as obliged to rescind until the secret mortgages were recorded, and until they ascertained that a fraud was in process of perpetration. Immediately thereafter the bill was filed; and while the allegations and prayers were not as ample in the outset as they might have been, this may be cured by the amendment offered, which, in view of the imperfect knowledge of the facts, necessarily had by counsel at the time the bill was filed, is now allowed.

The court appreciates sensibly the great assistance rendered by the master, in evolving the truth from the voluminous and complicated

transactions considered. The report is confirmed, save in the matters hereinbefore set forth.

Let all creditors who have made proof of their claims be made parties, and receive their distributive shares of the fund, in accordance with the ruling hereinbefore made; let the calculations be revised accordingly; let the costs be withdrawn from the fund in hand before the distribution is made: and the decree is so ordered.

Sale—Fraud. A sale procured by fraud or misrepresentation may be avoided by the seller, and the property retaken by him as his own, Sleeper v. Davis, (N. H.) 6 Atl. Rep. 201; Ensign v. Hoffield, (Pa.) 4 Atl. Rep. 189; Neff v. Landis, (Pa.) 1 Atl. Rep. 177; Hanchett v. Kimbark, (Ill.) 7 N. E. Rep. 491; S. C. 2 N. E. Rep. 512; Doane v. Lockwood, (Ill.) 4 N. E. Rep. 500; Goodwin v. Wertheimer, (N. Y.) 1 N. E. Rep. 404; Bussinger v. Bank of Watertown, (Wis.) 30 N. W. Rep. 290; Lee v. Simmons, (Wis.) 27 N. W. Rep. 174; Carl v. McGonigal, (Mich.) 25 N. W. Rep. 516; Oswego Starch Factory v. Lendrum, (Iowa,) 10 N. W. Rep. 900; Amer v. Hightower, (Cal.) 11 Pac. Rep. 697; Taylor v. Mississippi Mills, (Ark.) 1 S. W. Rep. 283; unless it was subsequently sold by the fraudulent vendee to one who purchased in good faith, and for a valuable consideration, Sleeper v. Davis, (N. H.) 6 Atl. Rep. 201; Neff v. Landis, (Pa.) 1 Atl. Rep. 177; Hanchett v. Kimbark, (Ill.) 7 N. E. Rep. 491; S. C. 2 N. E. Rep. 512; Goodwin v. Wertheimer, (N. Y.) 1 N. E. Rep. 404; Perkins v. Anderson, (Iowa,) 21 N. W. Rep. 696; Oswego Starch Factory v. Lendrum, (Iowa,) 10 N. W. Rep. 900.

It may be retaken from the possession of an officer who holds it under an attachment or execution against the fraudulent purchaser, Ensign v. Hoffield, (Pa.) 4 Atl. Rep. 189; Oswego Starch Factory v. Lendrum, (Iowa,) 10 N. W. Rep. 900; Taylor v. Mississippi Mills, (Ark.) 1 S. W. Rep. 283. The assignee for benefit of creditors is not a bona fide purchaser for value, and takes no better title than his assignor, the fraudulent vendee, Goodwin v. Wertheimer, (N. Y.) 1 N. E. Rep. 404; Lee v. Simmons, (Wis.) 27 N. W. Rep. 174.

N. W. Rep. 174.

N. W. Rep. 174.

The purchase of goods with the intention of not paying for them is a fraud which will justify the avoidance of the sale, Sleeper v. Davis, (N. H.) 6 Atl. Rep. 201; Farwell v. Hanchett, (Ill.) 9 N. E. Rep. 58; Hanchett v. Kimbark, (Ill.) 7 N. E. Rep. 491; S. C. 2 N. E. Rep. 512; Lee v. Simmons, (Wis.) 27 N. W. Rep. 174; Carl v. McGonigal, (Mich.) 25 N. W. Rep. 516; Oswego Starch Factory v. Lendrum, (Iowa,) 10 N. W. Rep. 900; Taylor v. Mississippi Mills, (Ark.) 1 S. W. Rep. 283. So are misrepresentations as to solvency, and the concealment of insolvency, Ensign v. Hoffield, (Pa.) 4 Atl. Rep. 189; Hanchett v. Kimbark, (Ill.) 7 N. E. Rep. 491; Lee v. Simmons, (Wis.) 27 N. W. Rep. 174; Oswego Starch Factory v. Lendrum, (Iowa,) 10 N. W. Rep. 900. But the mere fact of the purchaser's insolvency does not render the purchase fraudulent, unless it was made with no intention or expectation of paying for them, Dalton v. Thurston, (R. I.) 7 Atl. Rep. 112; Mack v. Adler, (Ark.) 2 S. W. Rep. 345.

Brower v. Brower.

(Circuit Court, D. Minnesota. January 8, 1887.)

EQUITY-ACCOUNTING-ADVANCES ON SECURITY OF IRREVOCABLE POWER OF AT-

In an action for an accounting wherein the complaint alleged a partnership, it appearing that there was no partnership, but that complainant, after taking from defendant an irrevocable power of attorney, authorizing complainant to take possession of the lands then owned, or which might thereafter be owned. by defendant, advanced the money to be put into real estate and a newspaper, on the security thereof, the court directed that the defendant be adjudged the owner of the real estate and newspaper, that complainant have an equitable lien on the property for his advances, with interest, and that the property be sold to satisfy the same.

In Equity.

J. V. Brower and C. D. Kerr, for complainant.

D. B. Searle, for defendant.

This is a family quarrel, and, as such, bitter and un-Brewer, J. pleasant. It is brother against brother, other members of the family siding with each. The complainant alleges a partnership, and claims an accounting. The defendant denies partnership. The transactions between the brothers, as developed in the pleadings and by the testimony, extend from the years 1871 or 1872 to 1885, a period of 13 or The property in controversy, as alleged in the bill, is—First, the newspaper published at Sauk Centre, known as the Sauk Centre Tribune: second, two pieces of real estate in Sauk Centre, one occupied by the defendant as his homestead; and, third, several tracts of land outside of Sauk Centre. With regard to the third class of properties, the defendant in his answer admits that he has no claim, and, in pursuance of the direction of this court at the hearing, deeds therefor have been executed by the defendant and his wife, and delivered to complainant. This should have been done by the defendant of his own motion, and before any suit. The defendant acted badly in withholding this property, to which he had no pretense or claim, and in attempting to compel thereby the complainant to abandon all other claims.

I now proceed to outline briefly the history of the relations between these brothers, and the claims of the complainant. The complainant is the elder brother. In 1871 or 1872 the defendant, then about 20 years of age, was afflicted with a severe sickness, from which he recovered, but with the entire loss of his hearing. From that day to this he has been totally deaf. He had had comparatively little early education, and was wholly unfit for business. His sickness occurred while he was at his father's house. After his sickness he went with complainant to St. Paul to consult physicians about the possibility of a cure for his deafness. The visit was ineffectual. He returned home, and worked about his father's place for two or three years. Then he attended the Institution for the deaf, at Faribault, where he learned the art of printing. this he worked in a printing-office for a short time, and in 1879 the complainant purchased the Todd County Argus, and placed the defendant in charge. In October, 1880, the defendant became dissatisfied, and the Argus was sold; the complainant receiving the entire proceeds of the Later in the fall of that year the Stearns County Tribune was established, the complainant advancing all or nearly all the money there-This is the paper whose name afterwards changed to the Sauk Centre Tribune, is the first property above mentioned in which the complainant claims a half interest as partner.

On October 31, 1876, defendant executed to complainant an irrevocable power of attorney. Complainant testifies that at this time a settlement was had between the brothers; that \$231 was then found due from defendant to him; and that, in satisfaction and payment of this amount, as expressed in the instrument itself, this power of attorney was executed.

The power of attorney authorizes the complainant to take possession of all lands then owned, or which might thereafter be owned, by defendant, or in which he might have any interest, excepting such as defendant should enter under the homestead laws of the United States, to sell or dispose of the same in any way complainant might see fit, and appropriate the entire proceeds to his own use. About this time, as complainant testifies, he was having some trouble with his wife; and, being somewhat engaged in the real estate business, desired to have some one in whose name he could place title to his real estate, and carry on such business. If this was the entire scope and purpose of this instrument. and if he was simply releasing to his brother this moderate claim in payment for the use of his name in his own business, the transaction was perfectly legitimate. The consideration, though small, was, as between brothers, not unreasonable compensation for valuable assistance. Such, I think, from all the circumstances, was at the time the intent of the parties, and the transaction one which might fairly be entered into between brothers, each prompted by fraternal confidence and affection. If there was also the thought on the part of the elder brother, a man of business capacity and experience in the affairs of life, that it would also operate temperarily to protect his younger brother, grievously afflicted, ignorant of business, and liable to be imposed upon, there would be nothing in the transaction to criticise or condemn; but if the intent of the complainant was to prevent his brother from ever becoming a free man as to the purchase, holding, and sale of real estate, if he thought by this to hold his brother forever within his grasp, and to debar him forever from investing his own earnings in real estate, for his own benefit, and subject to his own control, as, smarting under the bitterness of this present controversy, complainant now seems to claim,—the transaction is one which all honorable men must condemn, and the contract one which, in its entirety, no court of equity would ever enforce. be such an alienation of personal rights as, attempted to be accomplished between brothers situated as these were, would find its most fitting historic parallel in the ancient record of a brother's sale of his birthright for a mess of pottage. So far as the contract evidenced by this power of attorney is made the basis of complainant's claim to the real estate in Sauk Centre, it must be rejected, and the rights of the parties to those tracts determined by the facts as to their purchase.

With respect to these tracts, it appears that they were selected by defendant, and that he intended to purchase them for his own benefit; and also that the complainant assisted in obtaining the title, advancing money therefor. It may well be that the complainant relied upon the power of attorney as turnishing him abundant security on this real estate for all moneys advanced, and I think he is entitled to the benefit of that contract, as giving him an equitable lien. This power of attorney having been of record, no one could acquire title to or lien upon these tracts without notice of complainant's rights; so that, to the extent of his interest therein, he is entitled to a first lien.

In October, 1880, the Argus property was sold for \$2,500, all of

which was paid to the complainant, he at the time taking the notes and security given for the amount. Complainant testifies that this was a second settlement, and that this purchase price was received by him as a full settlement of all claims against his brother up to that time. I think the testimony bears out this claim, and that all inquiry as to the accounting between the brothers must be limited to the period subse-

quent to that time.

With reference to the Sauk Centre Tribune, it is undisputed that in its establishment, and for its benefit, complainant has advanced considerable money. His claim, however, that the property has been and still is partnership property cannot, I think, be sustained. Putting one side, as irreconcilable, the testimony of the two parties, I think the weight of the other testimony is to the effect that the complainant advanced this money to establish his brother in business, with the understanding that the newspaper property was to be the property of the defendant, and that he was to be reimbursed the moneys advanced by him. As clearly pointing to this, may be noted the bill of sale executed by complainant to defendant, the notice prepared by him, and published in the paper. the general management of the property by defendant during these years, and the admissions of complainant to his mother. It is true there are writings of the defendant, and other testimony, clearly recognizing the fact that complainant had some interest in the property, but nearly all are consistent with the idea of an interest by advancement of money, and do not assert an interest as a partner or a joint owner. It is obvious to my mind, however, from all the testimony, that both parties regarded the property as held by defendant as security to the complainant for the amount of his advances, and it would be simple justice to decree the complainant entitled to an equitable lien for whatever balance may be due him on such advances.

While the bill proceeds upon the theory of a partnership, and prays an accounting, yet the allegations are broad enough to justify the court in ordering an accounting, and decreeing a lien. This decree therefore will be entered: First, adjudging the defendant the owner of the tracts of ground in Sauk Centre, and of the Sauk Centre Tribune; second, adjudging the complainant entitled to a lien upon the two tracts of ground in Sauk Centre, separately, for the moneys advanced by him, less amounts received therefrom, with legal interest to date; third, adjudging that complainant has a lien upon the Sauk Centre Tribune property in like manner, for moneys advanced by him for the purchase or benefit of that property, less amounts so received therefrom, with interest to date; fourth, ordering the sale of these several properties for the balances which shall be found due; fifth, referring this matter to Mr. Shipman, master in chancery, to examine the testimony, and report the state of these accounts; sixth, continuing all orders of injunction until the final disposition of this case.

In making this accounting the master will consider all accounts and transactions between the parties closed and settled up to November 1, 1880, and will make no inquiry as to matters antecedent to that time. As

to subsequent dealings between the parties, he will state the account as to each tract of land, and as to the newspaper property, separately, and, if there be transactions between the parties outside of these matters, he will state an account between the parties as to them for the assistance of the court in making a final disposition of the case.

Nelson, J. I agree to the decree ordered.

HATHAWAY v. EAST TENNESSEE, V. & G. R. R.

(Circuit Court, S. D. Georgia, W. D. October, 1886.)

1. NEGLIGENCE-QUESTION FOR JURY, WHEN.

The question of negligence is for the jury when there is substantial doubt as to the facts, or as to the inferences to be drawn from them.

2. SAME—WHEN THE CASE WILL BE TAKEN FROM THE JURY.

When, however, all the evidence offered to show negligence is assumed to be true, and no inference which tends to show a failure of duty could fairly be drawn therefrom, the court must instruct the jury that no negligence has been shown, and to find their verdict accordingly.

3. Same—"Scintilla of Evidence,"
The doctrine of "scintilla of evidence" considered.

4. COURTS—FEDERAL—PRACTICE—NEGLIGENCE CASES—ORDERING VERDICTS. In the federal courts the judges are no longer required to submit a case to the jury merely because some evidence has been offered by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to find a verdict for the party adducing it.

5. TRIAL—ORDERING VERDICTS.

The practice of giving peremptory instructions to the jury considered and defined. "The practice is a wise one. It saves time and costs. It gives the certainty of applied science to the results of judicial investigation. It draws clearly the line which separates the province of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the court." Mr. Justice SWAYNE, 10 Wall. 604-637.

6. Same—Trial Judge Expressing Opinion on the Facts—Code Ga. § 3248. Section 3248 of the Code of Georgia, prohibiting the trial judge from expressing any opinion upon the facts in evidence, is not regarded in the courts of the United States. Railway Co. v. Putnam, 7 Sup. Ct. Rep. 1, (decided Sup. Ct. U. S. October, 1886.)

7. NEGLIGENCE VERDICT ORDERED FOR DEFENDANT.

Under the facts of this case the jury instructed to find for the defendant. (Syllabus by the Court.)

Action on the case against a railroad company for damages. tion for direction of verdict.

Lyon & Gresham, for plaintiff.

Bacon & Rutherford, for defendant.

Spren, J. The question whether or not negligence existed is generally a question for the jury. It has been held that the case should always go to the jury (1) when the facts which, if true, would constitute evidence of negligence, are controverted; (2) where such facts are not controverted, but where there might be a fair difference whether the inference of negligence should be drawn; (3) when at the same time the facts are in dispute, and the inferences to be drawn from them are doubtful. In other words, the question of negligence is for the jury when there is substantial doubt as to the facts, or as to the inferences to be drawn from them. When, however, it is assumed that the evidence which is favorable to the plaintiff is true, and no fair inference that the defendant had been guilty of a failure of duty could be drawn from such evidence, the judge should, according to the practice of the court, decide the case by peremptory instructions to the jury.

In the courts of the state of Georgia it is held "that when there is any evidence, however slight, tending to support a material issue, the case must go to the jury, in deference to the theory that they are the exclusive judges of the weight of evidence," (Mercier v. Mercier, 43 Ga. 323; Johnston v. Crawley, 22 Ga. 348; Stamper v. Hayes, 25 Ga. 546; Phillips v. Brigham, 26 Ga. 617;) and a verdict based upon such a scintilla of evidence will not be disturbed, although the court trying the case is dissatisfied with the verdict, and is of the opinion it is against the weight of the evidence. This doctrine is not

recognized in the courts of the United States.

In the case of the Commissioners, etc., v. Clark, 94 U. S. 278-284, Mr. Justice Clifford delivering the opinion, it is held the judges are no longer required to submit a case to the jury merely because some evidence has been offered by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party adducing such evidence. Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to-wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

Mr. Justice GRIER announced in Parks v. Ross, 11 How. 373,

the following forcible propositions:

"Undoubtedly it is the peculiar province of the jury to find all matters of fact, and of the court to decide all questions of law. But a jury has no right to assume the truth of any material fact without some evidence legally sufficient to establish it. It is therefore error in the court to instruct the jury that they may find a material fact when there is no evidence from which it may be legally inferred. Hence the practice of granting an instruction like the present, which makes it imperative upon the jury to find a verdict for the defendant, and which has in many states superseded the ancient practice of a demurrer to the evidence. It answers the same purpose, and should be tested by the same rules. A demurrer to evidence admits, not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom."

In Hickman v. Jones, 9 Wall. 197-201, it is declared by Mr. Justice Swayne that "when there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff to be given, such an instruction to the jury may be properly demanded, and it is the duty of the court to give it, and error to refuse it." And in Merchants' Bank v. State Bank, 10 Wall. 604-637, it is, in the opinion of the supreme court of the United States, delivered by the same eminent jurist, held that, according to the settled practice of the courts of the United States, it is proper to give such instructions if it is clear that the plaintiff cannot recover. "The practice," he declares, "is a wise one. It saves time and costs. It gives the certainty of applied science to the results of judicial investigations. It draws clearly the line which separates the province of the judge and jury, and fixes where it belongs the responsibility which should be assumed by the court."

Chief Justice Marshall, in the early history of the great tribunal which has rendered so renowned the jurisprudence of America, in Pawling v. U. S., 4 Cranch, 219, announced the same principle:

"The general doctrine [said he] on a demurrer to the evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit, but the testimony is to be taken most strongly against him; and such conclusions as a jury might justifiably draw the court ought to draw."

Mr. Justice Miller, in *Pleasants* v. Fant, 22 Wall. 116, 121, 122, reiterates this rule:

"It is the duty of the court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try; by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied; and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law. In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor, not whether on all the evidence the preponderating weight is in his favor,—that is the business of the jury,-but, conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify the verdict? If it does not, then it is the duty of the court, after a verdict, to set aside, and grant a new trial. Must the court go through the idle ceremony, in such a case, of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that, if the jury should find a verdict in favor of plaintiff, that verdict would be set aside, and a new trial had? Such a proposition is absurd; and, accordingly, we hold the true principle to be that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury. In such case the party can submit to a nonsuit, and try his case again if he can strengthen it, except where the local law forbids a nonsuit at that

stage of the trial; or, if he has done his best, he must abide the judgment of the court, subject to a right of review, whether he has made such a case as ought to be submitted to the jury; such a case as a jury might justifiably find for him a verdict."

In view of these and other decisions, we must accept it as a settled rule, adjudged by the supreme court of the United States, that when the judge is clear of doubt that a verdict ought to be rendered either for the plaintiff or defendant, and that it would be his duty to set a contrary verdict aside, he ought to instruct the jury so to find. On the other hand, such a direction cannot properly be given to the jury, unless the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly.

The doctrine in England is precisely equivalent, in every way, to the decisions of the supreme court of the United States. Jewell v. Parr, 13 C. B. 916; Toomey v. London, B. & S. C. Ry. Co., 3 C. B.

(N. S.) 150; Wheelton v. Hardisty, 8 El. & Bl. 262.

The ancient rule throwing everything to the jury if there is a scintilla of evidence is also advised by the courts of several states. In Maryland the court passes on the legal sufficiency of the evidence; in Missouri, on its legal effect. See, also, Witthowsky v. Wasson, 71 N. C. 451; Salomon v. Manhattan Ry. Co., (New York court of appeals,)

Daily Reg. December 6, 1886; S. C. 9 N. E. Rep. 450.

It is unquestionably true that the statute of Georgia, (Code, 3248,) which has been very recently, in Vicksburg & M. R. Co. v. Putnam, 7 Sup. Ct. Rep. 1, decided to have no standing in the courts of the United States, has had and is now having a most damaging and injurious effect upon the administration of justice in the state courts. It is, perhaps, of all causes the most fruitful occasion for mistrials, improper verdicts, and new trials, and the consequent delay and failure of justice. The experienced and able judges who preside in the courts of the state, qualified to sift testimony, experts in the detection of fraud and falsehood, unprejudiced, are absolutely powerless to aid the jury to ascertain the truth, and to make a proper verdict. Thus the people are in a large measure deprived of the best results of the skill, training, and experience of their judges. The judge may lay down general instructions as to the law. Here he must stop. In the language of a gifted publicist of the day, Mr. Thompson, the author of the Law of Negligence:

"Such a system is scarcely more wise than it would be to select a lawyer, a doctor, a clergyman, a farmer, a merchant, a carpenter, a shoemaker, a blacksmith, a saloon keeper, a street-car driver, a capitalist, or a barber, constitute them a ship's crew, and start them out on a voyage in company with an experienced navigator, who is permitted to give them general instructions on the theory of navigation, but who is prohibited from giving them any positive order how to navigate the ship, and from correcting any blunders they may make in navigating it."

My own opinion is that the terrible burden borne by the supreme appellate court of the state is largely traceable to this injurious statute.

Now, to apply the doctrine settled by the decisions cited to the case in hand. The plaintiff was an employe of the defendant corporation, as flag-man. He was injured, while in the performance of his duty, in the fellowing manner: The freight train was moving slowly from the station. The engineer told the plaintiff, who was on the track, that he was going to move out slowly, and to get aboard. The plaintiff replied: All right; I will signal you to go ahead fast, as soon as I get on the cab." The plaintiff went down the side track until the cab was opposite It was not really a cab, but a box car used in lieu of a cab. There was a ladder by the door, and an iron loop or step fastened to the car, under the door of the car, used as a cab. The plaintiff caught hold of the ladder with his hands, and attempted to get into the door. Before he made his step, as he testified, his feet struck a pile of sand. He lost hold of the ladder, and, falling on the pile of sand, rolled under the moving cars, and was injured as described. It was a dark night, with a "drizzly" rain. The plaintiff had a lantern on his arm. He stopped, to await the cab, near the pile of sand, and at that end in the direction from which the train was going. sand, it was stated in the declaration, had been put there since he made "his last trip down the road." That, he testifies, was the day before the accident. The plaintiff's witnesses testified that there were one or two car-loads of sand in the pile; that it had been brought there to fill a depression or sink in the road-bed and between the tracks. The evidence is clear and undisputed that the pile of sand was only from one and a half to two feet high; that the construction train brought the sand to this spot, and the section hands were to see that it was properly distributed. There is no evidence to show that the sand was improperly placed. There is no satisfactory evidence as to when the sand was dumped at this spot. The plaintiff's witness said that there was a sink there that had to be filled.

The declaration avers that the sand was unnecessarily placed at this spot, and unnecessarily kept there; but there is literally no scintilla of evidence to support this statement. The plaintiff himself furnishes no such evidence by his testimony; and his witness, who spoke to this point, said there was a sink there that had to be filled. So far as the evidence informs the court and jury, the sand may have been placed at this spot after sunset the evening before. The testimony is that it had been placed there by the construction train, in the usual and ordinary way. It was thrown between the tracks, where it properly should have been thrown. Another witness for the plaintiff states he had not seen the sand until that night.

Now, there can be no reasonable inference of negligence from these facts. A court could not sustain a verdict finding negligence to exist in view of these facts. It is well known that the railroad company must distribute earth along its track. It is just as essential to its business and to the safety of its trains, as its cross-ties or its steel rails. It must be placed in position to be used; and the fact that it

was so placed cannot in itself, in the absence of other evidence, be sufficient to warrant the inference of negligence. It is in this precise condition that the evidence leaves it. Under such circumstances it is the duty of the court peremptorily to instruct the jury that there can be no recovery, and that they must find for the defendant.

I need not, I trust, say that the unfortunate plaintiff has my sympathy as a man; but courts, in the determination of the rights of parties, are governed by the settled rules of law, not by the impulses of

the heart.

NOTE BY THE COURT. I am largely indebted for the authorities cited in this decision to the excellent work, "Charging the Jury," contributed to the profession by Mr. Seymour D. Thompson.

Peneteld v. Chesapeake, O. & S. W. R. Co.

(Circuit Court. E. D. New York. December 28, 1885.)

1. DOMICTLE—CHANGE OF RESIDENCE—WHAT AMOUNTS TO.

Mere intention to change one's residence does not affect that change.

Coupled with such an intention, there must be acts done, and one act must be that of living for some period of time in the place of intended residence.

2. Same—Statement of Case.
In August, 1883, plaintiff, a resident of St. Louis, formed the intention of taking up his residence in Brooklyn, New York. In pursuance of that intention, he sent his wife and children to Brooklyn in August; and his wife, upon arriving there, hired a house, in which she and her children thereafter lived. Plaintiff himself came to Brooklyn in January of the next year. Held, that on November 30, 1883, he had not acquired a residence in New York.

8. SAME-LIMITATION OF ACTION-SECTION 390, CODE CIVIL PROC. N. Y.-TEN-

NESSEE STATUTES.
On the trial, a motion to direct a verdict for defendant was granted on the ground that plaintiff was a resident of Tennessee, and that this action was barred by section 390 of the New York Code of Civil Procedure, by virtue of barred by section 390 of the New York Code of Civil Procedure, by virtue of which the laws of Tennessee limiting the time to commence an action like this must control. It was admitted that the laws of Tennessee provided that a like action for personal injuries must be commenced within one year from the time said action accrues: so that the plaintiff lost his right of action on November 30, 1883, unless previous to that date he became a resident of New York, and a motion for a new trial on the ground that he had before that date acquired such residence was depied date acquired such residence was denied.

At Law. Motion for new trial. Rufus M. Williams, for plaintiff." Charles H. Tweed, for defendant. man Authore

BENEDICT, J. The question upon which the motion made at the trial to direct a verdict for the defendant was decided in favor of the defendant was whether the plaintiff's cause of action, being for an injury reād satymieri ≥t looke , this but a

Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

ceived while in the defendant's cars on the thirtieth of November, 1882, was barred by section 390 of the New York Code of Civil Procedure. The defendant is a resident in and a citizen of Tennessee, (Muller v. Dows, 94 U. S. 444,) and by virtue of section 390 of the New York Code of Civil Procedure the statute of Tennessee limiting the time to commence an action like this must control. By that statute the plaintiff lost his right of action on November 30, 1883, unless previous to that date he became a resident of the state of New York.

The undisputed facts proved were that prior to August, 1883, the plaintiff resided in St. Louis. In August, 1883, he formed the intention to take up his residence in Brooklyn, New York. In pursuance of that intention, in August, 1883, he sent his wife and children to Brooklyn, and, upon arriving there, his wife hired a house, in which she and her children thereafter lived. The plaintiff himself, however, did not come to Brooklyn till January of the next year. Upon this proof, the question arises whether the fact that the plaintiff, prior to November 30th, formed the intention to change his residence to New York, and the further fact that he had gone so far in carrying that intention into effect as to send his wife and children to New York to live, coupled with the fact that he himself did not come to New York until January, 1884, were sufficient to give him a residence in New York prior to November 30, 1883. Upon this question I am of the opinion that mere intention to change his residence does not affect that change, but that, coupled with such an intention, there must be acts done, and that one act must be that of living for some period of time in the place of intended residence. Residence involves personal presence. 2 Bouv. Law Dict. 582.

The fact that the plaintiff's family lived in New York prior to November 30, 1883, did not make him a resident of New York. A man may have his home or domicile in this state, and be at the same time a resident of another. City of New York v. Genet, 63 N. Y. 646. "Change of mind may lead to a change of residence, but cannot with any proprietv be deemed such of itself." Frost v. Brisbin, 19 Wend. 14. To the intention to take up the new residence, must, in my opinion, be added the fact of living in the new place for some period of time. I do not say how long. Here the plaintiff did not follow his wife to the state of New York until January, 1884. Up to that time, although he sent his wife to New York in August, 1883, it was optional to him to abandon his intention without affecting his residence. If, instead of coming to New York in January, 1884, he had, under a change of intention, recalled his wife to St. Louis, it would scarcely be argued, I should suppose, that he had lost his residence in St. Louis by reason of what his wife and children had done in New York. Under such a state of facts. it would doubtless be held that the fact that he himself continued to live in St. Louis was sufficient to prevent a loss of residence there. If so, the fact that he did not come to New York until January, 1884, compels the decision that he had not acquired a residence in New York on November 30, 1883. The motion for a new trial is therefore overruled, and judgment must be entered on the verdict.

Lewis, Jr., v. New England Fire Ins. Co. (Circuit Court. D. Vermont. December 29, 1886.)

FIRE INSURANCE—POLICY—FORMEIGURE—SOLE, UNCONDITIONAL FEE-SIMPLE OWNERSHIP—CONTRACT FOR PURCHASE—DEED NOT PASSED.

A policy-holder who holds the property insured under a contract for its sale and conveyance to him by the owner in fee-simple by deed of quitclaim, on payment of the purchase money named therein, and who has fully paid the purchase money, but has not yet received the deed, is the sole, unconditional, and fee-simple owner of the property, within the meaning of the usual condition in insurance policies, rendering the policy void in case the assured is not the sole and unconditional owner of the property insured, and owns it in fee-simple at law.

At Law.

William G. Shaw, for plaintiff.

Joel C. Baker, for defendant.

WHEELER, J. This is an action on a fire insurance policy in which the defendant, on various conditions, insured the plaintiff against loss by fire or lightning on his steam saw and stave mill. The policy was to become void if, among other things, the assured was not the sole and unconditional owner of the property, or if any building intended to be insured stood on ground not owned in fee-simple by the assured, or if the interest of the assured was not truly stated in the policy, unless consent in writing should be indorsed by the company thereon. The defendant has, by plea, set out these conditions, and alleged, in substance, that the plaintiff had no title or right to the property insured, or the ground on which it stood, except by virtue of a contract in writing between him and the owner of the property in fee-simple, signed by both, by which the owner agreed to sell, transfer, and convey by deed of quitclaim to the plaintiff all the property in consideration of the full and complete payment of three notes of the plaintiff described, possession of the property, and full payment of the notes by the plaintiff, with failure to deliver the deed, without fault or neglect of the plaintiff. To this plea the plaintiff has demurred, and the cause has now been heard on this demurrer. The question raised by this demurrer is whether, on these facts, the plaintiff became the sole and unconditional owner of the property insured, and the owner in fee-simple of the land. If he did not, as there was no consent in writing on the policy, it was by its terms void.

According to these allegations, the plaintiff had bought the property, including the land, of the owner in fee-simple,—had paid for it, and got it. There was no condition about the manner of his acquiring it, by which he could be disturbed in his possession and enjoyment of it. No one is shown to have any color of claim whatever but the holder of the prior legal title, and he had left in him the bare record title without ownership. In equity the plaintiff could successfully resist any attempt on his part, by legal proceedings or entry, to deprive the plaintiff of the property or land, or of their possession. The plaintiff so had and held

the property that he could defend his right to and possession of it against all the world. This is nothing less than sole and unconditional ownership. By the terms of the contract, the property, including the land, was to be conveyed to the plaintiff. This would signify that the whole interest in the whole was to be conveyed, and the contract could not be answered by the conveyance of a mere life-estate, leaving the remainder in him who had agreed to convey the whole. Nothing short of a deed to the plaintiff and his heirs would be a fulfillment. The plaintiff therefore held the whole for his heirs, and his heirs, forever, all of whom are included within himself, as well as for himself. His estate would descend to his heirs, and it was the whole interest in the land and

property.

"Tenant in fee-simple is he which hath lands or tenements, to hold to him and his heirs, forever." Litt. § 1; Co. Litt. 1a.. The title by which they are held is immaterial. The description is answered if he hath them to so hold. The estate in the land, and the title by which the estate is held, are distinct from each other. 1 Washb. Real Prop. c. 3, pl. 4. By statute in Massachusetts a person, "having an estate of inheritance or freehold in any town," with certain conditions, gained a settlement in that town. It was held that a mere equitable estate resting on a bond for a deed was sufficient to give a settlement under this statute. Orleans v. Chatham, 2 Pick. 29; Scituate v. Hanover, 16 Pick. And a person occupying land without title, but whose possession was protected by the statute of limitations only, was held to have an estate of inheritance so as to gain a settlement if the other conditions were fulfilled. Brewster v. Dennis, 21 Pick. 233. In Vermont a pauper is not removable from his freehold, and a mere equitable freehold is sufficient to prevent removal. Walden v. Cabot, 25 Vt. 522.

The object of these and similar conditions in this and like policies is to make sure that the person seeking insurance is the real and substantial owner of the property, or interest in it, on which he intends to obtain insurance, and thereby to prevent wagering policies and fraudulent losses. The state of the title otherwise than in this view is not material. Therefore, in actions on policies of insurance, the person having the whole interest, has been held to be the true owner. Hough v. Insurance Co., 29 Conn. 10; American Basket Co. v. Insurance Co., 3 Hughes, 251; Franklin Fire Insurance Co. v. Crockett, 7 Lea, 725; Gaylord v. Insurance Co., 40 Mo. 13; Pelton v. Insurance Co., 77 N. Y. 605; Insurance Co. v. Simons, 96 Pa. St. 527; Chase v. Insurance Co., 22 Barb. 535; Insurance Co. v. Dougherty, 102 Pa. St. 568; Insurance Co. v. Haven, 95 U. S. 242; Carrigan v. Insurance Co., 53 Vt. 418.

The cases cited in behalf of the defendant do not appear to be to the contrary. In Columbian Ins. Co. v. Lawrence, 2 Pet. 42, and Smith v. Insurance Co., 6 Cush. 448, the condition of the bond for a deed to the assured had not been complied with. These are the most directly in point of any that have been noticed.

Demurrer sustained. Plea adjudged insufficient.

v.29r.no.11—32

Prather and others v. Kean and others.

(Circuit Court, N. D. Illinois. January 8, 1887.)

1. BANKS—THEFT OF BONDS DEPOSITED—SPECIAL DEPOSIT—USED FOR COLLAT-ERALS-LIABLE AS PLEDGEES.

Plaintiffs, bankers, deposited with defendants, other bankers, certain government bonds as a special deposit. They afterwards asked defendants "to discount for them up to par of the bonds as collateral." On this loan being paid, defendants asked what they should do with the collaterals, and, being directed to hold them as formerly for plaintiffs' use, replied, "We hold \$12,000 U.S. 4%, as special deposit;" and that they held them subject to plaintiffs' further orders. The two banks were in uninterrupted business relation for 10 years. The plaintiffs informed defendants that they wished, from time to time, to overdraw their account on the security of these bonds as collaterals, and plaintiffs, from time to time, made overdrafts on defendants, which were paid. The bonds were afterwards stolen by defendants' assistant cashier. *Held*, defendants' liability was that of pledgees.

2 Same—Defaulting Cashier—Warnings—Gross Negligence. In this case it was shown that plaintiffs' bonds were kept in the "treasury" part of defendants' bank safe, where the securities and reserve or surplus funds, not in active use, were kept; that Ker, the defaulting assistant cashier, had access thereto; that defendants examined their cash and counted their securities every month, and examined their special deposits twice a year, to see that they corresponded with the amounts marked on the envelopes, and were otherwise correct; that the collaterals and special deposits were kept together; that no record of the number of bonds held on special deposit was kept, and they could not be counted and checked off. More than a year before Kept and they could not be counted and checked off. fore Ker fled, defendants were warned that some one in their bank was speculating on the board of trade, of which Ker was accused, and admitted the fact, and on promising not to do so again, was retained in his position. Two months before Ker fled, defendants were again warned, and commenced an examination of their books and securities, but made no effort to see whether the special deposits were disturbed, because, as defendants testified, no record was kept of them by numbers or otherwise, although the numbers of plaintiffs' bonds did appear on defendants' bond register, having been sold by them to plaintiffs. *Held*, defendants were guilty of gross negligence in not discharging Ker, or placing him in a position of less responsibility, and were liable for bonds belonging to plaintiffs, stolen by him, whether such were held by them at law or special deposit.

At Law.

H. W. Jackson and Robert Hervey, for plaintiffs. John P. Wilson and O. H. Horton, for defendants.

GRESHAM, J. The plaintiffs, who were bankers at Marysville, Missouri, opened an account in 1873 with the defendants, who were bankers at Chicago, and this relation continued until the spring of 1883. Interest was allowed the plaintiffs on their deposits above a certain amount, at the rate of 2½ and 3 per cent. per annum, and the deposits averaged from \$200,000 to \$400,000 a year. On July 7, 1880, the defendants sold to the plaintiffs \$12,000 of 4 per cent. government bonds, for which the latter paid, including premium and accrued interest, \$13,005. The letter which the plaintiffs wrote ordering the purchase concluded thus: "You will please send us description and numbers of the bonds, and hold same as special deposit for us." In the account which the defendants rendered to the plaintiffs of the purchase, the latter were informed

that the bonds were held as a special deposit, subject to their order. The numbers of these bonds appeared upon the bond register which the defendants kept, and they remained in their custody until some time between November, 1881, and November, 1882, during which period they were stolen by their assistant manager, Ker, who disappeared on January 16, 1883, and this suit is brought to recover their value.

On October 8, 1880, the plaintiffs wrote to the defendants: "Would it be convenient for you to discount for us, say, up to par of our bonds with you as collateral, and, if so, at what rate?" and in reply to this, on October 11th, the defendants said: "We will discount for you with pleasure, taking your government bonds at par as collateral." On December 22d the defendants discounted plaintiffs' note for \$12,000, and on the same day notified them that the bonds were held as collateral security for the loan. This note was renewed, and when it became due, on April 27, 1881, the defendants wrote the plaintiffs: "We debit you \$12,000 for your note due to-day, which please find inclosed, canceled. What disposition shall we make of the collaterals?" The answer to this letter was not produced; but Robinson, one of the plaintiffs, testified that he directed the defendants to "hold the bonds, as formerly, for our [plaintiffs'] use," and to furnish a list of them, giving numbers. On May 5th the defendants wrote to the plaintiffs: "Your favor of the second inst. at hand. We hold \$12,000 U.S. 4%, as special deposit;" giving the numbers, and informing the plaintiffs the bonds were held subject to their further orders. On October 11, 1882, the defendants discounted the plaintiffs' note for \$10,000, at 60 days, receiving as collateral security therefor a number of notes given to the plaintiffs by their customers. This note was paid at maturity, and the collaterals returned.

Robinson testified that, in a letter which he wrote to the defendants asking for the last loan, he informed them the plaintiffs preferred giving the notes of their customers in place of the bonds as collateral, as they wished to use the bonds in case of emergency. He also stated that after the purchase of the bonds, the plaintiffs had overdrawn their account from time to time, and that their overdrafts had been honored. On November 24, 1880, the plaintiffs wrote to the defendants: "We are carrying a large amount of hogs and cattle at this time for our customers, and we shall wish to overdraw our account for a small amount, and we will thank you to honor the same, and will consider our bonds in your hands as security for the same. We do not wish to overdraw, but stock may be detained on the road;" and two days later the defendants replied: "Yours of the twenty-fourth inst. received. In reply, we beg to say, should you have occasion to check on us as you suggest, we will

pay your checks with great pleasure."

Robinson testified that on January 16, 1883, he wrote to the defendants asking for another loan of \$10,000 on the notes of their customers, as the plaintiffs wished to keep the bonds for emergencies, meaning to meet overdrafts as previously. On January 29th the defendants replied to this letter, apologizing for the delay which had occurred through oversight on the part of their corresponding clerk, saying: "We telegraphed

you to-day that it is all right, meaning to say that your request for discount is granted." If the defendants did not know when they wrote this letter that Ker had stolen the bonds, they had abundant reason for believing he had. On March 5, 1833, the defendants wrote to the plaintiffs: "Do your books show that you should have a special deposit of government bonds with us; if so, what issue of bonds, and what amount?" to which the plaintiffs replied, on March 8th: "We refer you to your advice of July 7, 1880, in regard to our bonds held by you."

Kean, one of the defendants, told Robinson in July, 1883, so the latter testified, that he (Kean) did not know until about the middle of January of that year that Ker had stolen the bonds. At the time the plaintiffs demanded the bonds, or their equivalent, there was nothing due from them to the defendants; and the latter refused to comply with the demand on the sole ground that the bonds were held as a special deposit, without reward, and that they were not liable for their loss.

Ker acted as book-keeper for about 10 years previous to May, 1881, when he became assistant cashier, at a salary of \$2,000 a year. The plaintiffs' bonds were kept in the "treasury" part of the safe, where the securities and reserve or surplus funds, not in active use, were kept. Ker took \$21,500 of the defendants' funds, and \$35,000 in bonds, including those sued for. Kean also testified that he did not know when the plaintiffs' bonds were last seen in the vault; that it was their habit to examine their securities and count their cash every month, and to examine their special deposits twice a year, to see that they corresponded with the amounts marked on the envelopes, and were otherwise correct; that the collaterals and special deposits were kept together; that Ker took none of the collaterals, presumably because he was aware of the habit of the bank to examine them and the cash; and that no record of the numbers of bonds held on special deposit was kept, and they could not be counted and checked off.

More than a year before Ker left, the defendants were cautioned that some one in their bank was speculating on the board of trade. Kean testified that, after receiving this caution, he made a quiet investigation, and the facts pointed towards Ker, if any one; that he thereupon called Ker up, and accused him of having been so speculating, to which he replied, "I have made a few transactions, but I am not doing anything now, and do not propose to do anything more." He admitted that what he had done was against the rules of the bank, and said: "I know I ought not to do it, and I am not going to do any more of it. I am ahead a thousand dollars, all told." Ker's salary appears to have been his only income. The defendants do not claim that he had accumulated any means or property from this or any other source, or that they thought he had; and yet they retained him in his position, which afforded him access to their own assets as well as the securities of others, without making any effort to verify the truth of his statements, or ascertain whether he had been tempted to appropriate to his own use the property of others. About two months before he left, Preston, one of the defendants, residing at Detroit, wrote to the bank at Chicago, calling attention to reported speculations of some of the employes on the board of trade. suggesting inquiry upon the subject, and directing that a careful examination be made of their securities of all kinds. On receipt of this letter, Kean told Ker what he had heard, and asked if he had not been speculating again on the board of trade? Ker said he had made some deals for friends in Canada for which he had received a brokerage, and that the transactions were all ended. The defendants then seemed to entertain suspicion of Ker's integrity, and an examination of their books and securities was commenced. No effort was made, however, to see whether the special deposits had been disturbed. Kean testified that the special deposits, including the plaintiffs' bonds, were not examined, because no record was kept of them, by numbers or otherwise; although the proof shows that the numbers of the plaintiffs' bonds did appear upon the defendants' bond register at the time of the purchase.

If the bonds were held as collateral security at the time they were stolen, the defendants were obliged, as bailees for reward, to exercise that degree of care in their safe-keeping which a reasonably prudent and cautious man would exercise in the care of his own property of the same It does not follow that they are not liable if they were as diligent in caring for these bonds as they were in caring for securities of their own, for they may have been careless of the latter. If, however, the custody of the defendants at the time the bonds were stolen was only that of gratuitous bailees, for safe-keeping, they are not liable for the loss unless it resulted from their gross carelessness. National Bank v. Graham.

100 U.S. 699.

When the first loan for which the bonds were pledged as security was paid, and the defendants inquired what should be done with the collaterals, they were directed by the plaintiffs to hold them as formerly, for the plaintiffs' use, and forward a list of them by numbers. The direction was not that the bonds be held as a special deposit, or for safe-keep-Evidently the defendants were informed that the plaintiffs expected to use the bonds as they had already been used, namely, as collaterals; and in informing the plaintiffs that the bonds were held as a special deposit, subject to their further orders, the defendants doubtless intended to be understood as willing to hold the bonds as collateral security for The two banks had been in uninterrupted business relations for a number of years, during the greater portion of which time there was a balance, varying in amount, with the defendants in favor of the The defendants deemed this account desirable and valuable. They cut off the coupons as they matured, and placed the amount to the plaintiffs' credit. While, therefore, the bailment was for the convenience of the plaintiffs, it came about in the course of business between the two banks, and it was for their mutual benefit.

If it be conceded, however, that the bonds ceased to be held as collaterals when the \$12,000 note was paid, and they thereupon became a mere special deposit, the character of the bailment was changed by the subsequent agreement whereby they remained in the custody of the defendants as a continuing security for advances made and to be made to

the plaintiffs. The defendants were distinctly informed that in order to accommodate, on short notice, such of the plaintiff's customers as were dealing in cattle and hogs, they might, from time to time, desire to overdraw their account on the security of these bonds as collaterals; and, in order that they might be held for such emergencies, the defendants discounted paper executed by the plaintiffs on the pledge of notes of the latter's customers. The evidence shows that this agreement continued in force until Ker fled, and that after it was made the plaintiffs did make overdrafts on the defendants, all of which were paid, some of them only a few months before Ker's dishonesty was discovered. If these overdrafts were not paid on the security of the bonds, they were paid without security, which is not to be presumed, in the absence of proof. The defendants made frequent examinations to see that their own cash and securities were correct, but, according to their own testimony, neglected any examination with a view of ascertaining whether or not the plaintiffs' bonds had been disturbed. The right of the defendants to hold the bonds against the plaintiffs and all others, as collateral security for any balance due to them from the plaintiffs, is too plain for dispute; and it follows that, having this right, their responsibility was that of pledgees.

It is immaterial, however, whether the defendants were bailees with or without reward, as in either case they are liable for the value of the bonds, the loss having resulted from their gross negligence. The defendants knew that Ker had been engaged in business which was hazardous, and that his means were scant. The demoralizing effect of speculating in stocks and grain-more properly speaking, gambling on the rise and fall of the price of stocks and grain—is seen in the numerous peculations, embezzlements, forgeries, and thefts plainly traceable to that cause. Ker had free access to valuable securities, which were transferable by delivery, easily abstracted and converted; and yet he was allowed to retain his position without any effort to see that he had not converted to his own use the property of others, or that his statements were correct. A prompt examination, after his first admission that he had been speculating, would have doubtless shown that even then some of the plaintiffs' bonds had been exchanged for others, if, indeed, they had not been stolen. Ker's position was one of trust and great importance. His own admission showed that he was not trustworthy for such employment, and it was gross negligence in the defendants not to discharge him, or place him in some position of less responsibility. Scott v. National Bank, 72 Pa. St. 471; Third Nat. Bank v. Boyd, 44 Md. 47; Cutting v. Marlor, 78 N. Y. 454.

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United States v. Jackson.

(Circuit Court, S. D. Georgia, W. D. October Term, 1886.)

1. CRIMINAL LAW-WEIGHT OF EVIDENCE-REASONABLE DOUBT.

In criminal trials simply, a preponderance of testimony is insufficient. A greater degree of mental conviction than in civil cases is held to be necessary, and the evidence must produce such an effect on the mind of the individual juror that, after its consideration, he can, in view of his oath, have no reasonable doubt of the guilt of the party accused, before a conviction is justified.1

2. Same—Flight of Accused—Assumed Name.

The flight of the accused under an assumed name, coincident with the theft of letters traced to his possession unexplained, tends strongly to show guilt.

3. Post-Office—Robbing the Mails—Registered Letter Stolen—Indict-MENT—Allegation of Ownership.

When the indictment alleges ownership in the person to whom a registered

letter was directed, and it appears in proof that when it was stolen the sender had deposited it with the postmaster, taking his receipt therefor, and it had, by due course of mail, left the mailing office, held, that its custody by the postoffice department was for the benefit of the person to whom it was addressed; that it was his property, the sender had no control over it, and there was no variance.

4. CRIMINAL LAW—EVIDENCE—GOOD CHARACTER.

In a criminal trial the good character of the accused is generally a fact fit, like all other facts proved in the cause, to be weighed and estimated by the jury, for it may render that doubtful which otherwise would be clear.

5. SAME-WEIGHT OF.

If the guilt of the accused is plainly proven to the satisfaction of the jury, notwithstanding proof of good character is made, and has been given its due weight, it would be their duty to convict, irrespective of such proof of character; but, where the evidence is doubtful and conflicting, the importance of the character of the accused is increased.

(Syllabus by the Court.)

Indictment under section 5467 of the Revised Statutes of the United States, for robbing the mails.

Du Pont Guerry, U. S. Atty., for the United States.

Hawkins & Hawkins, C. G. Simmons, and L. J. Blalock, for defendant.

Speer, J., (charging jury.) Will R. Jackson is on trial charged with the offense of robbing the mails. The statute he is alleged to have violated defines the offense.

In this trial, as in all criminal prosecutions, the burden and duty is on the government to produce such evidence of the truthfulness of the accusation as will satisfy the jury that the defendant is guilty.

That the guilt of a prisoner must be established beyond a reasonable doubt, and what is such reasonable doubt, see State v. Elsham, (Iowa,) 31 N. W. Rep. 66; Heldt v. State, (Neb.) 30 N. W. Rep. 626; People v. Steubenvoll, (Mich.) 28 N. W. Rep. 890, and note; State v. Thurman, (Iowa,) 24 N. W. Rep. 511, and note; State v. Meyer, (Vt.) 3 Atl. Rep. 201, and note; U. S. v. Searcey, 26 Fed. Rep. 442, and note; Brown v. State, (Ind.) 5 N. E. Rep. 905, and note; Stitz v. State, (Ind.) 4 N. E. Rep. 145, and note; Com. v. Leonard, (Mass.) 4 N. E. Rep. 96, and note; People v. Guidici, (N. Y.) 3 N. E. Rep. 496; State v. Jones, (Nev.) 11 Pac. Rep. 318, and note; Clair v. People, (Colo.) 10 Pac. Rep. 799, and note; Minich v. People, (Colo.) 9 Pac. Rep. 4, and note; Leonard v. Territory, (Wash. T.) 7 Pac. Rep. 872, and note; State v. Payton, (Mo.) 2 S. W. Rep. 394.

The degree of satisfaction and certainty required is not absolute conviction or certainty, but the evidence must produce that effect on the minds of the individual juror that, after its consideration, he can, in view of his oath, have no reasonable doubt of the guilt of the party accused. By "reasonable doubt" I do not mean any fanciful conjecture, or strained inference, but I mean such a doubt as a reasonable man would act upon, or decline to act upon, when his own concerns were involved,—a doubt for which a good reason can be given, which reason must be based on the evidence, or the want of evidence. This being true, it follows, logically, that the party accused, where such doubt as I have described exists, is entitled to its benefit,—he should be acquitted.

But where the evidence is satisfactory to the impartial mind that the crime was committed; that the prisoner committed it as charged,—when the mind comes naturally and reasonably to this conclusion, from a fair consideration of the evidence,—properly there can be no reasonable doubt, and the prisoner should be convicted. The same idea is expressed in another form when it is declared, as I now declare to you, that the prisoner is entitled to the presumption of innocence until his guilt, by proof, is made satisfactorily to appear. When such proof is had, the presumption of innocence is destroyed, and the prisoner should be convicted.

The following written requests to charge have been handed the court by counsel for the defendant, and I now charge you—

"(1) That, in a criminal case, a preponderance of testimony is insufficient to convict the accused, but a greater strength of mental conviction is held necessary to justify a verdict of guilty; and if there is any other reasonable hypothesis than the guilt of the defendant, from the evidence, or from the want of evidence, you are bound to adopt that theory, and acquit the defendant.

"(2) That the government is bound to prove every material allegation laid in the indictment; and, before the jury will be authorized to convict the prisoner under this indictment, you must be satisfied, from the evidence, beyond a reasonable doubt, that the money alleged to have been stolen was the property of the person alleged to be the owner in the indictment.

"(3) Where the evidence relied upon to convict is entirely circumstantial, the evidence must connect the defendant with the criminal act charged, and exclude every other reasonable hypothesis than the guilt of the defendant, before you will be authorized to find the prisoner guilty. The defendant is presumed to be innocent, and that presumption abides with him throughout the trial, and until removed by testimony satisfactory to the minds and consciences of the jury."

Bearing in mind these general rules given to you for your guidance in the determination of this issue, you will come to the consideration of the evidence. It is not disputed that on the first day of October, 1885, the accused was the assistant postmaster at Americus, in this district and division. He was an employe of the postal service. On that night he receipted for five registered packets, mailed from divers places to such points as, by due course of mail, they must

go through the post-office at Americus. His receipts for these packets have been introduced in evidence, and his signature identified. It further appears from the evidence that the parties to whom these registered packets were directed have never received them; that careful search was made for them in the Americus office. No account is had of these packets after they reached the hand of the accused. The accused made no record of them, as he was required to do, and he disappeared that night, and left the state, under an assumed name.

These are circumstances which, under the law, demand an explanation from the accused, or that such explanation be furnished by the facts of the case. In the absence of such explanation, if you find that the letters were stolen, these circumstances would raise the presumption that the accused was implicated in their disappearance. You will look to the evidence to see if such satisfactory explanation is afforded. If there be no such explanation properly inferable from the evidence, you will be justified in returning a verdict convicting the prisoner. If you find, on the other hand, from the evidence, that these circumstances have been satisfactorily explained, or that in themselves they are reasonably consistent with the theory of the innocense of the accused, it will be your duty to acquit him. In reaching your conclusion on this question, it is your duty to consider the testimony of the accused himself. By the humanity of the law, he is permitted to testify in his own favor. You are not bound to believe what he says, however, and you must bear in mind that he has great interest in your finding; and if his testimony conflicts with that of other witnesses, who have no interest in the question of his guilt or innocence, generally it would be your duty to credit that witness or those witnesses who have the best opportunity for knowing the fact to which they testify, and the least inducement, from interest or other cause, to testify falsely. You may, however, give to the testimony of the accused himself just such weight as you think it is properly entitled to have.

It is not denied that the accused disappeared from Americus contemporaneously with the disappearance of these registered letters; that is to say, as the prosecution insists, on the night of October 1st. He himself says that the receipts were made out on the 2nd, but that the letters were registered or dated on the 1st. If you believe this to be true, it, also taken in connection with the other evidence, demands a satisfactory explanation from the accused.

It is insisted by the defendant that the evidence upon which the prosecution must rely, in order to obtain a verdict of conviction, is circumstantial evidence. That is true, in part. It is shown by evidence positive—not circumstantial in its nature—that the defendant received, receipted for, and had in his custody four of these registered letter packets. It is shown positively that the persons to whom these packets were addressed did not receive the letters inclosed. It is

also shown, by positive or direct testimony, that the sums of money charged in the bill of indictment were placed in the letters inclosed in the register packet envelopes. By positive testimony, the missing letters were traced to the hands of the accused, and the evidence is only circumstantial in this respect: from the circumstance that the missing letters and their contents are not accounted for after they reach the hands of defendant, and, from the circumstance of his sudden and speedy flight, it is inferred by the prosecution that he embezzled the letters.

Now, I charge you, as requested by defendant's counsel, that before you are warranted in finding guilt from the evidence of circumstances, as in this case, such circumstances must so clearly point to the guilt of the accused, that there is left to the impartial and reasonable mind no theory or explanation of the circumstances consistent and reconcilable with the theory that the accused is innocent; but that explanation must be not only consistent with the theory of innocence, but it must be reasonable, and it must arise from the evidence, or from the want of evidence. The jury will not be justified in making excursions outside of the evidence, to conjure up fanciful theories. They must take the practical and sensible view of the evidence which men of fair intelligence take of matters of fact in the ordinary affairs of life.

Nor are you limited to the consideration of one portion of the evidence. You must consider all the evidence, and though a circumstance tending to show guilt may be partially susceptible of an explanation which, if credible, might be satisfactory, still, if there be other evidence to show the guilty conduct and purposes of the accused, you must take all the evidence together, and then determine whether the guilty or the innocent theory is your proper finding. The truth is that all evidence is in its nature more or less circumstantial. All statements of witnesses—all conclusions of juries—are the results of inference. All evidence admitted by the court is to be considered by the jury in making up their verdict, and their duty is to acquit, if on such evidence there is reasonable doubt of the defendant's guilt; otherwise, it is their duty to convict.

It is insisted by the defense that there is such a variance between the allegations in the bill of indictment, relating to the ownership of the money contained in the registered packets and the proof to show ownership, that the prisoner is entitled to an acquittal. It is true that the proof must conform to the allegations; but when the ownership of a registered letter and its contents is alleged to be in the person to whom the proof shows it was directed, and the proof shows that such registered letter was mailed and the sender took a receipt, the letter then is, in contemplation of law, the property of the person to whom it is sent; and, if the proof further shows that it has left the mailing office, the sender has no further control over it, and its delivery is complete. Its custody by the post-office department is

the custody of the law for the benefit of the person to whom it is addressed, or to his or her order, or his or her legal representative.

I charge you that if you find from the evidence that the registers mentioned in the indictment are shown by the proof to have been mailed, and that the persons mailing them took the department's receipt for them, and that they had passed from the mailing office, then there is such a property in them in the persons to whom they were directed as will sustain the allegation of ownership in the bill of indictment, and there will in that case be no variance which will entitle the prisoner to an acquittal.

It is in evidence before you that the defendant hurriedly left Americus the night after these registered letters were received; that he gave no notice of his departure, and that he was arrested the next month on the other side of the continent: that he denied his identity. and his residence; that he said his name was Jack Jones; that he had with him about \$225 when he was arrested. Two of his letters. written to a brother in Troy, Alabama, are before you. In both he enjoins secrecy; in one he states that he anticipates arrest. One is signed with a fictitious name. In one he informs his brother that he incloses him postal orders for \$300; tells him to get them cashed. and to meet him in Mobile. He tells his brother, if the postmaster at Troy has not got the money to cash the orders, to transfer them to some bank, and to get the money, and meet him. This was on the thirtieth of September. He admits that these money orders were drawn by him without placing the cash in the office whence they were issued, as he should have done.

Subsequently, in the other letter, written from El Paso, he directs his brother to keep \$100 of the money, and to send his mother \$200. He states that Maj. Black, the postmaster, authorized him to issue these postal orders without depositing the cash with the government This Maj. Black denies. In either event, the accused must have known that it was a criminal violation of the postal laws. You are not, however, trying him for this offense. It is only admitted on the theory of the prosecution that it was part of a deliberate plan to rob the government, both by the fraudulent money orders, and by the theft of the registered letters carried out at the same time. You will observe that this letter was written on the thirtieth of September. By his own account, he left the night of the second of October. is proper for the court to call your attention to this circumstance, and you will determine what importance, if any, belongs to it. you believe it important, you will determine whether there is a satisfactory explanation for it. It must be considered with all the other evidence.

The prisoner has made to you an explanation of his flight. He declares that he fled from Americus on very short notice because of an alleged improper intimacy with a woman of that place, and the

threatened criminal prosecution therefor. It is for you to say whether this account is reasonable and satisfactory. He explains the possession of the sum of money found with him at the time of his arrest by the statement that it was the proceeds of his winnings at cards. You will determine what weight to attach to that statement. You must not find your verdict in view of any isolated portion of the evidence before you. You must carefully take into consideration all the evidence that has been admitted, considering, as well, the evidence for the prisoner as for the prosecution.

Evidence has been introduced to show the general character of the accused antecedent to this transaction. Good character is generally a fact fit, like all other facts proved in the cause, to be weighed and estimated by the jury. Good character is an ingredient which may render that doubtful which would otherwise be clear. If the guilt of the accused is plainly proven to the satisfaction of the jury, notwithstanding the good character of the accused has been given its due weight by them, it would be their duty to convict the defendant, irrespective of such proof of character; but, where the evidence is doubtful and conflicting, the importance of the character of the accused is increased. In ascertaining what is that character, the jury is not limited to the testimony of those who swear generally, but they may look to all the evidence, and then determine whether or not the accused possessed good character.

There are several counts in this indictment. You may, gentlemen, if you think proper, under your view of the evidence and the rules I have given you, find the accused guilty on one or more counts, and not guilty on the others. If so, you will say: "We, the jury, find the defendant, Will R. Jackson, guilty on the first count, and not guilty on the others;" or guilty on the second and third counts, and not guilty on the others, as you may find. If you find him guilty on all the counts, you will say: "We, the jury, find the defendant guilty." If you find him not guilty, you will say: "We, the jury, find the defendant, Will R. Jackson, not guilty;" and your foreman will sign the verdict. Gentlemen, retire, and make up your verdict.

KITTLE v. HALL and others.

(Circuit Court, S. D. New York. January 8, 1887.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—PATENT No. 98,505—CLAIMS 1, 2,

AND 3—PATENT TO JAMES I. SPENCER.

Letters patent No. 98,505, granted to Samuel P. Kittle, January 4, 1870, for an improved spiral spring for mattresses and furniture, as limited to the first two claims under such patent, are valid; and the patent granted to James I. Spencer, July 24, 1877, for an improvement in spring bed bottoms, is an infringement upon them. The third claim, for a flexible border of rattan at-

tached to the outer edges of the springs as a support to keep the ticking in line, in combination with the springs, frame, webbing, etc., is not valid for the reason that it was inserted more than four years after the application was filed, and more than two years after the structure covered thereby had gone

into public use.

2. SAME—SEVEN YEARS' DELAY—NOTICE TO DEFENDANTS—NO DEFENSE. In an action for infringement of letters patent, where it is shown that defendants took a license from plaintiff to make and vend the patent, and subsequently denied plaintiff's rights, and claimed to make under another patent; that shortly after such denial plaintiff became bankrupt, and the assignee in bankruptcy sold the patent after two years; that plaintiff entered into negotiations to get the patent back from the vendee; that, though the vendee took no steps to prevent the patent being plundered, plaintiff gave defendants no tice he intended to hold them accountable for their infringements: that, after his discharge from bankruptcy, and when he had reacquired the patent, plaintiff commenced action against defendants for infringement,—the court, sitting in equity, will, considering all the circumstances, take jurisdiction of the cause, notwithstanding a delay of about seven years in the prosecution by relaintiff of his rights. by plaintiff of his rights.

In Equity.

James P. Foster, for complainant.

James A. Whitney, for defendants.

Coxe, J. This action is for the infringement of letters patent No. 98,505, granted to the complainant January 4, 1870, for an improved spiral spring for mattresses and furniture. The double cone or hourglass spring is constructed by having one or more of its central coils wound at right angles to its axis, instead of spirally, as before. When several of these springs are used, as in a mattress, for instance, the central coils are all on the same horizontal plane, so that when strips of cross-webbing, fastened to a suitable frame, are passed between the coils, the springs are held firmly in a vertical position.

It is asserted by the patentee that prior to his invention the spring in use could not be successfully supported in the middle, or held in a vertical position. It had a tendency to "bag out." The specification provides for a slight wooden frame to support the webbing and the springs. The webbing, having its ends secured to this frame, is passed through and fastened to the central horizontal coils, each strip of webbing passing alternately over and under the strip crossing at right angles. The middles of all the springs are thus held in the same relative position, their full

elasticity is preserved, and durability is assured.

The claims are as follows:

"(1) A spiral spring, for use in mattresses, furniture, etc., so constructed that its central coil or coils are wound at right angles to its axis, substantially

as and for the purposes set forth.

"(2) The combination of a spiral spring, when constructed as described, with the cross-webbing, C, C, and frame, D, or their equivalent, when arranged to support such spring, substantially as and for the purposes set forth.

"(3) In a spring mattress, having the springs supported from or at their centers, the arrangement of a rattan or a like flexible border, attached to the outer edges at bottom and top of the outside rows of springs, to furnish a suitable support to keep the ticking in line, but which will also yield as any spring or part of the mattress is compressed."

The defenses are—First, that the complainant has no title to the patent; second, that he is guilty of laches; third, abandonment; fourth, lack of novelty; fifth, non-infringement.

To the third claim several distinct and separate defenses are urged,

which will be stated hereafter.

There is no flaw in the complainant's title. On the thirty-first of December, 1877, he was forced into bankruptcy. The adjudication vested the title in the court. On the eleventh of April, 1878, the register in charge assigned all the property, as provided by law, to De Witt C. Weeks, the duly-appointed assignee. On the twenty-eighth of January, 1879, Weeks sold and assigned the patent to Francis C. Devlin. Six days thereafter Devlin assigned it to Theodore Wilkins, who held it until the eighth day of October, 1884, when it was transferred by him to the complainant. On the fourth of October, 1878, the complainant was discharged in bankruptcy by the district court. The chain of title is perfect. No valid accusation can be made against it.

The proposition that the bill cannot be maintained because of the laches of the complainant is a most perplexing one. The solution of it has been rendered more difficult from the fact that the complainant's brief, so full and exhaustive upon other branches of the case, makes only casual and passing allusion to the question, which is elaborately presented upon the brief of the defendants. The facts bearing upon this question

are as follows:

In the autumn of 1865 the patentee conceived the invention. On the fourth of January, 1870, the patent was granted. In February, 1885, 15 years thereafter, this action was commenced. In 1875 a suit for infringement was commenced against one James V. Schenck, but the proofs were not completed, and it was never brought to a final hearing. No step appears to have been taken in it after July, 1877. No other action was at any time commenced. In the autumn of 1877 the defendants commenced making the infringing mattresses. They were made under a patent granted to James I. Spencer, July 24, 1877, for an improvement in spring bed bottoms. In November, 1877, the defendants issued a circular to the trade, in which they insisted, in most vigorous and uncompromising language, upon their right to manufacture under the Spencer patent, and closed with these words:

"We have only to say in conclusion that Mr. Kittle must do one of two things,—he must stop interfering with our business, or he must bring suit upon his patent, and thus give us a chance to see how little it amounts to. If he does not do one thing or the other of these, he will soon find himself defendant, instead of plaintiff, in a lawsuit."

The complainant appears to have chosen the first of these alternatives; for from that time until this suit was commenced there was no more interference with the defendants or their customers, except, he testifies, that he told the defendant Hall, in April, 1882, that a day of reckoning was approaching, and he wished him to keep a strict account of his sales.

From December, 1877, neither the complainant, nor any of the intermediate owners of the patent, has manufactured or asserted any right

under it, except as before stated. The assignees, with the exception of Mr. Devlin, who held the patent but a short time, all knew of the infringement, by the defendants not only, but by the trade generally, and yet they made no move to prevent it, though frequently urged to do so. In short, the patent, from the fall of 1877, has been pirated upon by the whole trade. Since then no one has respected it. On the fourth of February, 1876, the defendants, then doing business at Philadelphia, took from the complainant a license to make and vend the patented mattress in that city for one year. The license provided that, in case of the failure of the defendants to perform the conditions of the license, the same was to become null and void, and all rights and privileges under it to cease and determine.

These are the facts. Bearing in mind the theory upon which equity takes cognizance in patent causes, as established by the decision of the supreme court in Root v. Railway Co., 105 U.S. 189, it becomes important to ascertain what the law is as applicable to these facts. accumulated wisdom of a multitude of precedents has established the principle that he who invokes the protection of a court of equity must be "prompt, eager, and ready" in the enforcement of his rights. will not encourage a sleepy suitor. As time passes, memory fails, witnesses die, proof is destroyed, and the rights of individuals and of the public intervene. Long acquiescence and laches can only be excused by proof showing excusable ignorance, or positive inability to proceed on the part of the complainant, or that he is the victim of fraud or concealment on the part of others. A mere "imaginary impediment or technical disability" is not enough. The court will not entertain a case when it appears that the complainant, or those to whose rights he has succeeded, have acquiesced for a long term of years in the infringement of the exclusive right conferred by the patent, or have delayed, without legal excuse, the prosecution of those who have openly violated it. These propositions are, it is thought, abundantly sustained by the following authorities: Piatt v. Vattier, 9 Pet. 405; Wyeth v. Stone, 1 Story, 273; McLaughlin v. People's Ry. Co., 21 Fed. Rep. 574; Speidell v. Henrici, 15 Fed. Rep. 753; The Fleming, 9 Fed. Rep. 474; Estes v. Worthington, 22 Fed. Rep. 822; Barden v. Duluth, 28 Fed. Rep. 14; Wagner v. Baird, 7 How. 234; City of Concord v. Norton, 16 Fed. Rep. 477; Badger v. Badger, 2 Wall. 87; Wollensak v. Reiher, 115 U. S. 101; S. C. 5 Sup. Ct. Rep. 1137; Brown v. County of Buena Vista, 95 U. S. 157; Lansdale v. Smith, 106 U. S. 391; S. C. 1 Sup. Ct. Rep. 350; Godden v. Kimmell, 99 U. S. 201; Maxwell v. Kennedy, 8 How. 210; Sperry v. Ribbans, 3 Ban. & A. 260; Curt. Pat. §§ 440, 441; Walk. Pat. §§ 596, 597; Pom. Eq. Jur. §§ 418, 419.

In the present case it is argued with considerable plausibility that the complainant, from the date of his patent until the commencement of this action, with the exception of the abortive and abandoned suit against Schenck, has made no active effort to stop infringements, although they commenced before the patent was issued, and continued, with the knowledge of the complainant, until they were well-nigh universal; that the

public had a right to assume, from this profound silence and supineness, that the patentee and his successors had relinquished any claim which they might possess. The complainant seems to proceed upon the theory that, if it can be shown that he personally is free from negligence, it is sufficient, and that he shows this when it appears that the title passed out of him when he was adjudicated a bankrupt, and that when he obtained it again in October, 1884, he used due diligence in prosecuting infringers.

The proposition, stated thus broadly, cannot be maintained. A party who purchases a patent which has for years been freely plundered by a multitude of trespassers does not answer the charge of laches by showing that he commenced, immediately after he acquired title, to bring the wrong-doers to account. Such a fact is of no more interest to a defendant sued for infringement than the fact that the last holder of an outlawed note brought an action upon it without delay, is to the maker of the note. But, so far as these defendants are concerned, it cannot be maintained that there was any laches until they stood out from under their license, and boldly proclaimed their purpose to continue the manufacture under the Spencer patent. This was in November, 1877. month later the complainant was in bankruptcy. It was not until the eleventh of April, 1878, that the patent was transferred to the assignee in bankruptey. He held the title until the twenty-eighth of January. During this period, when the patent was in the court of bankruptcy, negligence can be imputed to no one. For several months the title was suspended, and no action could have been maintained; and, as to the remaining time, it cannot be maintained that it is the duty of an assignee in bankruptcy to institute suits for the infringement of a patent owned by the bankrupt, and that his failure so to do is negligence.

Wilkins held the patent from February 3, 1879, until October 8, 1884, and no valid reason is discovered in the record why he could not have made some effort to prevent the patent from being plundered. It appears, however, that the complainant early commenced negotiations with Wilkins looking to a reassignment of the patent, and that in April, 1882, the defendant Hall had notice that the complainant still asserted its va-

lidity, and intended to hold him to a strict account.

Furthermore, it is entirely clear that, whatever may be said as to other manufacturers, the defendants were not misled. The defiant challenge of their circular leaves no doubt that they had made up their minds as to the course to be pursued, and that they did not intend to desist unless prevented by the command of the court. So the simple question is, will equity refuse to entertain a cause where, in the circumstances disclosed by this record, there has been a delay of about seven years in its prosecution? The question is an interesting one, and is by no means free from doubt; but it is thought, taking into consideration the fact that the delay has been partially accounted for and excused, that the case is in some respects sui generis, and that no precedent has been discovered for the dismissal of a bill for laches extending through so short a period; that it should be answered in the negative.

It is entirely clear that the invention must be confined to what is covered by the first and second claims. The accusations urged against the third claim are so numerous that it will be impossible to consider them all. It is said that the drawings which relate to it are defective; that the subject-matter of the claim was abandoned to the public; that no application was ever filed for the invention which it covers; that it is for a mere aggregation, and not for a patentable combination; and that it is void for uncertainty. It is by no means an easy task to place an intelligent construction upon this claim. The expert witnesses do not agree as to what it includes, and in one instance, at least, the same witness, when he is again called to testify, greatly modifies his first opinion regarding it. It may be said that, if the broad construction suggested is adopted, the claim is anticipated; if the narrow one is taken, the defendants do not infringe.

But the manner in which the claim found its way into the patent was irregular, and, it would seem, illegal; and the public acquired vested rights in the invention covered by the claim years prior to its first appearance in the patent-office. The application was filed November 28, 1865. It recites that the petitioner has invented, not a new mattress, but a new improved spiral spring, and prays that a patent may issue therefor. No other application was ever filed. The patent, when issued, was for a spring alone. The claims of the original specification—three in number—related only to the spring, and the "former" on which it was constructed. The application was rejected. A year later, the patentee, after correspondence with the commissioner, forwarded amendments omitting the claim for the "former," and substituting the present second claim for the proposed third claim; so that the patent then had but two claims,—the first and second as they now appear. On the tenth of December, 1866, the application was re-examined, and again rejected. Nothing more was done until November 22, 1869, when a request was made by the complainant, through his solicitor, for a re-examination of the case. This was granted, and the patent allowed about the twentyseventh of the same month. Three weeks thereafter, on the seventeenth of December, 1869, the solicitor wrote the commissioner proposing, if it was not too late, that the present third claim should be inserted. It was inserted.

So far as appears from the file-wrapper, the attention of the patent-office was never called to the third claim until December, 1879, and then only by this letter of the solicitor. For more than two years prior to the first suggestion of this claim, mattresses, embodying all its elements, were, with the knowledge and consent of the complainant, bought and sold in the open market. In this connection it is worthy of comment that one of the defendants testifies that the complainant repeatedly informed him, in substance, that his invention was confined to the spring, and the mode of fastening it, and that the third claim could not stand the test of a judicial examination. This testimony is not denied.

Assume that the patent had been granted in 1865 for a spring as prayed for, and on the seventeenth of December, 1869, four years later, the v.29f.no.11—33

complainant had petitioned for a new or reissued patent covering the combination of the third claim, it needs no citation of authorities to prove that such a proceeding would not have been received with favor by the court; and yet how is the position strengthened by an attempt to graft the invention upon an application which will not sustain it, especially when it is shown that during the interval the invention went into public use?

In Railway Co. v. Sayles, 97 U. S. 554, Mr. Justice Bradley, at page 563, says:

"It will be observed that we have given particular attention to the original application, drawings, and models filed in the patent-office by Thompson and Bachelder. We have deemed it proper to do this, because, if the amended application and model, filed by Tanner five years later, embodied any material addition to or variance from the original,—anything new that was not comprised in that,—such addition or variance cannot be sustained on the original application. The law does not permit such enlargements of an original specification, which would interfere with other inventors who have entered the field in the mean time, any more than it does in the case of reissues of patents previously granted. Courts should regard with jealousy and disfavor any attempts to enlarge the scope of an application once filed, or of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alterations, or to appropriate that which has, in the mean time, gone into public use."

See, also, Eagleton Manuf'g Co. v. West, etc., Manuf'g Co., 111 U. S. 490; S. C. 4 Sup. Ct. Rep. 593; at circuit, 2 Fed. Rep. 774; Planing-machine Co. v. Keith, 101 U. S. 479; Fruit-jar Co. v. Bellaire, etc., Co., 27 Fed. Rep. 381; Lindsay v. Stein, 10 Fed. Rep. 913; United States Rifle, etc., Co. v. Whitney Arms Co., 14 Blatchf. 94; Consolidated Fruit-jar Co. v. Wright, 12 Blatchf. 149; affirmed, 94 U. S. 92; Bevin v. East Hampton Bell Co., 9 Blatchf. 50.

It is asserted that the invention, confining it to the spring and the means of fastening it, is void for lack of novelty. The proof shows that prior to the patent it frequently happened that double cone springs, made of iron wire, which was then in use, "broke down" in the center. This occurred from accident or want of skill in the maker. this condition, they were regarded as second-class or damaged springs, and were sold as such for use in cheap and inferior furniture, the central coils, which thus happened, in some instances, to be at right angles to the axis of the spring, were not of the same size, so that when in use the smaller coil would frequently pass through the larger, thus causing the spring to rattle. These springs did not break down in the same place, and were incapable of performing the functions of the patented spring, even if any one had thought of putting them to this use; but no one ever did. Neither the damaged springs, nor the French patent, nor any of the other references, is sufficient to defeat the patent. The evidence all falls far short of that clear and convincing proof which is required in such cases. Coffin v. Ogden, 18 Wall. 120; Coburn v. Schroeder, 19 Blatchf. 377; S. C. 8 Fed. Rep. 519; Webster Loom Co. v. Higgins, 4 Ban. & A. 88; Herring v. Nelson, 14 Blatchf. 293; Wood v. Cleveland Rolling-mill Co., 4

Fish, 550; Putnam v. Hollender, 19 Blatchf. 48; S. C. 6 Fed. Rep. 882; Howe v. Underwood, 1 Fish. 160; Clough v. Barker, 106 U. S. 166; S. C.

1 Sup. Ct. Rep. 188.

The defendants infringe. The Spencer spring used by them is constructed with a vertical bend or bearing loop at the central axis of the spring. This bend or pin passes through a metallic evelet in the web-The spring is so wound that on either side of the webbing there is a horizontal, or nearly horizontal, coil, at right angles to the axis of the spring, which helps to support the spring in a vertical position. A portion of the central coil is wound at right angles to the axis, and there is a level bearing of the spring upon the webbing. It is quite likely an improvement, but, nevertheless, it performs all the functions of the patented spring.

The questions argued relating to the amount of damages and profits can best be considered upon the coming in of the report of the master.

The complainant is entitled to decree for an accounting upon the first and second claims of the patent.

Boston Electric Co. v. Fuller and others.

(Circuit Court, D. Massachusetts. December 24, 1886.)

1. Patents for Inventions — Letters Patent No. 280,590 — Electric Gas-LIGHTING APPARATUS—EARLIER INVENTIONS.

The invention contained in letters patent No. 230,590, granted July 27, 1880, to Geo. F. Pinkham, assignee of Jacob P Tirrell, for electric gas-lighting apparatus, held not anticipated by the Tirrell inventions of 1871 and 1872, contained in patents No. 121,302 and No. 130,770, nor by the Cutler patent No. 220,704; none of these prior devices being so constructed that by the action of the electric current the gas-cock is turned by a single impulse and a succession of sparks is produced at the burner tip without further motion of the gas-cock.

2. SAME—Invention.

Held, also, that this improvement over prior devices constitutes invention.

8. Same—Infringement—Difference in Details.

The patent held infringed by defendants' apparatus, although the latter differs somewhat in construction from that described in the patent. The fact that the main features in the patented apparatus, such as the circuit breaker, single circuit, operating the gas-cock directly by the armature, are old, should not limit the patentee to the exact form of mechanism found in the patent.

In Equity. Suit for infringement of patent.

- J. E. Abbott, for complainant.
- E. P. Payson, for defendants.

COLT, J. This suit is brought for infringement of the first claim of letters patent No. 230,590, granted July 27, 1880, to George F. Pinkham, assignee of Jacob P. Tirrell, for electric gas-lighting apparatus. The invention relates to apparatus for lighting gas by electricity, in which the gas-cock is opened and closed by electric action upon a mechanical device connecting with the cock and a battery. The specification says:

"My present improvements consist in the employment of a horizontal swinging arm attached to the lower end of the vertical gas-cock, this arm being forked and straddling an upright bar erected upon the top of a vibrating armature disposed between two pairs of electro-magnets, and caused to vibrate by the closing and opening of an electro-circuit from a suitable battery, the vibration of the armature effecting reciprocation of the lever and cock.

"My invention also consists in connecting the armature with the lower end of the movable electrode or arm in such manner that, as the armature moves in one direction and opens the cock, it causes the movable electrode to separate from the fixed and insulated electrode, thus breaking the electric circuit and producing a spark to light the gas, while a reverse movement of the armature closes the cock and allows the movable arm to return by the stress of a spring

and make contact with the fixed arm. * * *

"It will be seen that the vibrations of the armature are of such extent and its relations to the gas-cock and movable electrode are such that the cock is open before the spark is produced. The purpose of this is to cause a sufficient volume of gas to issue from the burner in advance of the spark to insure its ignition by the latter. * * *

"In the use of this device the pressure on the knob which charges the magnet, H H', should be continued for a few seconds, as this produces rapid intermittent vibrations of the movable electrode and a corresponding number of sparks; the object of this being to insure the lighting of the gas should the first spark fail to do so. In order that these continued vibrations of the movable electrode and armature may be placed without effect upon the gas-cock, I form the notch in the forked end of the lever of sufficient width to permit of the vibrations of the armature without moving such lever."

Claim 1 is as follows:

"(1) In an electric-lighting gas-burner, a magnet for turning the gas-cock by one electric impulse, combined with a fixed electrode, a', and a movable electrode, c', normally in contact, and mechanism connecting the armature with the movable electrode to break the contact between a' and c' the instant after the gas is turned on, and create a spark for ignition, substantially as described."

In gas-burners there is a portion of the tube between the cock and the end of the tube which becomes full of air when the gas is turned off. When the gas is again turned on a little time is required to expel the air from the burner. If only one electric spark is produced at the tip of the burner the instant the gas-cock is turned, the air would not have escaped and the gas may not be lighted. In the patented apparatus the gas-cock is opened by a single impulse, and by pressure on the button a succession of sparks is produced at the burner tip by the intermittent vibrations of the movable electrode and the armature, and these vibrations occur without further moving of the gas-cock by reason of the notch in the forked end of the lever. In closing the gas-cock no spark is produced at the burner tip. There is evidence that this apparatus was the first which operated successfully in house lighting, and that it has been extensively used. Now it is apparent that this apparatus was not anticipated by the Tirrell inventions of 1871 and 1872, and contained in patents 121,302 and 130,770, nor by the Cutler patent No. 220,704.

None of these prior devices were so constructed that by the action of the electric current the gas-cock is turned by a single impulse and a succession of sparks is produced at the burner tip without further motion of the gas-cock. I am also satisfied that this improvement over prior devices constituted invention.

The defendants' apparatus is the same in principle, though its construction differs somewhat from the plaintiff's. The magnets have their cores parallel with the burner, while the magnets in the patent are substantially at right angles thereto; the movable electrode has a vertical movement to break the circuit, while the movable electrode in the patent has a laterally vibrating movement; in defendants' apparatus the armature is horizontal instead of vertical, and the means for breaking the circuit are somewhat different. I am of opinion, however, that the defendants' apparatus embodies the substance of the patented invention, and that changes in the details of construction should not protect them from the charge of infringement. The fact that the main features in the patented apparatus, such as the circuit-breaker, single circuit, operating the gas-cock directly by the armature, were old, should not limit the complainant to the exact form of mechanism found in the patent. The patent covers an important improvement in the art of lighting gas by electricity, and it should receive a reasonably broad construction, and those should be held to be infringers who accomplish the same result by substantially the same or equivalent means.

Decree for complainant.

ALLISON v. TRUSTEES OF NEW YORK & BROOKLYN BRIDGE.

(Circuit Court, S. D. New York. December 28, 1886.)

Patents for Inventions — No. 105,290 — Pipe Couplings — Scope of Claim—Infringement.

The claim of letters patent No. 105,290, granted July 12, 1870, relating to an improvement in pipe couplings, is for rods or tubes "having tapering ends, and tapering threads upon the same, in combination with a sleeve having tapering sockets, and threads corresponding to those of the rods." Held, that the terms "tapering ends" and "tapering sockets," considered in connection with the descriptive part of the specification, are to be interpreted as describing a rod with a tapering screw, and a socket with a tapering chamber, and that the patent is not infringed by a coupling using rods in which the threads of the screw surround a cone-shaped stem, but the exterior lines of the threads form a cylinder, and not a cone-shaped or tapering end or screw, and in which the exterior lines of the sleeve form a cylindrical chamber, and not a cone-shaped or tapering chamber, and not

Suit for Infringement of Patent.

George Harding, for complainant.

Bergen & Dykman and Witmore & Jenner, for defendants.

WALLACE, J. The only issue between the parties is whether the rod coupling of the defendants is an infringement of letters patent No. 105,-

290, granted to the complainant, July 12, 1870, for an improvement in pipe couplings. The object of the invention described in the letters patent is to effect a perfect and secure junction of tubes, pipes, rods, etc., with a socket or sleeve designed to receive and retain them when the ends of two rods or pipes are brought into connection in the socket. The specification states that the invention "consists of a coupling in which tapering and vanishing screw-threads on the ends of the tubes, pipes, rods, etc., to be coupled together, are combined with a socket having internal vanishing and tapering screw-threads corresponding to those on the tubes, rods," etc.

In the accompanying drawings, Fig. 1 represents an exterior view, partly in section, of the ends of two pipes coupled together according to the invention; Fig. 2 represents the ordinary mode of coupling pipes together; and Fig. 3 illustrates the advantages of the invention.

The specification states that-

"It has been usual to cut a slightly tapering screw on the ends of the adjoining tubes, while an internal screw or thread, without any taper, was formed in the socket; hence but a portion of this internal thread of the socket was in proper binding contact with the threads of the pipes, as is clearly shown in figure 2; the greater portion of the threads, both on the tubes and in the socket, being of no avail as a medium of effecting a tight junction of the tubes,"

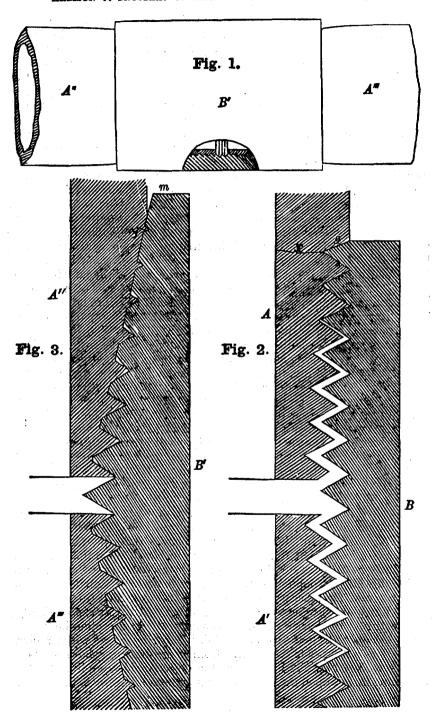
After pointing out the defects in and objections to such screw couplings, the patentee proceeds in the specification as follows:

"In order to obviate these objections, I cut on the ends of the pipes, A" and A" (Figure 3.) a tapering screw. Instead of cutting the thread of this screw to one uniform depth, however, I so cut it that it shall gradually vanish until it disappears at the exterior of the tube as shown at Y, figure 3. It should be understood, however, that the thread of the screw does not vanish so abruptly as is shown in that figure, which is exaggerated, with the view of rendering more apparent the advantages of my invention. The socket, B, figure 3, instead of having a screw-thread cut through it as in figure 2, has two screw-threads, tapering, one in one direction for receiving the end of one tube, and the other in another direction for receiving the end of the other tube, the tapers of each screw corresponding with that of the tube which it has to receive, and the screw-thread vanishes to correspond with the vanishing thread of the tube, as clearly indicated in the drawing."

The claim of the patent is as follows:

"The rods or tubes, A, A', having tapering ends and tapering threads upon the same, in combination with a sleeve having tapering sockets and threads corresponding to those of the rods, as set forth."

The defendants contend that their coupling does not infringe this claim, because, although their tube is cut with a vanishing thread, and their sleeve has a vanishing thread to correspond to that of the tube, their coupling does not have a rod with a tapering end or screw, or a tapering socket. In their rods the threads of the screw surround a cone-shaped stem, but the exterior lines of the threads form a cylinder, and not a cone-shaped or tapering end or screw; and the exterior lines of their sleeve form a cylindrical chamber, and not a cone-shaped or tapering chamber.



The case turns wholly on the meaning of the term "tapering ends" and "tapering sockets," as used in the claim. If these terms are to be interpreted as describing a rod with a tapering screw and a socket with a tapering chamber, the defendants do not infringe. If they describe a rod with a tapering stem having vanishing threads cut upon it, and a socket to correspond, infringement is established. It is entirely clear that the "tapering threads" of the claim are synonymous with the "vanishing threads" of the specification.

The patentee was the first to combine in a coupling a sleeve and screw in which a vanishing male and female thread were made to correspond with each other. By doing this, he effected a more perfect metallic contact throughout between the socket and the screw, and made a more perfect and secure joint than had been done before. The expert for the defendants admits that he knew of no instance in the state of the art in which a vanishing screw-thread cut upon a tapering mandrel or cone was combined with a tapering female thread cut upon the surface of a hollow cone prior to the date of the patent in question. The patentee was therefore entitled to claim broadly a sleeve or socket and screw in which a vanishing male and female thread were made to correspond with each But the question in this case is whether the terms of his claim, when interpreted, as they must be, by the specification, are not narrower than the real invention, and such as to enable the defendants to deny infringement. The claim by itself, so far as it relates to the rods, is capable of an interpretation which would fully cover the real invention. If a rod with a tapering end is to be regarded as a rod in which the stem of the screw is tapering, the claim is ample, and embraces the rod of the defendant. On the other hand, if the term "tapering end" is intended to describe a rod with a tapering screw,—that is, a rod in which the exterior lines of the screw-threads form a tapering end,—the coupling of the defendant is not an infringement. A rod with a tapering end may mean a rod in which the stem, mandrel, or solid part of the end tapers, or it may mean one in which the end, screw-thread included, as adapted to be fitted into a sleeve or recess, is tapering. The term, as used in the claim, is therefore capable of two meanings; and, being ambiguous, the true meaning must be ascertained by resort to the descriptive part of the specification in order to discover what the patentee describes as new, and what the public have a right to understand was intended to be claimed.

An examination of the specification denotes quite plainly that the patentee supposed that the gist of his improvement upon the couplings previously in use consisted in substituting a tapering screw having vanishing threads, in conjunction with a sleeve or socket adapted to receive such a screw, for tapering screws without the vanishing thread, and a socket not adapted to receive a tapering screw. The drawings distinctly denote this. In describing the advantages of his invention he dwells upon the objections to the use of a "slightly tapering screw" with a socket which does not taper to receive it. Each of the drawings shows a tapering screw, but Fig. 2, which shows the objectionable coupling, has no vanishing thread upon the screw, and has no tapering recess in the socket,

while Fig. 3, which illustrates the improvement, shows a tapering screw with a vanishing thread, and a tapering recess with a vanishing thread. Nevertheless, the inquiry is not what the patentee may have supposed, but what he has described, his invention to be. He states, in the general statement of the nature of his invention, that the tubes are to have "tapering and vanishing screw-threads," not "tapering or vanishing." He points out the objections to the use of a "slightly tapering screw" on the ends of the tubes in the old coupling, with a socket which did not taper to receive it. Then, in describing the difference between his coupling and the old one, he says that he cuts a "tapering screw" on the end of his tube; but, instead of cutting his threads at a uniform depth, he cuts them so that the thread shall vanish gradually until it disappears. He thus declares unequivocally that what he has done which is new is to make a tapering screw with a peculiar form of thread. The specification contains no suggestion to indicate that a rod having a tapering stem, but not a tapering screw, could be employed. Such a stem could not be employed with the socket described in the specification. The specification requires the ends of the rod to be adapted to fit into a tapering recess, "as clearly indicated in the drawing." The claim itself makes a sleeve having a tapering socket an element. A tapering socket is one adapted to receive a tapering screw. Read by the aid of the context, it does not seem open to fair doubt that the rods with tapering ends and tapering threads specified in the claim are rods with a tapering screw and vanishing threads upon the ends. Some significance should also be attached to the description of the rods in the claim by a reference to the drawings, which shows a rod with a tapering screw.

It follows that the bill must be dismissed.

THE CHADWICKE.

BOLCKOW, VAUGHAN & Co., Limited, v. THE CHADWICKE, etc.

(District Court, S. D. New York. January 19, 1887.)

1. CHARTER PARTY—BILL OF LADING—INHARMONIOUS CLAUSES—CONSTRUCTION—Where the provisions of a charter party are inharmonious, the general intent, as evidenced by its written portions, and its evident leading purpose, should control the minor provisions. Similar incongruities between the bill of lading and the charter party will also be controlled, as between the ship and the charterer, by the charter-party, as the more deliberate instrument in expressing the intent. Unless there is sufficient evidence of a waiver of the provisions of the charter, or of some new contract, mere loose and inharmonious expressions in the bill of lading, which refer to the charter, will not supersede the latter, as respects matters which the charter was clearly designed to cover.

2. SAME—DELIVERY AT ONE OF SEVERAL PORTS "AS ORDERED ON ARRIVAL"—ALTERNATIVE PORTS—DIFFERENT COLLECTION DISTRICTS.

On January 11, 1886, at Middlesbro on Tees, the libelants chartered the C. to take 1,300 tons of iron, and "proceed to the port of New York, Perth Amboy, Hoboken, or Brooklyn, and there to deliver the same as ordered on arrival.

Two days after, the cargo was loaded, and a bill of lading signed by the master, stating that the steamer was "bound for New York, and the cargo to be delivered at said port of New York to C. L. P., 30 Pine street, or his assigns; all other conditions as per charter-party." The vessel, on arrival at quarantine, New York, was ordered by the charterer's agents to go to Perth Amboy, a neighboring collection district. The master refused, and this suit was brought for the difference in price on a sale of the iron, for its non-delivery at Perth Amboy. Held that, under the circumstances, New York was presumably the primary port at which the order for ultimate delivery, according to the alternative contained in the charter-party, was to be given; that the privilege secured by the charter was a valuable one; that the bill of lading was intended to be but a receipt for the iron and a direction to the primary port only; that the option as to the place of final delivery was not waived, nor intended to be waived, by the bill of lading, and the master was not authorized so to treat it; and that there were no such difficulties, through the naming of different collection districts in the charter, as prevented or excused the ship from delivery at Perth Amboy, as directed at quarantine; and that the ship was therefore liable.

In Admiralty.

Wilcox, Adams & Macklin, for libelants.

Butler, Stillman & Hubbard and W. Mynderse, for claimants.

Brown, J. The libel in this case was filed to recover damages against the steam-ship Chadwicke, for refusing, on arrival at New York, to go to Perth Amboy to unload, as it is claimed she was bound to do, on re-

quest, under a stipulation of the charter.

On the eleventh of January, 1886, at Middlesbro' on Tees, England, the vessel was chartered to the libelants to take on board 1,300 tons of spiegel iron, etc., and, "being so loaded, therewith to proceed to the port of New York, Perth Amboy, Jersey City, Hoboken, or Brooklyn, and there deliver the same as ordered on arrival." The charter, however, provided that the vessel was "to be addressed to the freighter's agent at the port of discharge; the captain to sign bills of lading as presented, without prejudice to this charter." Three days afterward, the cargo being put on board, a bill of lading, in the common printed form, was signed by the master, stating the steamer to be "bound for New York," and that the cargo was to be delivered "at said port of New York, " * * unto C, L. Perkins, Esq., 30 Pine street, or his assigns, * * * and all other conditions as per charter-party;" the port and consignee's name being written in the usual blank spaces.

The steamer arrived at the quarantine station of the port of New York on the fifth of February, 1886, where a telegram from Mr. Perkins to the master dated January 30, 1886, was awaiting his arrival, and was received by the master, directing the steamer to Lehigh Valley Railroad dock, at Perth Amboy. Instead of going thither, he came up the bay, anchored off the Battery, reported to Mr. Perkins, the charterer's agent in New York, demanded to be unloaded there according to the terms of the bill of lading, and refused to go to Perth Amboy. After the charter had been signed, the libelants informed Mr. Perkins, by telegram, of the option contained in the charter. Thereupon the agent obtained an advance of 50 cents a ton upon a contract then pending, in consideration of a delivery of 1,000 tons of the iron at Perth Amboy, instead of "ex

ship" at New York. The option was worth to the libelants precisely \$500.

The claimants contend that the bill of lading, in making the port of New York the place of delivery, determined the charterer's option; and that he had no right afterwards to direct the vessel elsewhere. Perth Amboy is a different port, and in a different collection district, from New York, although not much further from quarantine, where the master first received his notice, than are the ordinary discharging berths for such cargo in the port of New York. The consular invoices, sworn to by the libelants before the consul at Middlesbro', declared that the cargo was shipped for New York, and designed to be entered there. The Revised Statutes require that manifests shall be prepared at a distance of four leagues from the coast, stating the destination of the cargo, and the intended port of entry, and require the vessel, when ariving within the limits of the port, to make entry there; although there are provisions under which goods destined for different ports, or arriving for orders, may, after arrival at one port, proceed to another port for delivery of the cargo. Sections 2776, 2779, 2807, 2811, 2812. The master in preparing his manifest stated New York as the only port, and entered his vessel at the New York custom house.

The disposition of the cargo was evidently designed to be left to the charterer's agent in New York. All the other places of alternative delivery named in the charter are in the immediate vicinity of New York. There is not the slightest reason to suppose that the shipper, in making out the consular invoices and the bill of lading for "the port of New York," actually intended either to waive his option as to the place of final delivery, or to charge himself with any irregularity in a delivery at Perth Amboy, should that be directed by his agent, even if he knew that Perth Amboy was a different collection district from New York, which he probably did not know. The charter-party provides that the cargo is to be delivered at any one of the five places named, "as ordered on arrival." The very terms of the charter provide, therefore, for an option to be exercised at the end of the voyage; not at the beginning of it. designation was to be made on arrival; but on arrival where? essarily there must be some place short of the ultimate destination where the orders were to be received, and the master must have understood that fact. But all the other places named are so near to New York. and New York is so naturally the head-quarters for this region, that the master must have understood, when he signed this charter-party, that he was first to go to or near New York, and there await orders as to the particular place of delivery. It is in this sense that the subsequent printed clause in the charter party must be construed, viz.: "The vessel to be addressed to the freighter's agent at the port of discharge." Clearly, this printed clause in the charter cannot be construed as intended to take away the option previously stipulated for in the written clause, nor to override the written clause, making the ultimate place of delivery dependent on directions to be given "on arrival" at the primary port. The words "port of discharge" are not strictly compatible with the prior

clause, and they must yield to the evident intent of the charter as a whole, and be construed accordingly. The charterer's agent was at the port of New York, where, under the circumstances, the master must have expected to go first; and the intent of the whole instrument seems clear that the vessel was to be consigned to New York for further orders,—a familiar form of charter, except that in this case the option was limited to a few places within the immediate vicinity of the primary port.

The bill of lading must be construed in the same sense, and as designed to indicate the port of New York as the primary port only, where C. L. Perkins would direct the place of final delivery according to the option provided for in the charter. No doubt the bill of lading omits what ought to have been inserted in it in order to make its provisions literally harmonious with the charter, and to make the whole intent clear from that paper alone; and some of the ordinary printed language of the bill of lading should also have been stricken out. Such incompatibilities of expression between the charter and the bill of lading are not infrequent, where the charterer's goods are laden on board. Often the two papers wholly fail to be adjusted nicely to each other. A bill of lading referring to a charter-party is never construed as intending to express the whole intent, or to control the charter-party in consequence of mere inharmonious expressions. The charter is the deliberate and controlling document; and, where the intent of the charter is clear, a bill of lading given under it, and referring to it, as between the ship and the charterer, does not supersede the express provisions of the charter-party that are clearly intended to apply to the situation, however inartificially the bill of lading may be framed. It is "little more," says Parsons, (Ship. & Adm. 286,) "than evidence of the delivery and receipt and shipping of the merchandise, for the charter-party is the controlling contract as to all the terms or provisions which it expresses." Perkins v. Hill, 1 Spr. 123; Wagstaff v. Anderson, 5 C. P. Div. 171, 177; Sewell v. Burdick, 10 App. Cas. 74, 105; Gledstanes v. Allen, 12 C. B. 202; Rodoconachi v. Milburn, 17 Q. B. Div. 316, 320.

To control the charter-party, there must be sufficient evidence of a new contract between the parties pro tanto. In this case there is no evidence of any further or different contract. It is the simple case of a loose, incomplete, and incompatible wording of the bill of lading, but without any further negotiation or change in the consideration or intent of the charter. The bill of lading says: "All other provisions as per charter-party;" and it thereby adopted all its provisions that were designed by the charter to become applicable. In Gullischen v. Stewart, 11 Q. B. Div. 186, S. C. 13 Q. B. Div. 317, the bill of lading was held controlling, as to payment of freight and demurrage, because the charterers, in receiving delivery of the goods, acted in the character of consignees, and not in that of charterers, which alone the charter-party covered; and the cesser clause of the charter-party was held inapplicable, and not within the original intent.

The stipulation for one of several places as the place of final delivery was a valuable privilege to the shipper, and to some extent burdensome

upon the vessel. It is incredible that the shipper, having secured this option, and carefully provided that it should be exercised "on arrival," and by presumption of law having paid for this privilege, immediately waived it intentionally, and then informed his agent of this option for his future guidance. In my judgment, therefore, the charter clearly controls. The master was not authorized to treat the bill of lading as waiving the option secured by the charter, or as designating anything more than the primary port where he was to receive from the charterer's agent his final orders as to the particular place of delivery. The manifest should have stated the provision for final orders at New York, or the several alternative places, according to the charter. There would then have been no difficulty in delivering at Perth Amboy; and, even after the vessel had been entered at New York, though there would have been doubtless some inconvenience and delay, I think there was no insuperable obstacle. Wyncoop, Vessels & Voy. § 341. No objections of that kind were stated by the master at the time. The complaint made of ice around Perth Amboy seems much more likely to have been the determining consideration, in connection with the inharmonious reading of the written documents, in leading the captain to refuse to proceed thither. There is no evidence, however, that the ice was such as to furnish a legal defense, and no such defense is made.

Decree for the libelants, with costs.

THE DENTZ,1

THE PLYMOUTH ROCK.

PENNSYLVANIA R. Co. v. THE DENTZ and THE PLYMOUTH ROCK.

(Circuit Court, S. D. New York. December 8, 1886.)

1. Collision—Steamers—Signals—Hell Gate.

In view of the rule of the board of supervising inspectors and the particular circumstances of this case the exchange of signals between steamers passing through Hell Gate, one of which is astern of the other, amounted to an agreement that the vessel astern might precede the vessel ahead by passing upon the port side of the overtaken vessel. Such an agreement implies that the overtaking vessel will in passing fulfill her statutory duty of keeping out of the way of the overtaken vessel, and that the latter will keep her course so far as practicable consistently with the knowledge that the overtaking vessel is to pass her to port. The overtaken vessel has the right to keep in midchannel so long as there is sufficient room on the port side for the overtaking vessel to pass her.

2. Same—Rules of Supervising Inspectors.

The rules of the board of supervising inspectors, when within the scope of their authority, have the force of statutory rules; but their violation will not charge the vessel violating with damages if the proximate cause of the collision was a faulty maneuver of the other vessel, and the violation of the rule was a remote and not a contributory cause.

Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

8. SAME—APPEAL—COSTS.

If there be enough in the circumstances of the cause to justify the libelants in joining both vessels as respondents in the district court, and if, upon appeal by one of the respondents to the circuit court, the appellant is adjudged to be without fault, it is in accordance with equitable principles to so frame the decree that the costs in the circuit court shall be adjudged against the guilty vessel, and in favor of the appellant.

4. Same—Signals By Whistle—Vessel's Duties.

Response to a signal by whistle does not imply any relinquishment of the right of way, excepting so much as may be necessary to enable the overtaking vessel to execute her maneuver.

In Admiralty. On appeal from decision in 26 Fed. Rep. 40. Edwin G. Davis, for appellant. Charles A. Deshen, for claimant of steam-boat. Wilcox, Adams & Macklin, for libelant and appellee. Biddle & Ward, for Pennsylvania R. Co.

WAILACE, J. This is an appeal by the owners of the tug Dentz from a decree of the district court pronouncing for the libelant, the owner of a barge in tow of the tug, against the tug and the steamboat Plymouth Rock in a cause of collision. The collision took place in the afternoon of September 6, 1884, in the channel of Hell Gate above Flood rock and between the Gridiron and Hallet's point. libelant's barge was lashed to the port side of the tug, two other tows being lashed on the starboard side, and while they were proceeding eastwardly the steam-boat Plymouth Rock, which was also proceeding in the same direction, struck the port side of the stern of the barge. As neither the libelant nor the owners of the Plymouth Rock have appealed, the only question now is whether the Dentz was guilty of fault contributing to the collision.

The Dentz with her tows had taken the passage between Blackwell's Island and Long Island, and when she had reached a point opposite and some 150 to 200 feet away from the Astoria ferry she received a signal of two whistles from the Plymouth Rock. The Plymouth Rock had passed up the channel to the westward of Blackwell's Island, and was then a considerable distance astern of the tug and tow. The Dentz immediately answered this signal with two The Pilgrim, another steam-boat, just astern of the Plymouth Rock and on her starboard quarter, was also proceeding east, and shortly after the exchange of signals between the Dentz and the Plymouth Rock she gave a signal to the Dentz of one whistle. Dentz replied by one whistle to the signal of the Pilgrim. The pilots of the vessels understood these signals to express a proposition on the part of the Plymouth Rock to pass the tug and tow on the port side, and of the Pilgrim to pass on the starboard side, and the signal on the part of the Dentz to be an assent to these propositions. The proofs show satisfactorily that from the time the signals were exchanged between the Dentz and the Plymouth Rock that the Dentz kept the

usual course of a vessel going from the point where she was when signaled through the channel of Hell Gate to the point of collision; that is, that she followed the current of the flood-tide and kept near the middle of the channel, which was about 700 feet wide, and in doing so slowed her engines and kept herself under proper control. The proofs also show that the collision is attributable to the haste and recklessness of those in charge of the Plymouth Rock. The only witnesses for the Plymouth Rock are her pilot and her captain, both of whom assume in their testimony that the collision would not have taken place if the Dentz had kept her course along mid-channel with the true tide. They insist that the Dentz did not do this, and must have starboarded her helm so as to throw herself and her tows across the course of the Plymouth Rock as the latter was passing by Flood rock and along by the Gridiron as near as she could go. This theory is very improbable, and the testimony of the master of the barge, who was an intelligent observer of all that took place after the signals were exchanged, and whose testimony is that of a candid and disinterested witness, is alone sufficient to overthrow it.

The pilot of the Plymouth Rock assumed that his vessel had the right of way, and that the Dentz was bound to give way and keep to the starboard; and in consequence he kept on at full speed, going well out towards the middle of the channel, expecting the Dentz would give way, until it was too late, with the force of the flood-tide, to stop in season to avoid a collision. If the Dentz, by assenting to the signal of the Plymouth Rock, consented to give the right of way to the latter, and obligated herself to keep to the starboard of midchannel, the decree below was right. The liability of the Dentz to the libelant was placed substantially upon this ground by the court below. The district judge was of the opinion that the Dentz was in fault because by her assent to the proposal of the Plymouth Rock she consented to a violation of rule 7 of the board of supervising inspectors, which in substance forbids steamers attempting to pass each other in going through Hell Gate in either direction; but he also held that by reason of such assent she assumed the obligation of keeping upon the starboard side of the channel all the way around the bend above Flood rock, and he found that she did not keep further to the starboard than the middle of the channel at most. He also held the Plymouth Rock in fault because she violated rule 8 of the board of supervising inspectors, and because she did not stop and reverse in time to avoid the collision when the Dentz was seen by her to be approaching the westerly half of the channel.

The proposition that the Dentz committed a maritime fault by consenting to a violation of the rule of the board of supervising inspectors is fully approved. The language of the rule is plain, and is not fairly capable of the narrow construction contended for by the counsel for the appellant. The rule was designed to prevent just what was attempted in the present case. It is one which the board

of supervising inspectors have competent authority to ordain; and being of that character is as obligatory as any statutory rule. It would probably be held that the vessel consenting to the violation of such a rule would be estopped from asserting the violation as a fault against the other, but that question is not here. The tow did not consent, and the owner can invoke the violation of the rule as a fault on the part of both vessels. The libelant cannot rely upon any antecedent misconduct of the Dentz which did not contribute to the collision; but when it appears that the Dentz has violated a rule which it was her duty to observe she must assume the burden of showing, not only that the act did not probably contribute to the disaster, but that it certainly did not.

It may be assumed that the Plymouth Rock would not have attempted to pass the Dentz in violation of the rule of the board of supervising inspectors without the consent of the Dentz, but if the consent extended no further than an agreement to waive the rule, without relaxing the obligation of the Plymouth Rock not to attempt to pass until she could do so prudently, it is not obvious how the infraction of the rule can be deemed in any aspect a contributory cause of the collision. In such a case the cause of the collision would be the breach of duty of the vessel under obligation to keep out of the way, and the infraction of the rule would be only remote and irrelevant misconduct.

The real question, therefore, is whether the Dentz, by consenting that the Plymouth Rock might pass on her port side, impliedly promised to assist the latter in this movement by changing her own course and keeping to the starboard side of the channel. If she did, it cannot be found upon the proofs that this obligation was fully met. It is evident that the pilot of the Dentz did not understand that he was under the duty of materially changing his course, or suppose that he had absolved the Plymouth Rock from her statutory duty of keeping out of the way. The single inquiry is as to the legal implications properly to be deduced from the exchange of signals.

It is to be assumed that both pilots contracted with reference to the rights and obligations of the respective vessels under the rules on navigation. If the Dentz had not assented to the proposition of the Plymouth Rock, both pilots would have understood that the latter was to keep out of the way as an overtaking vessel, and that the former was to hold her course. But both pilots would also have understood that the Dentz was entitled to the exclusive right to the channel under rule 7 of the board of supervising inspectors, and that the Plymouth Rock could not lawfully attempt to pass at all. There was no signal known to the pilots by which one could ask the other to yield the exclusive right of way, except one which would also indicate the intention of the Plymouth Rock to pass on the one side or the other of the Dentz. The proposition of the Plymouth Rock would therefore seem to have been, "Will you let me pass if I will go on

your port side?" and the signal of the Dentz was an answer in the It is not obvious how this proposition and assent can be interpreted otherwise than as an agreement that the Dentz would yield her exclusive right of the way with the understanding that the Plymouth Rock should undertake to pass her on the port side. agreement would naturally imply that on the one hand the Plymouth Rock as an overtaking vessel should, in passing to the port, fulfill her statutory duty in passing to keep out of the way, and on the other hand that the Dentz should keep her course so far as she could consistently with the knowledge that the Plymouth Rock intended to pass her on the port side. There is no reason why it should be interpreted as requiring the Dentz to yield the mid-channel so long as there was sufficient room left on the port side of the mid-channel for the contemplated movement of the Plymouth Rock. This is guite a different contract from the one to which the Dentz was held in the court below, and which, in effect, was treated as one which required the Dentz to yield the mid-channel, keep on the starboard side of it, give the Plymouth Rock practically the right of way, and absolve the latter from the primary duty of keeping out of the way. Upon the interpretation now placed upon it the pilot of the Dentz was justified in pursuing the course he did, and the pilot of the Plymouth Rock was in the wrong when he supposed that the Dentz was under any other obligation than that of allowing to the Plymouth Rock sufficient room on the port side of the channel to execute her maneuvers. As emphasizing this conclusion the signals which were exchanged between the Dentz and the Pilgrim are significant. is not clear upon the proofs whether these signals followed those exchanged between the Plymouth Rock and the Dentz so closely as to be almost simultaneous, but they were exchanged before the vessels had reached the more critical point in the passage through Hell Gate; and all the pilots should have understood that the situation required the Dentz so to conduct her movements as to leave room for the Pilgrim to pass upon her starboard side. This could be more safely accomplished by the Dentz following the current of the true tide and keeping near mid-channel.

The case is one where the pilot of the Dentz, from motives of courtesy and to accommodate the Plymouth Rock, and the Pilgrim also, was led to waive his privilege to the exclusive use of the channel as against these steam-boats. Those in charge of the Plymouth Rock, presuming upon his courtesy, recklessly encroached upon the midchannel, assuming that he would look out for the safety of his tug and tow. They thereby brought about a disaster which it would seem

they now attempt to excuse by falsifying the facts.

The contest in this court has been mainly between the Plymouth Rock and the Dentz. There was enough in the facts to justify the libelant in joining the Dentz as a respondent, and testing her liability in the district court. It is in accordance with equitable prin-

ciples that the costs of this court be decreed against the Plymouth Rock in favor of the Dentz.

There will be a decree against the Plymouth Rock in favor of the libelant for the whole damages decreed by the district court, with interest, and the costs of the district court, and in favor of the Dentz for the costs of this court.

MAGDEBURG GENERAL INS. Co. v. PAULSON.

(District Court, S. D. Georgia, E. D. November 30, 1886.)

 CARRIERS — OF GOODS — SHIP—EVIDENCE REVIEWED—VESSEL HELD UNSEA-WORTHY.

On the evidence stated, the vessel is adjudged unseaworthy.

2. Same—Damage to Cargo—Partial Injury—Measure of Damages.

If the damage complained of is the partial injury or destruction of the property shipped, in the absence of proof of fault or fraud on the part of the carrier, the difference between the actual value of the goods at the point of destination at the time and in the condition in which they did arrive, and their actual value at the time and in the condition in which they ought to have arrived, is the proper amount of recovery.

B. SAME

In other words, when there is a breach of contract, the amount that would have been received had the contract been kept is the measure of damages, if the contract is broken. Pollock, C. B., in Alder v. Keighly, 15 Mees. & W. 117.

4. SAME—MARKET VALUE—HOW ASCERTAINED.

Held, under the facts of this case, that the market value of the damaged rice was to be determined by the price it actually brought after it was beaten and prepared for market, and not by the testimony of the experts.

(Syllabus by the Court.)

In Admiralty. Libel in personam. Garrard & Meldrim, for libelants. Lester & Ravenel, for respondent.

Speer, J. The libel is sued out by the Magdeburg General Insurance Company, a corporation by the laws of the kingdom of Prussia, against Paulson, the owner of the schooner Pilot. It alleges that on the tenth day of September, 1879, A. E. Moynello shipped on the Pilot a cargo of rough rice in bulk, from the Vallambrosa plantation, on the Ogeechee river, to Savannah, Georgia; that the rice was to be delivered in good order to Moynello, on the schooner, at the upper rice-mill, in Savannah; that it was delivered badly damaged by water; and that this damage was occasioned by the unseaworthiness of the schooner. The cargo had been insured against marine losses with the libelants, and they paid all the damages to Moynello, and the costs of a board of survey; the amount being \$563. Moynello assigned, in consideration of this payment, all his claim for damages against the Pilot to the libelants. They allege that they are subrogated to his rights for compensation from the owner

of the schooner, and that they made a demand upon Paulson for the amount paid to Moynello by them, and on his refusal, brought the action, civil and maritime. Respondent filed an answer, in which he denies that the Pilot was unseaworthy, and that the injury to the rice was caused by negligence; but alleges that it was caused by a boisterous sea, which strained the seams of the vessel during a strong east wind. He also denies that Moynello was damaged.

On the hearing, many witnesses were examined, but the evidence is quite clear that the Pilot was unseaworthy, and at the time of this shipment unfitted to safely convey a cargo, even on the quiet waters stretching from Vallambrosa to the harbor of Savannah. The port wardens A. M. Miller and Thomas H. Laird, together with H. F. Willink, a master ship-carpenter, surveyed the Pilot, and give their testimony as witnesses to the effect that they found her planking and frame defective. with a large leak on the stem under the bowsprit. The leak had recently been covered with canvass, but, in the opinion of the witnesses. the Pilot made a great deal of water at that point, and was not in a seaworthy condition to carry grain or any perishable cargo. The "protest" filed by the mariner who navigated the Pilot on this voyage, in its enumeration of the perils of the deep encountered, mentions nothing more severe than a strong breeze from the eastward, with a heavy sea, "which compelled him to put the Pilot in the marsh, and pump her out." On this evidence the Pilot is adjudged unseaworthy at the time the cargo was shipped.

The testimony of Mr. Moynello is that the cargo consisted of a fine lot of rice, in good order at the time of its shipment; that it was delivered at the rice-mill, and was wet and injured. Frank Buchanan, an expert with rice, testified that with Mr. McArthur he examined the rice on board the schooner, and found it wet. It was impossible to separate the wet from the dry; that nobody could tell exactly what the damage was, but they estimated it to be 34 per cent.; that the market value of rice in Savannah at that time was \$1.60 to \$1.65 per bushel; that he sold some of the rice of this shipment; that it brought \$1.36 to \$1.40 net, equivalent to \$1.65 gross: that this was the full market price. W. T. Owen, clerk in the rice-mill, testified that the cargo of rice was handled with great care, and it turned out as well as if it had never been injured, and that Mr. Moynello got as much for it, less the expense of handling and milling, and less a loss of 26 bushels, which could not be He also testified that the extra expense consisted in the hire of two hands for nine days, at 75 cents per day. Major Tilton, superintendent of the rice-mill, testified that it took nine days to cure this rice in the mill, and that the moisture did not penetrate the grain; that all of it turned out in good condition, except 26 bushels; that he was surprised at the quality of the rice; that it was much superior to what he expected. The witness Freeman testified that the rice brought the best market price.

From this evidence, it is manifest that the rice was injured to some extent because of the unseaworthiness of the schooner in which it was

shipped. To the extent of that injury libelants, who were the insurers, were liable to Mr. Moynello; and the amount which they should properly have paid to him they are entitled to recover from the respondent. In order to ascertain what is that amount, it is necessary to determine what is the measure of damages in view of the facts in this case. It is insisted by the counsel for the libelants that the damage must be estimated in view of the condition of the rice at the time of its delivery by the carrier at the point of destination, and that the testimony of the experts who examined the rice at that time is conclusive, and shows that it was injured 34 per cent. of its value, which amount, with interest thereon, they insist the libelants should recover. The general rule that, in case of injury to the property by the carrier, the measure of damages is the difference between the value of the goods and what their value would have been if they had not been damaged in the course of transportation, may be considered as settled. 3 Suth. Dam. 237. ficulty is in the ascertainment of what is such difference of value. is a matter of evidence. The testimony of the gentlemen who inspected this rice would be satisfactory, if there was no other evidence before the court to show its actual condition, although the inspection of a cargo of grain in bulk, only partially exposed to view, is necessarily superficial. If it turns out that there was no loss, does it not follow that there was no damage? But, say the counsel for libelants: "Suppose the rice had turned out badly, could the defendant have been held liable for the loss of handling in the mill?" In that event there would likely have been no facts before the court to negative the testimony of the appraisers, and their testimony might have been controlling.

Nothing is better settled in estimating damages than the rule that every case is to be governed by its own facts. There was a duty on the shipper as well as on the carrier. It was the duty of Mr. Moynello to do the best he could with the wet rice, and to be diligent about its manipulation, and thus, if possible, to prevent loss. If he had intended to sell the cargo as rough rice,—if that had been the purpose for which the shipment was made,—the evidence of the appraisers might have been conclusive. But that was not his purpose. The rice had been consigned to the rice-mill, to be beaten and prepared for the market. This process developed the fact that the injury was apparent, and not real, and that, at a trifling expense, the rice was made marketable, and at the highest net price. It cannot, therefore, be justly insisted, because while in transmission, at one time, the cargo seemed damaged, that the court must settle damages on a partial view of the facts, and must not look further to ascertain whether the apparent damage was actual and The value upon which this is to be estimated is the net value, after deducting freight and expenses. Pars. Shipp. & Adm. 271; Wallace v. Vigus, 4 Blackf. 260; McGregor v. Kilgore, 6 Ohio, 358.

To illustrate: Suppose the carrier had delayed to deliver the goods beyond the day promised, and the shipper, for that reason, for one day, had failed of a market, and yet, on the day thereafter, sold for a price quite as good as that he could have had the day before, could anything

more than nominal damages be given for the delay? I think not. The true rule is this: that if the damage complained of is the partial injury or destruction of the property shipped, in the absence of proof of fraud or wrong on the part of the carrier, the difference between the actual value of the goods at the place of delivery, at the time and in the condition in which they did arrive, and their actual value at the time and in the condition in which they ought to have arrived, is the measure of damages. In other words, the amount which would have been received had the contract been kept is the measure of damages, if the contract is broken.

There has been some contrariety of opinion as to the manner in which this actual value should be ascertained. In The Columbus, 1 Abb. Adm. 97, it was held that where goods were damaged during transportation on board ship, and were received by consignees upon an understanding that the depreciation was to be made good to them, and they were sold at auction by the consignees, but with the assent of the master, for the purpose of making adjustment of the amount due from the vessel for the injury, the sum realized at the sale should be regarded as the value of the goods in their damaged state. Where the vessel proved unseaworthy, and put into port, the voyage broken up, and the plaintiff's cargo sold, held, that the loss on the goods, taking them at their "invoice price," resulting from the sale, was the true rule of damages, on the ground that there was no fault or fraud on the part of the defendant; the case showing only the breach of the implied warranty of seaworthi-Wheelwright v. Beers, 2 Hall, 391. In the case of Hamilton v. The Kate Irving, 5 Fed. Rep. 631, where cotton ties were injured by being stowed with chemicals, it was held that the market value of the damaged cotton ties was to be determined by the price they actually produced when sold, and not by the testimony of experts. See, also, Barb. Ins. § 155 et seq.; Pars. Shipp. & Adm. 271-273; 2 Phil. Ins.

For these reasons it is clear that the libelants improvidently paid to Mr. Moynello the sum fixed by the appraisers for the apparent damage, without waiting to ascertain what was the real damage. To this appraisement, Paulson, the owner of the Pilot, was not a party, and did not consent. The libelants cannot, therefore, recover from Paulson the amount for which they sue. They are entitled to recover for the extra expense incurred in handling the wet rice, and also for the value of 26 bushels of rice so injured as to be worthless, and for the costs of the survey of the Pilot. It is true, as insisted by respondent, that the claim of libelants was largely in excess of their just demand; but it is also true that Paulson offered to pay nothing, when he was clearly liable for some amount, and he also greatly increased the expense of the trial by maintaining that his vessel was seaworthy, and he must have known that it was unseaworthy. For these reasons it is adjudged that each party pay half the costs. Let the decree be framed accordingly.

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THE SALOMONI and another.

FEOL v. THE SALOMONI and another.

(District Court, S. D. Georgia, E. D. December 7, 1886.)

1. CLERK OF COURT—UNITED STATES DISTRICT COURT—IN ADMIRALTY—JURIS-DICTION—TRESPASS.

If the clerk of the United States district court issue process under a standing admiralty rule of the court, he cannot be regarded as a trespasser, even though the court had no jurisdiction in the premises.

2. Seamen — Controversy between Seamen and Officers — Jurisdiction — Justices of the Peace—Consuls—Treaty between United States and Italy—Rev. St. U. S. §§ 4546, 4547.

Under the treaty between the United States and the kingdom of Italy, stipulating that "consuls general, consuls, vice-consuls, and consular agents shall have exclusive charge: * * * and shall alone take cognizance of questions, of whatever kind, that may arise, both at sea and in port, between the captain, officers, and seamen, without exception, and especially of those relating to wages, and the fulfillment of agreements reciprocally made," a justice of the peace has no power, under sections 4546 and 4547 of the Revised Statutes of the United States to compel the clerk to issue admiralty process against an Italian ship for the wages of a seaman thereon.

8. Same — Assault on Seaman in United States Port — District Court — Jurisdiction.

Where the master of an Italian vessel, in one of the ports of the United States, is guilty of a barbarous and malicious assault upon a seaman on such vessel, he is not protected by the terms of the consular compact above quoted, and the district court may, in its discretion, take jurisdiction of the case, for the protection of the seaman, and the redress of his wrongs.

(Syllabus by the Court.)

In Admiralty. Seamen's wages. Rule against the clerk. Henry McAlpin, for the rule. Denmark & Adams, contra.

Speer, J. This is a rule sought against the clerk of this court by Henry McAlpin, as proctor for Frank Feol. It appears, from the petition filed, and the answer of the clerk thereto, that Feol was a seaman on the Italian bark Salomoni. On the fifteenth day of September last he made an affidavit before McNaughton, a justice of the peace, alleging an assault upon him, made by Francisco Grasso, the master of the bark, while she was lying at the wharf in the harbor of Savannah. The affidavit was intended to be in accordance with sections 4546 and 4547 of the Revised Statutes of the United States, to compel the payment of the wages due affiant, and to obtain his discharge. It does not appear, from these sections, that they embraced the subject of the discharge of the seaman, but they relate simply to his claim for wages. A summons was issued by the justice, directed to the master and owner of the vessel, commanding them to appear before him to show cause why process of attachment should not issue. A copy of the summons was served personally on the master of the bark by the constable of Justice McNaugh-Ton's court, but the master treated the summons and the justice's court

with great indifference, and, indeed, refused altogether to appear. Where-upon the justice issued his certificate to the clerk of the district court, in accordance with section 4547, Rev. St.

THE CERTIFICATE.

"Savannah, Chatham Co., Georgia.

"OFFICE OF MCNAUGHTON, JUSTICE OF THE PEACE,

"September 17, 1886.

"The master against whom the within summons issued neglects to appear, and I certify to the clerk of the district court of the United States for the Eastern division of the Southern district of Georgia that there is sufficient cause of complaint whereon to found admiralty process against said vessel.

"In witness whereof I have hereunto set my official signature and seal of

office this seventeenth day of September, A. D. 1886.

[Seal.] "McNaughton, N. P. & Ex. O. J. P., C. Co., Ga."

On the eighteenth day of September, the seaman also filed his libel in this court, and prayed process for the recovery of his wages. He made no claim for compensation for the assault, nor did he ask to be discharged. The clerk declined to issue process, either on the certificate of the magistrate or upon the libel. The reason he assigns for this refusal was his knowledge of the want of jurisdiction by this court of a difference of this character, between the master and seaman of an Italian vessel, both Italian subjects. He answers that he was aware that, under the treaty between the United States and Italy, this jurisdiction had been surrendered by the government of this country.

The article of the consular compact ratified between the United States and Italy on the eighteenth of September, 1878, is as follows:

"Art. 11. Consuls general, consuls, vice-consuls, and consular agents shall have exclusive charge of the internal order on board of the merchant vessels of their nation, and shall alone take cognizance of questions, of whatever kind, that may arise, both at sea and in port, between the captain, officers, and seamen, without exception, and especially of those relating to wages, and the fulfillment of agreements reciprocally made. The courts, or federal, state, or municipal authorities in the United States, and the tribunals or autherities in Italy, shall not, under any pretext, interfere in such questions; but they shall lend aid to consular officers, when the latter shall request it, in order to find out, arrest, and imprison any person belonging to the crew, whom they may think proper to place in custody. These persons shall be arrested at the sole demand of the consular officers, made in writing to the courts, or federal, state, or municipal authorities in the United States, or to the competent court or authority in Italy,—such demands being supported by an official extract from the register of the vessel, and from the crew-list; and they shall be detained during the stay of the vessel in port, at the disposal of the consular officers. They shall be released at the written request of the said officer, and the expenses of the arrest and detention shall be paid by the consular officer."

A protest, signed by the master and the Italian consul at the port of Savannah, was tendered to the clerk, and his attention was therein called to the provisions of the consular compact, and it was therein insisted that he should issue no process in the premises. The master also stated that he appeared before Justice McNaughton, and called his attention to

the consular compact between the government of the United States and the kingdom of Italy. The great names appended thereto, viz., Baron Alberto Blanc and William Maxwell Evarts, had no terrors for his honor Justice McNaughton. He discredited the treaty, and refused to attach any importance to it. But the clerk regarded it as controlling him in his action, and declined to issue the admiralty process of the court. For this refusal it was sought to make him liable.

If the clerk had issued the process sought by the seaman upon the libel filed in this court, he could not, in the opinion of the court, have been regarded as a trespasser. It is true that he is merely a ministerial officer, but there is a standing admiralty rule of this court, having the effect of an order of direction to the clerk, to-wit:

"Admiralty rule No. 1. * * In all suits in rem or in personam, attachment or warrant of arrest and monition may issue, without a judge's order, immediately upon the filing of the libel, and the usual stipulation for costs in the clerk's office, except in suits in personam requiring bail, where the claim of the libelant amounts to more than five hundred dollars, upon an ascertained demand appearing upon the face of the libel, or is for uncertain or unliquidated damages. In such excepted cases, a judge's order authorizing bail process, and fixing the amount of bail, will be required."

So far as the proceeding under the libel is concerned, the clerk would have been protected by this rule had he issued process. So far as the certificate of the justice of the peace is concerned, the action of the clerk was entirely justifiable. The order directed to an officer of this court from an inferior judicature must depend for its validity upon the power of the court issuing it. The justice of the peace, in the presence of the treaty stipulations, had no power to interfere in this difference between the Italian master and seaman of an Italian vessel. The treaty was paramount law, and should have been respected by him. His sole power, under the statute, related to the wages of the seaman, and that, by the treaty, is clearly remitted to the Italian consul. It was to avoid interference of precisely this character, with the navigators of both nations, that the compact between the kingdom of Italy and the United States was made.

The court has no disposition to lessen the importance of the functions attaching to the office of justice of the peace. They are stated with some elaboration of detail in the case of *Bendheim* v. *Baldwin*, 73 Ga. 594, Mr. Justice Blandford delivering the opinion of the court; and on this subject of state polity the decision of the highest appellate tribunal of the state may be regarded as binding on the courts of the United States; albeit the excellent humor of their court of appeals is scarcely just to the dignified metropolitan justiciary of which Justice McNaughton is a member. It is true, however, that certain functions are occasionally improperly exercised by justices of the peace; as, for example, a justice would improvidently issue a warrant for the arrest and imprisonment of seamen under section 4080 of the Revised Statutes. This power belongs to the judge of a court of record of the United States, or to a commissioner of that court. Besides, it is the duty of all courts,

from motives of justice and reciprocal policy, and for the advancement of commerce, to interfere as little as may be between the master and seamen of foreign vessels trading in ports of the United States. The certificate of the justice in this case, directed to the clerk, was a nullity, and the clerk very properly paid no attention to it.

The only remaining question is, should the clerk have issued process under the libel? It is now settled that the district court of the United States, unless restricted by some treaty stipulations, may, in the exercise of its discretion, assume jurisdiction of a claim for wages against a foreign vessel; and also, where it is provided by treaty stipulation that the consuls, vice-consuls, etc., of a nation, shall have the right, as such, to sit as judges and arbiters upon such differences as may arise between the captains and crews, without the interference of the local authorities, it is held that the district court was not thereby debarred from exercising its authority, in a case where there was no consul, or other such officer, within the territorial jurisdiction of the court. The Amalia, 3 Fed. Rep. 652.

It appears, therefore, that, notwithstanding the treaty, there are occasions when the courts should take jurisdiction of suits prosecuted by foreign seamen against foreign vessels. Such cases are, however, of rare occurrence. In the case cited by counsel for the rule, reported in the New York Daily Register of March 13, 1875, decided by Judge Joachsin in the marine court of New York city, where a suit to recover for assault and battery, committed on board the vessel, was entertained, it was held that the injury complained of was a difference of a nature to disturb the public peace and order in port or on shore, and the treaty vesting jurisdiction in the German consul excepted cases of that character.

The language of the treaty under consideration, to-wit, "consuls, etc., shall alone take cognizance of questions of whatever kind that may arise, both at sea and in port, between the captain, officers, and seamen, without exception, and especially of those relating to wages, and the fulfillment of agreements reciprocally made," suggests the inquiry, do the questions contemplated by this clause of the treaty include such a tort as an unjustifiable and cruel assault by the master upon the seamen on board ship, while in port?—an assault which would indicate settled hostility, and probable repetition. I am inclined to think they do not. Must we not construe the treaty to include questions of a similar character to those enumerated, ejusdem generis?

The treaty, it seems, does not indicate a criminal assault upon the seaman, within the territorial jurisdiction of the court, as a matter of exclusive consular jurisdiction; and, in that humane protection which courts have always extended over the seaman, a denial of jurisdiction in the admiralty court is held to be a matter of too serious import to be rested on implication. Weiberg v. The St. Oloff, 2 Pet. Adm. 433. It is perhaps fortunate, therefore, for the legality of the clerk's action, that the libel filed in this court contained no prayer for the injury occasioned by the assault, and no prayer for a discharge on account of such assault,

and did not otherwise comply with the admiralty rule above cited. Since it contained a prayer for wages only, a matter of which, by virtue of the terms of the treaty, the Italian consul had exclusive jurisdiction, the rule must be discharged.

THE GALILEO.

THE EDGAR BAXTER.

RIEDEMANN and others v. THE GALILEO and another.

(Circuit Court, S. D. New York. October 12, 1886.)

1. ADMIRALTY—DISTINCTION BETWEEN APPEALS AND WRITS OF ERROR.

In suits against joint tort-feasors, if the defendants answer severally and not jointly, their interests are severed, and, if a judgment be recovered against one, he may sue out a writ of error without joining the other defendant. The writ of error is, in effect, the foundation of a new suit; and the only questions brought up for review are those arising between the person who takes out the writ and the opposite party, because the party who is not joined in the writ is no longer in the case. This is not so, however, in admiralty, when the appeal suspends the operation of the decree, and brings up the whole cause for a new hearing. The appellant alone can be heard in support of the appeal, but all parties interested in supporting the decree appealed from are entitled to be heard.

2. Same—Decree on Appeal.

The libelants proceeded against two vessels for damages by collision. The district court dismissed the libel, with costs, as to one, and awarded the libelants their whole damages, with costs, against the other. An appeal was taken by the latter vessel, and also by the libelants. The libelants subsequently abandoned their appeal. Upon the hearing in the circuit court all parties appeared, and litigated the cause. The decree of the district court was reversed, and both vessels pronounced in fault. Held, that although the libelants were in the position of not having appealed, they were entitled to a decree against both vessels, such a decree being necessary to protect the appealant and do full justice between all parties; but that the libelants were not entitled to costs of the circuit court.

8. Collision—Appeals—Libelants not Joining in Appeal—Form of Decree.

When, in a cause of collision, a libel against two vessels has been dismissed as to one and sustained as to the other, and if therefrom the latter alone appeals, the libelants, though not appealing, will be entitled to the same form of decree as if they had appealed, though not to costs.

Admiralty. Motion for decree and costs. For opinion of court, see 28 Fed. Rep. 469.

H. Putnam, for libelant.

Owen & Gray, for the Edgar Baxter.

E. C. Henderson and James Thomson, for the Galileo.

WALLACE, J. Upon the settlement of the decree in this cause, the fact was first brought to the attention of the court that the appeal which

¹Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

had been taken by the libelants from the decree of the district court had been withdrawn and abandoned, and therefore, at the time of the hearing in this court, the libelants were in the position of not having appealed from the decree. The libel was filed against the tug Baxter and the steam-ship Galileo, jointly, to recover damages to the bark of the libelants for a collision alleged to have been produced by the negligence of both the Baxter and the Galileo. Separate answers were interposed, each vessel denying negligence on its own part, and asserting negligence on the part of the other. The district court exonerated the Baxter, and pronounced the Galileo solely responsible. The decree dismissed the libel as to the Baxter, with costs, and awarded the libelants their whole damages against the Galileo, with costs. The Galileo appealed from this decree, and so did the libelants; but, as now appears, the latter abandoned their appeal. Upon the hearing in this court the owners of the Baxter as well as the libelants appeared, and litigated the cause. This court reversed the decree of the district court, and pronounced both vessels in fault.

If the libelants had appealed, they would have been entitled to a decree in the form approved in *The Alabama*, 92 U. S. 695; that is, to a primary award against each vessel of a moiety only of the libelants' damages, with interest and costs, and a further award against each vessel of such part of the moiety of the other as the libelants might be unable to collect of the latter. But the point is now taken in behalf of the Baxter that, as the libelants did not appeal from the decree of the court below dismissing the libel as to her, they cannot be heard, except in support of the decree, and can have no decree against her in this court; and it is insisted for the Galileo that, if there can be no recovery for the libelants as against the Baxter, they should not recover against the Galileo more than a moiety of their damages.

It is familiar law that a party who does not appeal cannot be heard upon the appeal, except in support of the decree below. This is the rule, not only in admiralty, but also in equity. In suits at law against joint tort-feasors, when the defendants answer severally, and not jointly, their interests are severed, and, if a judgment is recovered against one only, he may sue out a writ of error without joining the other defendant. Thomas v. Lane, 2 Sum. 1; Cox v. U. S., 6 Pet. 172. In such case, the only parties in the appellate court are the one who takes the writ of error and the opposite party. The writ of error is a new suit in effect, and of course the only questions brought up for review are those arising between these parties only, because the party who is not joined in the writ of error is no longer in the case. This is not so, however, in admiralty or in equity, where the appeal suspends the operation of the decree below, and brings up the whole cause for a new hearing. Although a writ of error has been brought from a judgment at law, the judgment is nevertheless a bar and estoppel until reversed. In equity, however, the decree does not have this effect, when an appeal has been taken. See Sharon v. Hill, 26 Fed. Rep. 337, 345.

In suits in equity the real controversy is often between parties who

have been joined as defendants, rather than as between either of them and the plaintiff. An appeal by one defendant brings up the whole controversy, so far as it affects him, and all parties interested in supporting the decree appealed from are entitled to be heard, although no party except the appellant can be heard in support of the appeal; and, if the decree is affirmed, these parties are entitled to costs as against the appellant. In a case where the plaintiff's bill was filed against two defendants, who separately claimed the same property, and, the plaintiff having obtained a decree, one defendant appealed, the court, being of opinion that the other defendant was entitled to the property, dismissed the bill on the appeal, as against both defendants. Vaughan v. Halliday, L. R. 9 Ch. App. 561; Kent v. Freehold Land & Brick-making Co., L. R. 3 Ch. App. 493.

In the present case the libelants could have proceeded against either vessel, and recovered their whole damages, notwithstanding it might have appeared that the collision was produced by the contributing negligence of both. The Atlas, 93 U.S. 303. It was to obviate the hardship of compelling one vessel to pay the whole damages for a collision in which another vessel, not sued, was equally guilty with the vessel sued, that led to the adoption of supreme court rule 59, (112 U.S. 743,) by which the claimants of the vessel sued can require another vessel, which contributed to the same collision, to be proceeded against in the same suit. The object of this rule is to prevent a libelant from pursuing one vessel alone, when two are equally responsible for the damages caused by a collision, and to require both, at the option of either, to be brought in, that a decree for a moiety of the damages may be made against each, when such a decree will fully protect the libelant.

The party most interested in supporting the decree of the district court was the Baxter. Her owners were entitled to be heard in support of it on the appeal, and they were heard. If their present contention is correct, either the Galileo has appealed in vain, because, although she ought to be held responsible primarily only for a moiety of the damages, she must now be held for the whole, or the libelants, who had no reason to be dissatisfied with the decree of the district court, inasmuch as they were awarded their whole damages against the Galileo, must lose a moiety of the damages, because they did not appeal, and further litigate the cause for the benefit of the Galileo. The statement of such a proposition is its answer.

The decree will follow the form approved in *The Alabama*. The libelants are entitled to the costs of the district court, but not to the costs of this court; and the Galileo is entitled to the costs of this court against the Baxter.

BALL v. BERWIND.

Luckenback v. Same.

(District Court, E. D. New York. May 27, 1886.)

1. COLLISION—SUNKEN AND ABANDONED WRECK—LIABILITY OF FORMER OWNER. The canal-boat Eureka No. 5, owned by defendants, was sunk in New York harbor through no fault of her owners, and was abandoned. Libelants' boats thereafter were damaged by running upon the wreck. Held, on suit brought against the former owners of the wreck, that they were not liable, although they had afterwards removed the wreck, on being notified by the pilot commissioners to do so.

2. WATERS AND WATER-COURSES-DUTY OF OWNER TO REMOVE WRECK-LAWS

N. Y. 1860, CH. 522.

Chapter 522 of the Laws of New York of 1860 provides that, after notification from the pilot commissioners to the former owner of a wreck to remove it, if the owner fails to do so, he shall be liable to pay to the county any sum that the pilot commissioners may have expended in their removal of the wreck; but the law does not create a duty on the part of the owner to remove the wreck.

In Admiralty.

Butler, Stillman & Hubbard, for libelants.

Beebe & Wilcox, for defendants.

These actions are brought to recover from the de-BENEDIOT. J. fendants the damage caused to the vessels of the libelants by running upon the wreck of the canal-boat Eureka No. 5, a vessel which, while owned by the defendants, and through no fault of theirs, had been sunken in the harbor of New York, and thereupon abandoned by them. In view of the adjudged cases, (King v. Watts, 2 Esp. 675; White v. Crisp, 10 Exch. 312; Brown v. Mallett, 5 C. B. 599: Hancock v. York, N. C. & B. R. Co., 10 C. B. 348; Taylor v. Atlantic Mut. Ins. Co., 37 N. Y. 279; Winpenny v. Philadelphia, 65 Pa. St. 135; Philadelphia W. & B. R. Co. v. Philadelphia & H. de G. St. Tow-boat Co., 23 How. 209,) the only question that seems open for discussion in this case is whether the statute of the state of New York (Laws 1860, c. 522) created a duty upon the part of the defendants to remove the sunken canal-boat from the channel, which duty they failed to discharge, and thereby caused the injury of which libelant complains. Upon this question my opinion is with the defendants. The defendants did not obstruct or interrupt the navigation of the port. for the boat was not sunk by any fault or neglect of theirs. When, through no fault of theirs, their boat was sunk, and thereby rendered of no value, they had the right to abandon the possession and con-This right they had exercised, and in this way they had terminated their responsibility for the boat before the injury com-

¹Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

It is indeed true that after the injury complained of occurred. plained of, and after they had been notified by the board of pilot commissioners to remove the wreck, they did so, at the loss of some hundreds of dollars. But I do not perceive how this action on their part, taken after the injury in question, can affect the question of their responsibility at the time of the injury sued for. If any duty at all on their part arose out of the statute in question, it was only the duty to remove within three days after being notified that the wreck had been adjudged by the pilot commissioners to constitute an obstruction to navigation, and that time had not elapsed when the injury in question occurred. Not every sunken vessel is to be raised, nor does the statute say that the owner of any sunken boat found to be an obstruction to navigation shall remove it. All the statute says is that when, after being notified by the pilot commissioners to remove an obstruction, the owner fails to do so, he shall be liable to pay to the county any sum that the pilot commissioners may have expended in their removal of it.

The libel must be dismissed, and with costs.

BURDETT and others v. WILLIAMS and another.1

(District Court, D. Connecticut. December 31, 1886.)

AdmiraLTY—New Trial—Motion—Facts not Originally Presented.

A motion for a new trial will be refused if the conclusion originally reached is, after the presentation of new facts, still adhered to.

In Admiralty. Motion for new trial. Reported 27 Fed. Rep. 113. E. L. Barney, for the motion. Samuel Park, against the motion.

Shipman, J. This is a motion for a new trial in the above-entitled cause. The facts were stated in the opinion of the court. 27 Fed. Rep. 113. The strong and vigorous argument of the counsel for the libelants endeavored to establish the position that on October 4, 1884, the voyage was not turned into and did not become a whaling voyage, but that, by reason of the detention of 20 or 25 days in the ice in July, 1884, and the delay in September, on account of the services to the Isabella's crew, the proposed whaling voyage was frustrated; and that the stop to whale for 20 days on the return from Cumberland inlet was a mere incident, which did not cause the freighting voyage to come to an end. This particular phase of the case was not presented upon the trial as vigorously as it was upon the motion, but I cannot see that the conclusions to which I came originally are incorrect.

¹Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

If not enough freight was received to fill the vessel, the contract provided that "our wages are to cease, and we are to stop to whale at New Gunenke, or elsewhere, and receive" a lay in lieu of wages. The vessel did not obtain a sufficient quantity of freight, did stop for the purpose of whaling, and tried to obtain whales until October 24th, when, on the point of starting for home, she was compelled to stay by stress of weather. The captain would not have been endeavoring to do his duty towards the owners if he had started for home on October 4th without trying to whale, and had thus virtually abandoned his undertaking; for if the vessel was not to return with freight, a whaling voyage was to be attempted. If she had left the straits on October 24th, and returned to New London, it would hardly have been contended that the monthly wages did not stop on October 4th. The conditions upon which the men were to receive a lay had taken place, and the unfortunate termination of the voyage by reason of having obtained no catchings, either in the fall of 1884 or during the season of 1885, ought not to change the pecuniary relations of the parties.

The fact that the sailors are poor, and that poverty, in a contest with wealth, always enlists the sympathy of the triers, ought not to induce the court to strain the facts in order to permit the sailors to receive some

compensation for the hardships which they endured.

The new facts which were presented do not seem to me to vary the original case materially. The motion is denied.

THE SEVEN SONS.

McLaughlin v. The Seven Sons.

(District Court, W. D. Pennsylvania. October Term, 1885.)

Towage—Negligence—Presumption.

Where a flat-boat, when delivered under a towing contract into the custody of a tow-boat, was in good order, but when it reached the port of destination was in a broken and sinking condition, and the owner did not accompany the flat-boat either personally or by agent, it is the duty of those owning or navigating the tow-boat to show how the injury occurred, and, in the absence of explanation or proof on that subject, negligence will be presumed, and dameroes decreed against the tow-boat ages decreed against the tow-boat.

In Admiralty. Burleigh & Harbison, for libelant. H. H. Marcey, for respondents.

Acheson, J. The owners of the tow-boat Seven Sons undertook to tow the libelant's loaded flat-boat down the Monongahela river, from Brownsville to Pittsburgh. The flat-boat was in good order when the tow-boat took it in charge, but when it reached the place of destination it was in a sinking condition, there being then a serious break in its bottom. One of the owners of the tow-boat stated to the libelant "that they had hurt the flat in landing at Jack Jones' landing;" but, it would seem, no further explanation was given. The libelant was not with the flatboat, nor had he any agent with it at the time it was injured. There was a good boating stage of water during the trip. These facts the libelant proved, and also the amount of his loss.

Besides the pilot, the tow-boat had a full crew of hands, and one of her owners was on her during the trip. Of these the pilot only was examined. He testified as to the care taken to keep the flat-boat afloat after it was found to be leaking, but he gave no account of the manner in which it was injured, nor of the degree of care observed by the towboat. As the case stands, there is no evidence to show the cause or manner of the accident, or what precautions were taken to avoid it, although these are matters peculiarly within the knowledge of the owners of the tow-boat and their employes. Under the proofs, then, what should be the judgment of the court?

The owners of a tow-boat, it is true, are not common carriers, and they are responsible only for ordinary care, skill, and diligence. But a bailee subject to that degree of responsibility only, is yet bound to show how the goods intrusted to him were lost or damaged, before he can throw upon the bailor the burden of proof of negligence. Clark v. Spence, 10 Watts, 335; Beckman v. Shouse, 5 Rawle, 179; Logan v. Mathews, 6 Pa. St. 417. Now, here, the owners of the tow-boat were bailees for hire of the flat-boat. Again, it has been held that, under a bill of lading excepting "the dangers of the river," it is not enough for the carrier to show that his steam-boat run upon a stone, and knocked a hole in her bottom, but he must also prove that due diligence and proper skill were used to avoid the disaster, and that it was unavoidable; and this, because the facts are peculiarly within the knowledge of himself and his Whitesides v. Russell, 8 Watts & S. 44. In the absence, then, of all testimony as to the manner in which the libelant's flat-boat was injured, or acquitting the tow-boat of blame, negligence is justly to be presumed. Humphreys v. Reed, 6 Whart. 444.

Let a decree be drawn in favor of the libelant for \$70, the amount paid for repairs, and \$5.40, the cost of pumping, with interest from Feb-

ruary 5, 1885, and costs of suit.

DIMMOCK and others v. DOOLITTLE.

(Circuit Court, N. D. Illinois. January 17, 1887.)

REMOVAL OF CAUSE—ASSIGNMENT OF NON-NEGOTIABLE CONTRACT.

Where an action is brought by a party to a non-negotiable contract for the use of his assignee, citizenship of the party to the contract, and not that of his assignee, determines the question of the removability of the cause.

On Motion to Remand.

Millard R. Powers, for plaintiff.

Doolittle & McKey, for defendant.

BLODGETT, J., (orally.) This case was commenced in the state court in the name of Richard W. Dimmock et al. against Doolittle, for the use of Powers. Doolittle applied for a removal of the case on the ground that the controversy was between citizens of different states, charging in the petition for removal that the Dimmocks were citizens of New Jersey, and the defendant a citizen of Illinois; and the case was accordingly sent to this court by the state court. The plaintiffs now move to remand, on the ground that the party for whose use the suit is instituted is a citizen of Illinois, and therefore the federal court has no jurisdiction.

The question, I find on examination, is by no means a new one; it was raised in the case of Sere v. Pitot, 6 Cranch, 332, and quite fully discussed; but the case which finally settled the principles involved in this case is undoubtedly that of Irvine v. Lowry, 14 Pet. 293, where a distinction is drawn between the class of cases where an official bond was given,—as, for instance, in the case of McNutt v. Bland, 2 How. 9,—and suits brought for the use of the equitable owner of a non-negotiable contract. A statute of Mississippi required that sheriff's bonds should be made payable to the governor of the state, and in the latter case a suit was brought in the name of the governor of the state of Mississippi for the use of a citizen of Massachusetts, against the sureties upon a sheriff's bond. The question of jurisdiction was raised, and the court there held that in that class of cases, the bond being given for the benefit of whoever might be injured by the acts or negligence of the sheriff, the citizenship of the party for whose use the suit was brought determined the jurisdiction. Irvine v. Lowry the former case was fully discussed, and it was held there that where, as in the case now before the court, the suit is brought upon a non-negotiable contract or right of action, where the legal title still remained in the original creditor, so as to require the suit to be brought in his name, the citizenship of the plaintiff holding the legal title, and not that of the person holding the equitable title, to the demand, controlled the jurisdiction.

It will be readily appreciated that, in suits on official bonds made payable to a public officer, who merely holds the bond for the benefit of persons who may become entitled to a remedy upon it, the designation of the person for whose benefit the suit is prosecuted is a necessary part

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of the case; as, unless some specific person has been injured, there would be no right of action. But in a case like this, where a right of action rests in a non-negotiable contract or right of action, express or implied, there is no necessity, as a matter of pleading, for naming the party equitably or beneficially interested in the suit, and the statement of such person's name upon the record is really no part of the case, and has no effect except to act as notice that the demand is not owned by the plaintiff.

The motion to remand is therefore overruled.

CENTRAL TRUST Co. of New York and another v. Wabash, St. L. & P. Ry. Co. and others. (CITY OF ST. LOUIS and another, Intervenors.)1

(Circuit Court, E. D. Missouri. December 13, 1886.)

1. Contract—Construction—Punctuation.

Where the meaning of a contract is doubtful, the punctuation may be taken into consideration, in deciding upon the proper construction.

2. Same—Context.

A single sentence of a contract should not be construed as if standing alone, but with reference to the context.

3. Same—Public Policy—Railroad Companies.

Railroads perform a quasi public service, and, so far as vested property-interests are not impaired, such construction should be given to all contracts made by them as will make them most fully subserve the interests and welfare of the general public.

4. Same—Consideration—Compromise.

The law favors compromises, and upholds them as considerations of the covenants of the compromising parties.3

5. Same—Performance—Mutuality.

A party who has been paid for a privilege cannot resist its enforcement on the mere ground that he cannot compel the other party to continue in its enjoyment.

6. Equity—Practice—Jurisdiction—Decree.

Where a court of equity takes jurisdiction of a controversy, it is bound to continue that jurisdiction up to the final determination of the entire contro-

7. Specific Performance — Equity — Jurisdiction — Railroad Companies—

RIGHT OF WAY.

Where a railroad company binds itself by contract to allow other companies to use its right of way under such reasonable regulations and terms as may be agreed upon by such companies, and thereafter refuses to recognize the right

¹ Edited by Benj. F. Rex, Esq., of the St. Louis bar.

²The law favors the settlement of disputed matters without recourse to litigation, Hart v. Gould, (Mich.) 28 N. W. Rep. 831; Wells v. Neff, (Or.) 12 Pac. Rep. 84. Such settlement of claims asserted in good faith, the validity of which has been doubted, constitutes a valid compromise which will not be disturbed in the absence of fraud, undue advantage, or mistake, Shipman v. District of Columbia, 7 Sup. Ct. Rep. 134; Stimpson v. Poole, (Mass.) 6 N. E. Rep. 705; Adams v. Adams, (Lowa,) 30 N. W. Rep. 795; Zimmer v. Becker, (Wis.) 29 N. W. Rep. 228, and note; and which furnishes a sufficient consideration for the mutual promises of the parties, Lipsmeier v. Vehslage, ante, 175, and note; Dunham v. Griswold, (N. Y.) 3 N. E. Rep. 76; Adams v. Adams, (Iowa,) 30 N. W. Rep. 795. W. Rep. 795.

of another company to use such right of way upon any terms, a court of equity has power to enforce the contract, determine the amount of consideration, and decide upon the regulations.

8. Same—Contracts Indefinite as to Details.

Where a right is absolutely contracted for, but the details are left un settled, either because they cannot be determined at the time the contract is made, or because the changing condition of affairs indicates that details must be subject to modification, and should therefore be left to settlement by agreement or decree at the time the right may be insisted upon, a court of equity will not hold the contract incomplete, when called upon to enforce it, if the details are of a nature which it can properly fix and settle, but will determine the right, and prescribe and settle the details. The decree should be subject to modifications, however.

9. RAILROAD COMPANIES—LEASE—RIGHT OF WAY—COMPENSATION FOR USE. The defendant company having contracted to allow another company to use its right of way and track upon reasonable terms, held, that such latter company desiring to use such right of way and track jointly with the owner should, under the circumstances of this case, pay interest on half their value, and that the share of the expenses of keeping up the track to be paid by each company should be fixed upon a wheelage basis.

10. Mortgage - Notice - Reference in Recorded Deed to One not Re-

Where a deed conveying a right of way to a railroad company recited that it was executed in pursuance of a contract between the grantor and grantee, and stated, towards its close, that the conveyances "of the said right of way in the deed mentioned are made subject to the terms and conditions upon which the same were granted to the party of the first part," and the contract referred to was not recorded, but another contract of even date therewith, referring to it, and limiting the grantor's rights, was recorded, held, that persons to whom the grantee's successor mortgaged its road are chargeable with notice of the terms and conditions of said contracts, and are bound thereby.

11. RAILROAD COMPANIES - RIGHT OF WAY, DEFINED - CONSTRUCTION OF CON-

TRACT.

The tripartite agreement of August 11, 1875, between the Forest park commissioners, the St. Louis County Railroad Company, and the St. Louis, Kansas City & Northern Railroad Company, construed, in connection with the contract of even date therewith between the last two parties; and held (1) to form a part of the latter contract; (2) to be upon sufficient consideration, and binding; (3) to have bound the St. Louis, Kansas City & Northern Railroad Company to permit other railroads to use its right of way and track, not only through Forest park, and the non-contiguous tracts, through which the St. Louis County Railroad Company had a right of way, but also through all tracts intervening between said park and the Union depot, in St. Louis, through which the St. Louis, Kansas City & Northern Railroad Company might thereafter obtain a right of way from other parties; (4) to have meant by the term "right of way" the strip of land upon which a railroad company constructs its roadbed; (5) to have entitled the St. Louis, Kansas City & Northern Railroad Company, and its successors, to the first right to use its right of way, not limited to its necessities, but as broad as its conveniences, and to have entitled other roads, subject to such prior right, to the use of said right of way, including, if necessary, the owner's tracks.

In Equity.

Noble & Orrick and Dyer, Lee & Ellis, for St. Louis, K. C. & C. R. Co. Leverett Bell, for City of St. Louis.

Wager Swayne, Wells H. Blodgett, Warwick Hough, and H. S. Priest, for defendants.

Brewer, J. The intervenors represent that the Wabash road is in the possession of receivers appointed by this court, and that such road is the owner of a right of way passing through Forest park, and then easterly

to the Union depot, in the city of St. Louis. They further represent that said road holds said right of way subject to use by other railroads, upon reasonable terms; and seek, through their petition of intervention, an order from this court directing the receivers to permit the St. Louis, Kansas City & Colorado Railroad Company, one of the petitioners, to run its cars and engines over the tracks of the Wabash upon said right of way. They base this claim, not upon any reserved right in the state to a new exercise of the power of eminent domain, but upon two contracts made on the eleventh day of August, 1875. We have therefore no inquiry to make as to the power of the state to condemn a partial use of an existing railroad track in behalf of a new railroad company. condemnation is here sought, nor proffer made of any condemnation money. Neither have we any inquiry as to the power of the state to compel one railroad company to permit the use of its right of way by The petitioners rest their claim alone on the contracts, and the question is therefore narrowed to the matter of a contract right. this may narrow, it does not belittle, the question; nor can we be insensible that important rights and interests are involved in the correct solution of this question. We have, on the one hand, the city of St. Louis, -a large commercial city,—anxious to do everything that it may to further and extend its commercial interests, and urging that a new railroad company may have access to the center of passenger business in the city, and the new company itself, projecting and building a line westward through the state of Missouri, pressing in like manner for such access; and, on the other hand, a large corporation, with extensive lines, which has purchased and paid for a most valuable right of way, admitting it to the Union depot of the city, eager to protect its property interests, and to preserve its right of way free for its own use,—anxious also, doubtless, to prevent that competition in business which a new road occasions. The parties on both sides are earnest and strenuous, for the interests to be affected by the decision are important. We are fully sensible of this importance, and have given the matter the most careful consideration.

The facts upon which the claims of the petitioners are based are these: In 1871 the St. Louis County Railroad Company was organized for the purpose of building a narrow-guage road from the city of St. Louis to Creve Cœur, a distance of about 16 miles. Its proposed route crossed diagonally the north-eastern part of what is now Forest park. That ground at the time belonged to one W. D. Griswold, and from him, the same year, the railroad obtained a deed to the right of way. In 1872 the general assembly passed an act entitled "An act to establish Forest park." By section 5 of the act the control and government of the park was placed in the hands of a board of commissioners. These commissioners, in the fall of 1872, made an agreement with the County Railroad, changing the location of the right of way granted by Griswold, and enlarging its width from 40 to 70 feet. In the winter of 1872 and 1873, the supreme court of Missouri decided that the act to establish Forest park was unconstitutional and void. Of course, with the downfall of

the act, went all contracts and arrangements made by the park commissioners. The title of the County Railroad to the right of way granted by Griswold remained as it originally existed, unaffected by the attempted agreement with the park commissioners.

In 1874 the general assembly passed a new act to establish Forest park. This act was adjudged valid. By it, also, the government and control of the park was vested in a board of commissioners. In section third, which provided for the vesting of the title to the property in the people of the county by general condemnation proceedings, was in-

serted this proviso:

"Provided, that nothing in this act shall prevent the St. Louis County Railroad from using and occupying a right of way of the width of not more than seventy feet through the north-eastern portion of said Forest park; the said railroad shall only enter the park through Duncan's subdivision on the east side of said park, and, running westwardly on the northern side of the River Des Peres, shall pass out of said park at a point on the northern line thereof, east of Union avenue; and provided, further, that no switch or siding shall be constructed by said railroad company in said park, nor shall more than one depot be established in said park, and that shall be for passengers only; and provided, further, that the grade of said railroad, as far as the same runs through Forest park, shall be approved by said Forest park commissioners."

The route mentioned in this proviso departs from the route named in the Griswold deed, and comes more closely to that named in the agreement of 1872 between the County road and the park commissioners. In addition to this right of way through the park, the County road proceeded to acquire title to certain tracts and parcels of ground along its route from the eastern boundary of Forest park to the Union depot. These tracts were not contiguous so as to form a continuous right of way, but were separate, and with much intervening space between.

The St. Louis, Kansas City & Northern was the owner of a standard-guage railroad extending from St. Louis to Kansas City, with a branch running northerly from Moberly. It had for years entered St. Louis along the levee, reaching the city on the north side. Desiring to enter the Union depot, it proceeded to lay off a line from Ferguson, which ran parallel, or nearly so, with the line of the County Railroad through the park, and thence easterly to the Union depot. Such was the situation when the contracts which are the basis of the present claim were

executed.

The first of these contracts was between the St. Louis County Railroad, party of the first part, and the St. Louis, Kansas City & Northern Railroad, party of the second part,—companies which, for convenience hereafter, may be called respectively the County Company and the Kansas Company. By this contract the County Company agreed to convey to the Kansas Company an undivided one-half interest in the right of way through Forest park, and a strip 28 feet in width through the several tracts owned by it, between the eastern line of Forest park and the western limit of the city, and a strip 30 feet in width through the various tracts owned by it eastward from those limits to the Union depot. In consideration of this the Kansas road was to pay \$125,000. This con-

tract further provided that the right of way through the park, as well as a tunnel and cut contemplated just east of the park, were to be used in common by the two roads. Beyond that, eastwardly to the depot, the contemplation was of two separate rights of way, with independent tracks for each road; with a further provision that at two places, unless the County road could obtain the use of the street, it should be permitted to put a third rail on the right of way of the Kansas road. It was further provided that the Kansas road should construct and maintain the road-bed through the park, and the tunnel and cut, hereinbefore referred to; also that the County Company should, within two years, pay to the Kansas Company one-half of the cost of this construction; and that, on failure thereof, it should forfeit all right and interest in said right of way, and be forever excluded therefrom.

The second contract, made the same day, was what is known as the "tripartite agreement;" the parties to it being the commissioners of Forest park, party of the first part, the County Company, party of the second part, and the Kansas Company, party of the third part. Each of these contracts refers to the other, and, while the tripartite agreement was executed after the other, they are so connected as properly to be

considered parts and parcels of one contract.

This tripartite agreement recited that "said Forest park commissioners, in consideration of the relinquishments, agreements, and stipulations hereinafter contained on the part of said party of the second part, do hereby accept and approve the line and grade of said railroad as laid down and described upon the accompanying plat and profile hereto attached, and forming part of this agreement; and said line and grade, in case there is no forfeiture of this agreement, is hereby fixed as the sole and finally established right of way to which said party of the second part is entitled by statute, or otherwise, through said park, or any part thereof; and the width of said right of way, as established by statute, is hereby reduced from seventy (70) feet, and fixed at forty-two (42) feet, between its outer points." Then that the County road, in consideration thereof, relinquished 28 feet off the 70 feet established by statute for its right of way through Forest park; with the proviso that, in case the right of way described and established should not be promptly placed at the disposal of the County road, this agreement should be set aside, and become null and void. It then, in eight successive paragraphs, provided for the manner of constructing the road-bed through the park by the county road, and also for the building of the depot outside the right of way, but immediately adjoining thereto. The ninth paragraph reads as follows:

"Said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park, and up to the terminus of its road in the city of St. Louis, upon such terms, and for such fair and equitable compensation, to be paid to it therefor, as may be agreed upon by such companies."

The tenth paragraph is an admission by the County road that its right of way is not exclusive, and that this agreement is not to be construed as limiting or impairing the right of the park commissioners to grant another right of way to any other railroad company. The twelfth paragraph is as follows:

"And whereas, for the purpose of enabling the party of the third part to reach the Union depot of St. Louis, Missouri, an amicable agreement and arrangement for a right of way outside of and through said Forest park has been made and entered into by and between the parties of the second and third parts, and in pursuance thereof the parties of the second and third parts are to enter upon and enjoy the right of way, and all the rights, privileges, immunities, powers, improvements, and property belonging to, or vested in, or that may belong to, or vest in, the party of the second part, in common, in, upon, and through said park, under certain regulations, terms, and conditions agreed upon by and between said parties therein; and whereas, the party of the third part, in further pursuance of said last-named agreement, is about to construct, maintain, and operate a railroad, in, upon, and through said park, at great expense, and to engage in other great outlays, and to assume other heavy burdens and responsibilities, to be of advantage to said third party, through the continued enjoyment of said right of way and other rights, privileges, powers, franchises, immunities, improvements, and property in, upon, and through said park: now, therefore, in view of the premises, and as inducements to said party of the third part to proceed as intended, the party of the first part does hereby grant and convey unto, and license and permit, the said party of the third part, its successors and assigns, to have, hold, use, and enjoy said right of way, in, upon, and through said park, in common with, and to be held and enjoyed jointly with, said party of the second part, and its assigns, on the terms of the said contract between them, and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part as to improvements, except as to building a depot and switch in said park, which the party of the second part is to do itself; or, in case said party of the second part, its successors or assigns, should forfeit its said rights, privileges, and franchises in, upon, and through said park, or from any cause cease to have, maintain, and enjoy the same, then it is hereby agreed and covenanted that the party of the third part shall not also be excluded from said park, but shall, with its successors and assigns, continue to have, maintain, and enjoy all of said rights, privileges, immunities, franchises, improvements, and property on the terms hereinbefore set forth, continuously and forever."

The thirteenth paragraph provides that the Kansas road shall have no depot in the park. The fourteenth paragraph, so far as it is material, is as follows:

"Now, therefore, in consideration thereof, and of the agreement of the party of the third part herein, the party of the first part herein accepts the agreement and contract of the party of the third part herein to execute, perform, and comply with all of the terms, provisions, and things herein mentioned to be done, performed, or complied with, as to said improvements, except as aforesaid, by the party of the second part hereto, so far as assumed as aforesaid, releasing it therefrom, and in consideration thereof the party of the third part hereto covenants and agrees with the other parties hereto that it will, in lieu and stead of the party of the second part hereto, do, perform, and comply with all the terms and provisions, matters and things, herein expressed, to be done, performed, or complied with by said party of the second part, as to said improvements, except as aforesaid, subject to the terms and conditions in said agreement of even date herewith contained; and it is

hereby expressly covenanted and agreed that a compliance by the party of the third part for itself, or for itself and the party of the second part jointly, in the construction of said railroad in, upon, and through said park, tunnel, and cut, in accordance with the terms of this agreement, shall be taken and accepted as a performance of the conditions imposed upon said party of the second part; and it is expressly covenanted and agreed that all and every part of the work, its kind, description, and extent, to be performed by either of said parties of the second or third parts, is hereinabove expressed, and neither of said parties shall be held or required to do or perform any other or further work and conditions than those hereby definitely set forth."

It will be observed that by the ninth paragraph the County road agreed to permit the use of its right of way by other railroads. Whether a like obligation was assumed by the Kansas road depends upon the last sentence in the twelfth paragraph, which purports to grant to the Kansas road the right to occupy and enjoy the right of way through the park jointly with the County road, "on the terms of the said contract between them, and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part as to improvements, except as to building depot and switch in said park, which the party of the second part is to do itself."

It must be conceded that the meaning of this language is not perfectly clear. It is claimed by the defendants that the words, "as to improvements, except as to buildings," etc., qualify not only the immediately preceding clause, commencing "and which are hereby assumed," but also the one prior, commencing "and under the same terms and conditions;" and therefore that the terms and conditions as to improvements are those alone cast upon the Kansas road. This would make the two clauses but a single compound one, qualified by the following relative clause "as to improvements," etc. As against this, it must be observed that, grammatically, a relative clause generally qualifies its immediate antecedent, and therefore in this case would refer simply to that clause which provides for the assumption by the Kansas road. This natural grammatical construction is strengthened by the punctuation,—a comma after the words "party of the second part," and none after the words "party of the third part," which seems to separate the entire first clause from the second and its qualifying terms. I know that the matter of punctuation is never relied upon to defeat the obvious intent; but, when the meaning is doubtful, the punctuation is certainly a matter tending to throw light upon it.

Further, there are not simply two, but really three, antecedent clauses; the first one being, "the terms of the said contract between them;" that is, the two railroad companies. Very clearly this qualifying clause does not refer to that, and therefore it should not be held to qualify the second, unless the obvious intent compels such construction. It is objected that the clause commencing "and which are hereby assumed," is, under this construction, superfluous. I think not. These improvements called for the expenditure of money, and the idea seemed to be that the Kansas road should not only hold its rights upon certain condi-

tions, but that, as to those involving the expenditure of money, it should expressly assume the performance. There is a manifest difference between a conveyance subject to a mortgage and a conveyance in which the grantee assumes the payment of the mortgage. This distinction evidently dictated the form of expression used.

Again, it is insisted that, by the fourteenth paragraph, the parties expressly declared what they meant by the terms and conditions imposed upon the County road; for, in next to the last sentence quoted, it is provided that "a compliance by the party of the third part for itself, or for itself and the party of the second part jointly, in the construction of said railroad in, upon, and through said park, tunnel, and cut, in accordance with the terms of this agreement, shall be taken and accepted as performance of the conditions imposed upon said party of the second part." But this language, which, while taken by itself, seems very broad, must be construed in reference to the context. From the opening language of the paragraph it appears that the parties were stipulating concerning the matter of improvements alone, and in reference to the party by whom said improvements should be made; and when in this sentence certain work done by the Kansas road is declared to be taken and accepted as a performance of the conditions imposed upon the County road, it must be taken as referring simply to the conditions in respect to improvements. This construction is strengthened by the language following this sentence, in which it is said that neither of said parties—neither the County road nor the Kansas road—"shall be held or required to do or perform any other or further work and conditions than those hereby definitely set forth." Certainly it was not meant by this to nullify the provisions of the ninth paragraph, or release the County road from the stipulation therein con-Making the fourteenth paragraph refer simply to the matter of improvements, as indicated by its opening sentence, it becomes consistent and harmonious with the balance of the agreement.

Further, it is insisted that, if it was the intent of the parties that such an important obligation should be assumed by the Kansas road, the language imposing it would have been more definite, precise, and clear, and that the very uncertainty of this language precludes the idea that it was the intent of the parties that this obligation should be cast upon Counsel speak of it as "a ghastly blunder," and argue the Kansas road. that, from language of such doubtful import, no imputation of such a blunder ought to be cast upon the then representatives of the Kansas Probably at that time—more than 10 years ago—the assumption of such an obligation did not seem to be a matter of serious moment. Indeed, the very language in which the ninth paragraph is couched, and by which unquestionably such an obligation was intended to be cast upon the County road, lacks, as we shall hereafter see, the precision, certainty, and fullness which, in view of the present importance of such a stipulation, would to-day be expected.

Again, it is insisted that there was no consideration for this stipulation on the part of the Kansas road. It is urged that the County road had, by virtue of its deed from Griswold, and the act establishing Forest

park, a clear legal title to a right of way, 70 feet in width, through the park,—a title beyond the possibility of interference by the park commissioners; that the only power left with the park commissioners was in respect to the grade; that the County road had, under the statutes, a right to convey any or all of such right of way to the Kansas road, and that, having such right of way, an attempt by the park commissioners to impose this condition was unauthorized; that the assumption by the Kansas road was without consideration, and not binding. To this it may be replied that the park commissioners accepted and approved the proposed grade; that by the last clause of the tripartite agreement they agreed to build and maintain certain arched entrances and exits from the park, and that, as a matter of fact, they did thereafter spend many thousand dollars in such work; and, finally, that the agreement indicates on its face that it was made as a compromise of certain claims on the part of the respective parties. The law favors compromises,—upholds them as considerations of the covenants of the compromising parties. park commissioners claimed the right to grant a right of way through the park. By the terms of this tripartite agreement, they conveyed this right, and approved the proposed grade, and contracted to do work along that line. Clearly there was consideration for this stipulation. While I concede that the language is not entirely perspicuous, yet I think the true construction is that the Kansas road assumed the stipulation of the ninth paragraph, that there was sufficient consideration, and therefore a binding stipulation upon it.

For further argument tending to show that this is the true construction, and that there was sufficient consideration, I refer to the elaborate

opinion of the special master filed in this cause.

A solution of this question only opens the door to others, some of which are even more embarrassing and difficult of solution. It is insisted that by this stipulation the railroad company agreed to permit the use of its right of way, and did not agree to permit the use of its track or road-bed, and that the road should not be bound, therefore, beyond the very letter of its obligation. Also that this agreement was not one running with the land; that it bound only the party assuming it, as a merely personal covenant; and while, therefore, binding on the Kansas road, and also the Wabash Company, into which it was consolidated, it does not bind the mortgagees, who take as purchasers, and as purchasers without notice. Further, that the use by other railroad companies stipulated for was to be only on such compensation as should be agreed upon by the parties, and that, in the absence of such agreement by the parties, the court had no power to determine the amount of compensation, or enforce the contract. And, again, that the contract is one which in its nature is not susceptible of specific enforcement, because the duties required by it, and which are sought to be enforced, are of a continuous character, and require the personal skill and cultivated judgment of the officers of the defendant road; and therefore the matter cannot be disposed of by one decree, but will require the permanent retention of the case, and constant supervision by the court. Still, again, it is insisted that there is no mutuality in the contract, and that therefore it is one that courts will not specifically enforce; and, finally, that, if all these objections fail, the amount of compensation reported by the master is not fair and adequate, but should be largely in excess of that amount.

Of these in their order.

The language of the ninth paragraph, under which, as before noticed, intervenors must claim, is that the party of the second part shall permit other railroads to use its "right of way." Now, the term "right of way" has a twofold signification,—it sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed. Obviously, in this paragraph, it is used in the latter sense. Through both of these contracts the terms "right of way," "track," and "road-bed" frequently appear, and in all cases the term "right of way" is used as descriptive of the strip above referred to. Notably, in the fifth paragraph, is the distinction between the "right of way" and the "track" disclosed, in which it is provided that the depot shall be wholly outside of the right of way, but immediately adjoining the track. Now, the right of way through the park, as given by the Griswold deed, was 40 feet; as fixed by the contract with the Forest Park commissioners, was 70 feet; and by this present contract, 42 feet. So the County road conveyed to the Kansas road, outside of the park, a strip either 30 or 28 feet in width for its right of way. My thought, at first, was that the intervenors could only claim a right to use so much of this right of way as was not, in fact, occupied by the track of the Wabash, and that all that was intended by this ninth paragraph was to permit other railroad companies to occupy and use so much of the Kansas road's right of way as it did not itself occupy and use; but, after reflection on the arguments of counsel, I have been led to the conviction that this was too narrow a construction, and was not the real intent of the The master, in his report, shows that the entire right of way is occupied by tracks and sidings, so that there is no room for another and independent track; and as there is nothing to show that this occupation has not been made in good faith, and to supply the needs of the Wabash Company, if my first interpretation had been correct, the intervenors would plainly be without any rights. I think, however, the true construction is this: that the Kansas Company was to have the first right,—a right not limited to its necessities, but as broad as its convenience. Subject, and only subject, to such prior right, other companies were to have the use of the right of way, and if the respondent's business compelled the occupation by its tracks or sidings of the entire right of way, but the convenience of its business would permit the use of those tracks and sidings by another road, then such other road would be entitled to the use of both the right of way and the tracks and sidings. This construction is, I think, in accordance with the obvious intent of the parties, who were contracting for general rights, and not fixing the specific details.

With reference to the next matter, it is not seriously contended that the obligations assumed by the Kansas road are not also binding on the Wabash, because the latter is a mere consolidation of the former with other companies; but the contention is that the mortgagees take as purchasers, free from any burdens which do not run with the land, or of which they do not have either actual or constructive notice. On the same day on which these contracts were executed the County road executed a deed to the Kansas road of the undivided half of the right of way through the park, and of the separate portions of the various parcels of ground eastward, to the Union depot, which deed was recorded two days thereafter. This deed recites that it is executed "in pursuance of the terms of a certain contract made and executed by and between the parties of the first and second parts hereto, and dated August 11, A. D. 1875, and in full satisfaction of so much of said contract as relates to the conveyance of certain pieces of land and right of way to said party of the second part by said party of the first part." Also, towards the close of the instrument, after providing for a transfer of an undivided half of all right of way, and all other rights and privileges, franchises, powers, and immunities owned by or vested in the party of the first part, in, through, or upon Forest park, it has these words: "All of which conveyances of the said right of way in this deed mentioned are made subject to the terms and conditions upon which the same were granted to the party of the first part." Now, the tripartite contract was recorded prior to the consolidation of the Kansas road with the Wabash, and prior to the issue of the mortgages referred to. There being express reference, in the deed from the County road to the Kansas road, to the contract in pursuance of which the deed is made, and an express declaration that the conveyances are made subject to the terms and conditions upon which the grantor received them, it seems to me that there is enough to cast upon even a bona fide purchaser notice of the terms and conditions of these contracts. It is argued with great force, however, by counsel for the respondents, that even if the purchasers were charged with notice of these terms and conditions, as attaching to the lands described in the deed, inasmuch as the Kansas road obtained a large portion of its right of way between Forest park and the Union depot from other sources, it took these latter portions free from any burden cast upon the lands specifically conveyed by the County road. "Can it be," he says, "that a condition in a deed of a few feet of the right of way, in a long line of three hundred miles, casts a burden on the entire line, to be assumed by every succeeding purchaser?" I might answer this extreme case by a reverse question: Can it be possible that a condition attached to substantially the entire right of way of this long line of road can be defeated by the fact that some few feet have been acquired by a deed free from such condition? these extreme cases do not constitute the practical matter before us. the County road had an incomplete right of way through the park, and to the Union depot. A share of this incomplete right of way it conveyed to the Kansas road, subject to certain conditions. Can it be that the

completion by the Kansas road of this right of way, by purchase of intervening and isolated tracts, destroys the entire value of the conditions? Looking at this matter in a practical way, and from a reasonable standpoint, I think the answer to this question must be in the negative.

Passing to the next matter, the ninth paragraph contemplates that the conditions and compensation for use should be determined by personal agreement. As there has been no such personal agreement, counsel deny the power of the court to interfere, and say that any interference would be the making of a new contract. They refer to the familiar cases in which parties, in their contract, have stipulated for a particular mode of determining rent or other compensation, as by arbitration, etc. In such cases, courts have held that parties cannot ignore such stipulations, and invoke the aid of the courts, in the first instance, to determine. here the respondents denythe right. They never advanced to the position of a mere disagreement about the amount of compensation, or terms As the question of right must be settled before the question of compensation is presented, and as the respondents, by denying the right; have forced the intervenors to an application to the court, it seems to me that the court, taking cognizance of the question of right, is bound to determine the whole case, and settle both the right and the It is a general doctrine that a court, once taking juriscompensation. diction of a controversy, is bound to continue that jurisdiction up to the final determination of the entire controversy. The stipulation provided for use under such reasonable terms and regulations, and for such reasonable compensation, as should be agreed upon. It cannot be that the mere whim and caprice of the one party—a blind refusal to come to any agreement—can nullify the entire force of the stipulation. It would make the right of the intervenors a mere barren right. It would nullify the entire stipulation, and operate simply to give to the respondents that which without it they had,—the privilege of permitting other roads to enter. It would be mockery to call such a provision a stipulation for a right.

The next matter is one of exceeding difficulty. The stipulation is general in its nature, -contains no provision as to details. Is it thereby rendered so incomplete that the courts may not enforce it? That a court may enforce, by its decree, either a contract or legislative right to the use by one railroad company of the tracks of another, cannot, it seems to me, under the intimations of the supreme court in its recent decision in the Express Cases, 6 Sup. Ct. Rep. 542, be doubted. In England legislation has been had in reference to this matter, and the right thus granted has been enforced by the decrees of courts; and so, if this contract had provided the details, so that all that the court would have to do would be to declare by its decree that the plaintiff was entitled to the benefit of such contract, the duty of the court would seem plain. Does the omission of the details destroy the power of the court, and practically nullify the force of the stipulation? or was it the intent of the parties simply to contract for a right, and leave with the court, in the absence of the agreement of parties, the full determination of all the de-

tails? I am aware of the rule that courts are not bound to relieve parties from mistakes or omissions, or to complete contracts which parties have left incomplete. But it is also true that offtimes, at the making of the contract for a right, it may be impossible to determine details, or the changing situation of affairs may indicate that details also must be subject to modification, and therefore should not be definitely prescribed, and should be left to settlement by agreement or decree at the time the right is insisted upon. In such cases, if the right is absolutely contracted for, and the details are of a nature which courts may properly fix and settle, then, I take it, the courts should not hold the contract incomplete, but determine the right, and also prescribe and settle the de-An act of the legislature might be passed giving to one company the right to use the tracks of another, and prescribing all the terms and conditions,—the details for the use. I take it, an act of the legislature would also be valid which simply declared that one company should have the right to use the tracks of another upon such terms and conditions as the parties might agree upon, or should be prescribed by the courts; and, if such a legislative act would have to be adjudged valid and complete, I see no satisfactory reason why courts may not also hold sufficient and valid a mere contract for the right, and, determining the right, also settle and prescribe the terms of the use. It is true that such a decree cannot be executed by the performance of a single act. is continuous in its operation. It requires the constant exercise of judgment and skill by the officers of the corporation defendant; and therefore, in a qualified sense, it may be true that the case never is ended, but remains a permanent case in the court, performance of whose decree may be the subject of repeated inquiry by proceedings in the nature of contempt. It is also true that in the changing conditions of business the details of the use may require change. The time may come when the respondent's business may demand the entire use of its tracks, and the intervenor's right wholly cease. But other decrees are subject to modification and change, as in decrees for alimony. The courts are not infrequently called to modify them by reason of the changed condition of the parties thereto. So, when a decree passes in a case of this kind, it remains as a permanent determination of the respective rights of the parties, subject only to the further right of either party to apply for a modification upon any changed condition of affairs; and, so far as any matter of supervision of the personal skill and judgment of the officers of the respondent corporation, the contract, in terms, provides that the regulation of the running of trains shall be subject to the control of the officers of the respondent. While I concede that there is force in the objection that this must remain, in a qualified sense, a continuing case in the courts, with the constant duty of supervising the acts of the respondent, yet it seems to me that where there is a right there must be a remedy, and that the mere machinery of court procedure is flexible enough to adapt itself to the necessities of protecting a right. Clearly, a mere action for damages would be a grossly inadequate remedy. Clearly, the public interests justify, if they do not compel, the enforcement of this right, and so, with much hesitation, I have come to the conclusion that this objection cannot be sustained.

As to the objection on the ground of the want of mutuality in the contract, I think it of little force. The respondent has been paid for the privilege that is now claimed. The consideration, as I have heretofore shown, was ample; and, when a party has received payment for a privilege, I do not think it can resist the enforcement of that privilege on the mere ground that it cannot compel the other party to continue in its en-

joyment.

The final matter is that of compensation. In this I think the master erred. He fixed the value of the right of way at a million of dollars; and reported that, in his judgment, the share of the interest on this value, and in the expenses of keeping up the track, which the intervenor company should pay, should be fixed upon a wheelage basis. So far as respects the mere matter of keeping up the track, I see no reason to doubt the justice of the rule fixed by the master; but, in regard to the interest on the value, I think the intervenor should pay one-half of that, and for these reasons: It is a familar fact that in a large city like St. Louis, along the track of an important railroad, within the city limits, are built large manufacturing establishments, warehouses, and other buildings, for the convenient transaction of business between the carrier, on the one hand, and the manufacturer and the merchant, on the other. Another road coming over the same track not only uses the property, of great value, which the company owner has in the first instance paid for, but also shares in the benefit of access to all these manufactories, warehouses, etc. It thus places itself in competition with the original company for this valuable business. Such competition may operate to diminish the business of the original company, or compel it to lower its rates to preserve the business. In either way, it operates to the serious detriment of the original company. The new company comes in as an equal competitor. It shares in all the benefits of this business, and it may share equally. those circumstances it seems to me no more than fair that a new company, which crowds itself into an equal access to such benefits and such privileges, should pay an equal share of the interest on the value of the property. Hence I shall sustain the objections of the respondent to the report of the master, so far as concerns the amount of compensation, and I think that the intervenor company must pay one half the interest on the value, and its share of the cost of keeping up the track, determined upon a wheelage basis. In other respects, the report of the master will be confirmed.

In conclusion, let me say that I have given the various questions here presented a most careful examination. I am fully sensible of the many difficulties that have attended the solution of these questions, and my conclusion has been reached after much hesitation. I have endeavored to preserve fully the property rights of the respondent company. At the same time I have been deeply impressed with the truth that railroads are performing a quasi public service, and that, so far as vested property interests are not impaired, such construction should be given to all con-

tracts and legislation as will make these public servants most fully subserve the interests and welfare of the general public.

TREAT, J. I concur fully with so much of the foregoing opinion as establishes the intervenor's right to the entrance into St. Louis over respondent's right of way and tracks, subject to reasonable regulations by respondent for the safe conduct of persons and property in the common use thereof. This case involves a very difficult and complicated inquiry, and the court has been embarrassed by the many obscure details of the After reading and analyzing with the most painsdifferent contracts. taking care the special and general provisions of the contracts in question, no other conclusion could be reached than that stated by my brother judge, viz., that the intervenor has a right to the use of the track and right of way of the respondent. The very terms of the original contracts to which the respondent succeeds cast upon it the obligations connected therewith. In other terms, it takes cum onere. Hence I concur fully with my brother judge that the right of user exists; but I differ as to the propriety or duty of fixing the measure of compensation in this stage of the case. Those terms are, by the contract, to be agreed upon by the parties; and why should they not have an opportunity to come to an agreement? True, the respondent denies the right of intervenor to the use of its track and right of way, and consequently, in the intermediate inquiry, refused to enter upon terms. How could it make such terms without confessing intervenor's right?

It having now been decided, with full concurrence on my part, that the intervenor has the right claimed, the difficult proposition is thrust upon the court as to the terms of its enjoyment. By the contract itself, those terms are to be settled by the parties. Why should they not be permitted to do so? If, hereafter, it should occur that through fraud, attempted extortion, or otherwise, the right of user is to be practically defeated, the court would necessarily lay its hand upon the transaction, and enforce the respective rights of the parties as justice might demand. It seems to me that the measure of compensation should not be prescribed at the present state of the controversy, irrespective of the terms of the contract as to the mode of determining the same, the more especially as the intervenor has no exclusive right in the premises. Another railroad corporation may appear next year, and insist upon its rights under the contract; and so on, from time to time, successive corporations. spondent must make, necessarily, the proper regulations for safety and otherwise, pertaining to the use of a common track entering a large city like St. Louis, where the most complicated details are needed for approaches to a common depot.

It is true that the Express Cases rested on an independent proposition, and consequently cannot govern this case. Here is a distinct contract by which the respondent is bound. It took cum onere. By the terms of the obligation, others could use, subject to its regulations, the common track and right of way, upon such consideration as the parties might agree upon. They have not as yet agreed, and, since this determination of the

right of intervenor, no opportunity has been given them to consult and agree. It may be that they can do so, more wisely and justly than the court, if opportunity is given. It is obvious that courts are not, without fullest evidence before them, equal to the task of prescribing how railroads should be operated in their minute details, one with the other, in the interchange of traffic, or use of common tracks, depots, etc. When difficulties arise, as now, where rights between them are to be determined, the adjustment of details should he left where the contract leaves it; otherwise, not only great injury and confusion may occur, but the court be compelled to retain an indefinite control of the case, to meet ever-shifting contingencies, as to transportation, new improvements, advancing trade, etc. In my view of this case, the question of compensation between the parties should not be decided now, but reserved for further consideration.

There are some minor elements as to the status of the parties, technically, which may be worthy of further consideration, should cause therefor be presented. By this is meant the position occupied by the pur-

chasing committee under the terms of sale heretofore made.

The result is that I fully concur in the foregoing opinion, except so far as the same determines the measure of compensation between the parties, not that the rule may or may not be correct, if the court is compelled finally to pass upon the same, but merely that such action is premature, and should be reserved for further action, if needed.

REYBURN v. Consumers' Gas, Fuel & Light Co. and others.

(Circuit Court, N. D. Illinois. January 4, 1887.)

CORPORATIONS—RECEIVER—MORTGAGE SALE—"OPERATING AND SUPPLY MATERIALS" CONSTRUED.

A receiver was appointed to wind up a corporation engaged in the manufacture and supply of gas. By the order appointing him he was directed to keep the works in operation, to make necessary repairs, and to pay and discharge the debts of employes, and bills for supplies and operating materials contracted within sixty days prior to his appointment. Pursuant to the orders of the court, he made improvements and extensions on the gas-works of the company, part of which was paid by money raised on receiver's certificates, and part out of the earnings of the company Default having been made in the payment of interest on bonds secured by mortgage given prior to his appointment, the trustee in the mortgage intervened, and a decree of foreclosure was entered on a cross-bill filed by him. The property was sold, and the proceeds paid into court for distribution. Held, that meters supplied to the company were not operating or supply materials, but of the nature of materials used in the construction of the works; and, being supplied more than 60 days prior to the appointment of the receiver, the creditors supplying them were not entitled to be paid out of the fund in court, in preference to the bondholders, on the ground that, the receiver having, under orders of the court, applied part of the income of the company to the improvement and extension of the works of the company, the claim for the meters should be paid out of the proceeds of the res.

In Equity. Bill to wind up a corporation.

Grant & Brady and Mr. Petit, for Goodwin Gas Stove & Meter Co.
v.29F.no.12—36

Learning & Thompson, for Dearborn Foundry Co. F. J. Loesch, for Pennsylvania Tube-works.

Mr. Post and R. B. Bacon, for Sheckel, Harrison & Howard.

Peckham & Brown, for First Nat. Bank of Chicago.

Osborn & Lynde, for the bondholders.

BLODGETT, J. The original bill in this case was filed June 30, 1885, and on July 30, 1885, a supplemental bill was filed charging that the defendant corporation, the Consumers' Gas, Fuel & Light Company, was insolvent, and unable to pay its debts, and asked that the company be wound up, its property sold and distributed among its creditors pursuant to the provisions of the statutes of Illinois in such case made and provided, and asking for the appointment of a receiver to take possession of the property of the corporation, and, under the orders of the court, sell and dispose of the same, and distribute the proceeds to the creditors of the company as required by law. An interlocutory decree was entered, on the filing of this supplemental bill, appointing a receiver, and directing him to take possession of all and singular the assets of the company, and the supplies and material on hand, to keep the works in operation, to make necessary repairs, and to pay and discharge the debts of employes, and for supplies and operating material, contracted within 60 days prior to his appointment. Under this decree the receiver took possession and operated the works of the company, and, pursuant to the orders of the court, made improvements and extensions of the gas-works of the company, part of which has been paid by money raised on receiver's certificates, and part out of the earnings of the company.

Prior to the appointment of a receiver the company had given a mortgage to secure an issue of \$4,000,000 of bonds, of which \$2,000,000 had been issued and put in circulation, and were in the hands of bona fide holders at the time the receiver was appointed. The mortgage covered all the works, franchises, personal property, and rents, issues, and profits of the property, to secure the payment of the bonds so issued; the bonds bearing interest at the rate of 6 per cent. per annum, payable semi-annually on the first day of April and October of each year. Default was made in the payment of the interest due October 1, 1885, and on March 6, 1886, the trustee in the mortgage intervened in the case, and, by leave of court, filed a cross-bill, praying a foreclosure of the mortgage; and under this cross-bill a decree of foreclosure was entered, the property sold, and the proceeds paid into court for distribution. Parties having claims against this fund in court were duly notified to present them, and make proof thereof before the master, to whom the case had been referred.

Among the claims so presented were the following:

Goodwin Gas Stove & Meter Company of Philadelphia,
Sheckel, Harrison & Howard,
Dearborn Foundry Company.

First National Bank of Chicago,
Pennsylvania Tube-works,

S5,715 89
1,032 74
3,393 69
1,416 50
794 87

Making a total of - 11

The proofs presented before the master by these creditors have been returned by him into court; and the question made upon these proofs is whether these claims, or any part of them, are properly chargeable against the proceeds of the property now in court, either as equitable liens upon the property itself, or by reason of any diversion of the earnings of the property while in the hands of the receiver. The proof shows, without contradiction, that the course of business of the company was to pay its employes every month, and supplies bought on credit during the month were paid for on the first of the succeeding month, so that all debts for labor and operating supplies fell due within 30 days from the time they were contracted.

Of the claim of the Goodwin Gas Stove & Meter Company, \$3,000 was contracted between March and December, 1884, and the remainder was contracted between February and March, 1885; so that all of this claim was contracted more than 60 days before the appointment of the receiver, and the proof shows that this indebtedness is wholly for gasmeters furnished to the defendant company. It is contended by this creditor that its claim is for supplies furnished the defendant, and that as the proof shows that the receiver, under the orders of the court, applied enough of the income of the company to the improvement and extension of the works and plant of the company, therefore this debt should be paid out of the proceeds of the res; thus replacing for the benefit of supply creditors that which was diverted, for the time being, from them to the benefit of the mortgaged property.

I do not concur with the learned counsel who appeared for this creditor in their position that the goods furnished come under the definition of "operating supplies." The debt was wholly contracted for gas-meters, which were a part of the gas-works of the company, and as much required for the complete and operative construction of the works as any other part of the plant or machinery of the works. It is impossible, as the proof shows, for the gas company to sell gas without meters, with which to measure and distribute it to their customers, and from which the accounts are to be made up and the bills collected. It seems to me that it requires meters to make the works of a gas company complete, as much as pipes and generators, and no gas-works can be said to be in operating condition unless they have an adequate supply of meters. The claim, therefore, comes within the definition of a claim for material furnished for the construction of the works; and from the decision of the supreme court of the United States in Fosdick v. Schall, 99 U.S. 235, down to the present time, I have seen no case which contemplates, except under very peculiar circumstances, that general creditors who have furnished mere material for the construction of works of this character are to have a lien. as against the lien of mortgagees. The doctrine of Fosdick v. Schall, and the subsequent cases on the same question, is that, for the purpose of keeping works of a public character, within which the works of this company may be properly included in operation, those who have given the company credit for the supplies necessary to keep the works in operation—current operating supplies—are to have a lien extending back not to exceed six

months, except under extraordinary circumstances; but I do not understand that this rule has ever been applied to cases of creditors who have simply furnished material for the construction of the works, in contradistinction to operating material. The material for the building or construction of the works, in theory, at least, is supposed to be paid for out of the capital stock, or bonds secured by the mortgage upon the property. It is from this source that companies of this character raise the money with which to construct their works, and they depend upon the earnings or income after the works are constructed to pay for their operating labor and supplies, and pay interest upon their bonds, and dividends to their shareholders. And, recognizing the necessity to the public that enterprises of this kind, exercising franchises of a public character, shall be kept, in the language of the cases, "going concerns," the courts have favored creditors who have furnished labor and supplies to the extent of allowing them an equitable lien, extending, as a rule, not further back than six months, but recognizing, however, the principle that the extent to which credit for this class of supplies is to run back is to be measured by the usual course of credit and business of the company in the conduct of its affairs; that is, ascertaining from the proof what was the usual term of credit upon which these companies have purchased their supplies, or settled, as in the case of railroads, with their connecting lines, this term of credit has been taken as a measure by which to determine the time within which this class of claims shall be protected.

This claim for meters did not originate in a claim for operating supplies, but in a claim for material furnished for the construction of the works,—the outfit by which the gas company was able to enter upon and do business.

But it is further urged in reference to this claim that the receiver in this case was appointed for the benefit of the general creditors, and therefore, by appointing a receiver, the court has appropriated, so to speak, the net earnings of the company beyond its operating expenses to the general creditors, of which this creditor is one; and therefore, inasmuch as the reports of the receiver show that some of the net earnings have been expended by the receiver in permanent improvements on the property itself, thereby benefiting the mortgagees, therefore these creditors have the right to ask the court to take from the proceeds of the property a sufficient amount to pay their claims, thereby adjusting the accounts between the parties, and repaying to the account of general creditors that which has been diverted to the improvement account. The fallacy of this argument consists in the assumption that the receiver was appointed solely for the benefit of the general creditors. The original bill in the case was in form and substance a creditors' bill, filed by Reyburn as a judgment creditor; but the supplemental bill under which the receiver was appointed was a bill for winding up the affairs of the corporation under the provisions of the Illinois Statutes, and the receiver was appointed as much for the benefit of the lien creditors as the general cred-In fact, it may be said that he was appointed for the benefit of the creditors in the order of their priority; because the prayer of the bill,

and the general scope of the proceeding, indicate that the purpose of the complainant, and the purpose of the court in making the interlocutory decree appointing the receiver, was a sale of the property, and a distribution of the proceeds among the creditors in the order of their priority.

The counsel for this creditor has also overlooked the fact that the mortgage, in express terms, conveyed to the trustee for the security of the bonds, not only the works, franchises, and real estate of the corporation, but all its personal property, including, of course, its operating material, implements, tools on hand, and the rents, issues, and profits of such property. From the time that the receiver took possession of this property he was, as it seems to me, as much a receiver of the bondholders as he was of the general creditors, and the court, in the exercise of its discretion, should give such direction to the expenditure of the earnings of the works during the time of the receivership as the equities of the respective parties require. The income having been pledged to secure the payment of the bonds, the court might, under its equitable powers, have directed the receiver to pay the net income to the bondholders, as having a vested first lien upon it, or, with the consent or acquiescence of the bondholders or their trustee, such income could be applied to the improvement of the property. In other words, the vested lien of holders of the bonds of the company was superior to that of any general creditor, and, if the court diverted the earnings from the creditors secured under the mortgage, no one but such secured creditor can complain. This creditor having no vested lien against this property, and having no equitable lien under the decision of the court, I can see no ground upon which the proceeds of the property can now be taken from the bondholders to whom they belong, and applied to the payment of this debt. The mere fact that, during the administration of the receiver, the court saw fit to allow the net earnings, or a portion of them, to be applied to the extension and improvement of the property. does not create an equitable lien upon the fund now in court in favor of this creditor, who never had any lien either upon the property itself, or any fund in court.

The proof also shows that the claims of Sheckel, Harrison & Howard, the Pennsylvania Tube-works, the Dearborn Foundry Company, and the First National Bank of Chicago, are all for construction material furnished to the company more than 60 days prior to the appointment of the receiver, and what I have said in regard to the claim of the Goodwin Gas Stove & Meter Company applies with equal force to the other claims which were disallowed by the receiver. As already stated, the proof shows the usual term of credit of this company for supplies was only 30 days; but, as a matter of precaution, the court allowed the receiver to pay any indebtedness of the company for supplies and labor contracted within 60 days from the day the receiver was appointed. It seems to me, from the facts of the case, that is as far back as the court should extend the lien of the supply and labor claim upon the proceeds of the corpus, and under that rule these intervenors would none of them be entitled to payment; but the more conclusive and satisfactory reason to

my mind why these claims should not be allowed is that none of them are operating and supply claims. They are all for construction material, such as meters, pipes, and other material, which was used in the construction of the works, and not in their operation after they are constructed.

All these claims are therefore disallowed.

Lyon and others v. Council, Bluffs Sav. Bank and others.

(Circuit Court. S. D. Iowa, W. D. September Term, 1886.)

FRAUDULENT CONVEYANCES -- CHATTEL MORTGAGE -- STOCK IN TRADE -- MORT-GAGOR IN POSSESSION.

GAGOR IN POSSESSION.

In August, 1884, P., a merchant, mortgaged to defendant bank, to secure the payment of three notes due in September, October, and November for \$3,500, his goods then in stock, and that might thereafter be added thereto, together with the furniture and fixtures, and all notes, book-accounts, and evidences of indebtedness owned by P. The mortgage, by its terms, permitted P. to sell the property in the usual course of trade. It was delivered to the bank at the time of its execution, but not recorded till March, 1885, seven months after. The notes were not paid when due. In September, 1884, P. purchased of plaintiff, on credit, goods of the value of \$3,704.56, which were added to the mortgaged stock. Plaintiff, at the time of the sale, was ignorant of the mortgage, and made the sale in the belief that the stock was unincumbered. The bank had a \$5,000 mortgage on P.'s homestead which was rant of the mortgage, and made the sale in the belief that the stock was unincumbered. The bank had a \$5,000 mortgage on P.'s homestead, which was exempt from execution. It applied \$2,000 deposited with it by P., proceeds of the sale of this stock of goods, in part payment of this mortgage. Plaintiff recovered judgment against P. for his claim, attached the goods, and sued to set aside the mortgage. Held, that the chattel mortgage was void as against plaintiff, because it, and the transactions under it, operated as a fraud

In Equity. Bill to set aside chattel mortgage. Mills & Keeler and Wright, Baldwin & Haldane, for complainants. D. C. Bloomer, for defendant.

In the year 1884 one James Porterfield was engaged in Shiras, J. business at Council Bluffs, Iowa, as a retail dealer in dry goods, and on the thirtieth of August of that year he borrowed of the Council Bluffs Savings Bank the sum of \$3,500, for which he executed his three promissory notes, maturing September 29, October 29, and November 28, 1884, and to secure the payment thereof he also executed a chattel mortgage dated August 30, 1884, and covering "all my certain stock of dry goods, notions, hosiery, cloaks, and all other goods that are now in stock, or may hereafter be added thereto, owned and kept by me in a certain * * together with all furniture and fixtures thereunto belonging; also all notes, book-accounts, and other evidences of indebtedness now owned by me." The mortgage, by its terms, permitted the mortgagor to sell the property in the ordinary course of trade. This

mortgage was delivered to the bank at the time of its execution, but it was not recorded until March 20, 1885, nearly seven months after its execution.

In September, 1884, Porterfield went to New York, and bought, on credit, of complainants, goods of the value of \$3,704.56, which were placed in the store containing the stock covered by the mortgage. sales on credit were made by the complainants, they had no knowledge of the existence of the unrecorded mortgage, and sold the goods in the belief that Porterfield's stock was unincumbered. On March 20, 1885, as already stated, the mortgage was placed upon record, and on the next day the bank took possession of the property described in the mortgage, for the purpose of foreclosing the same. On the twenty-fifth of March, 1885, Porterfield made a general assignment for the benefit of creditors to C. R. Scott, and complainants brought an action at law against Porterfield, aided by attachments, to the August term, 1885, of the circuit court of Pottawatamie county, and recovered judgments for the amounts due them from Porterfield. Complainants also filed a petition in equity in the state court for the purpose of contesting the validity of the mortgage to the savings bank, and asked the issuance of a writ of injunction under the provisions of section 3317 of the Code of Iowa. The writ was issued and served upon the bank, and then, upon application of complainants, who are, and were when the suit was commenced, citizens of the state of New York, the cause was removed into this court, and is now submitted upon the evidence introduced by both parties; the question being whether the chattel mortgage is valid as against the claims and equities of complainants.

Counsel for the mortgagee cites authorities in support of the well-recognized proposition, that the construction put upon the language of a state statute by the supreme court of the state is binding alike upon the federal and state courts, and then claims that the supreme court of Iowa, in a series of decisions beginning with Hughes v. Cory, 20 Iowa, 399, and ending with Meyer v. Evans, 66 Iowa, 179, S. C. 23 N. W. Rep. 386, has held "that the fact that the mortgagor retains possession of the mortgaged property, and reserves the right to sell the same in the ordinary course of trade, and apply the proceeds to his own use, does not render the mortgage fraudulent in law;" and that consequently the United States courts are bound to hold, in all such cases, that the mortgage is valid as against all parties.

It would seem that a mischievous misunderstanding has arisen in the minds of many in the community, not only touching the rulings in this court upon the validity of chattel mortgages, but also in regard to the true meaning and scope of the decisions of the supreme court of Iowa upon this subject. The impression seems to prevail that the rulings of the federal and state courts upon the true construction of the Iowa statute are radically different; yet a careful examination of the rulings actually made will show that this impression is an error.

The fatal mistake made by many is in assuming, as is practically done by counsel for defendant in this case, that when the supreme court of Iowa decided, in Hughes v. Cory, and other cases based thereon, that, under the facts appearing in the several cases, the chattel mortgages under consideration could not be declared to be invalid as a matter of law, that the court meant to declare, and did declare, that the mortgages were valid as a matter of law. The rule actually laid down is that the court could not, under the facts presented in the several cases, declare, as a matter of law, that the mortgages were either valid or invalid, but that the question of invalidity was one of fact to be decided in each case upon the evidence and the conclusions to be deduced therefrom. To ascertain just what has been in fact held by the supreme court of Iowa, a brief examination of the leading cases may not be out of place.

Under the rules of the common law, and under the provisions of the statute of 13 Eliz., as construed in Twyne's Case, 3 Coke, 80, if the vendor or mortgagor of chattels was allowed to continue in possession, and use the property as his own, the transfer would be deemed fraudulent as a matter of law.

The Code of Iowa, § 1923, provides that "no sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors, or subsequent purchasers without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides."

By this statute the recording of the mortgage gives the notice of change in ownership which was secured at the common law by requiring an actual and visible change of possession, and therefore the mortgagor might retain possession of the property, the mortgage being recorded, without giving rise to a presumption of fraud as a matter of law. Hayden, 11 Iowa, 435; Wilhelmi v. Leonard, 13 Iowa, 330; Jordan v. Lendrum, 55 Iowa, 478; S. C. 8 N. W. Rep. 311. By reason of the fact that the statute declares the mortgage, if not recorded, to be invalid only against creditors and purchasers, it is held that an unrecorded mortgage will not, as between the mortgagor and mortgagee, be rendered invalid simply because it is not recorded, and also that an unrecorded mortgage is valid as against all creditors and purchasers who have actual notice of its existence when their rights accrue, (McGavran v. Haupt, 9 Iowa, 83; Allen v. McCalla, 25 Iowa, 464;) also that, if withheld from the record for a time, and then recorded, the mortgage will become a lien, as against creditors and purchasers without actual notice of its existence, from the date when it is filed for record.

These decisions of the supreme court of Iowa are constructions of the language and true meaning of the Iowa statute, and the federal courts are bound to follow these interpretations of its meaning in all cases wherein the rights of parties are dependent upon the meaning of the statute. No case can be found in the reports, decided in the federal courts for Iowa, in which a construction of the Iowa statute has been adopted which differs from that announced by the supreme court of the state. It is possible that cases may be found which do not differ greatly in their facts, and in which different conclusions have been reached in the state and

federal courts; but it will appear that these differing decisions are not based upon diverse constructions of the Iowa statute, but upon diverse conclusions of fact drawn from the evidence in the cases.

As between a creditor and a mortgagee the question of the rights arising under the mortgage may be (1) a question of priorities of lien, in cases in which fraud is not an element, and where the question of priority usually depends upon the meaning of the statute of the state; (2) a question of fraud, in which the inquiry is whether the mortgage is in fact fraudulent, as against creditors, by reason of the fact that it is used as a cover and shield for the protection and benefit of the mortgagor, to the injury and delay of creditors, or that its existence is kept a secret, with the intent to thereby mislead third parties, to their loss and injury.

The question of whether a mortgage is fraudulent in fact is not determinable usually by the construction of the Iowa statute providing for the recording of mortgages, and the retention of possession by the mortgagor, but is a question of fact, to be determined in each case upon the evidence submitted and pertinent to the issue. Let us now see what are the views of the supreme court of Iowa upon what facts may be consid-

ered as tending to show fraud.

In the case of Torbert v. Hayden, 11 Iowa, 435, the trial court had ruled, in instructing the jury, that a mortgage of personal property, which gives to the mortgagor the possession and right to sell the property, was fraudulent in law, irrespective of the intent of the parties. The supreme court reversed this ruling, holding that the statute authorized the mortgagor to remain in possession, and that whether the power of disposition by the mortgagor rendered it void was a question of fact. Thus it is said:

"On the other hand, it is easy for us to conceive how such a mortgage may be fraudulent in fact, whether the possession of the property be in one party or the other, and notwithstanding it may be regularly executed, duly recorded, and all fair upon its face; yet such fact or fraudulent intent must be shown by extrinsic evidence, and be pronounced by the jury. But in so doing the jury could infer nothing from the possession of the property by the mortgagor, for this would be entirely consistent with the authority of the statute if the parties had duly complied with the terms thereof. The manner, however, of possession, would be a proper subject of inquiry. If it was accompanied with the power of disposition, or used in any way inconsistent with the object of the security of the rights of the mortgagee, there would be badges of fraud, not absolute, but prima facie, requiring explanation. * Whether, therefore, possession, with the right to deal with the property as his own, is fraudulent in a mortgagor, is a question of intent, and will depend entirely upon the circumstances explaining such acts of ownership. If a stock of goods is mortgaged to their whole value, and the mortgagor is permitted to hold possession, sell, and pocket the proceeds, such acts would be wholly irreconcilable with the object of the mortgage and the interest of the mortgagee; and the inference that the mortgagor had a secret or beneficial interest reserved would perhaps be irresistible. These illustrations show, as we think, the soundness of the rule that whether a chattel mortgage under our statute, when the mortgagor retains possession, and deals with the property as his own, is fraudulent or not, is a question of fact for the jury, and not one of law for the court."

In Hughes v. Cory, 20 Iowa. 399, is found a full discussion of the meaning of the Iowa statute, with a review of all the previous decisions, and the conclusion is reached that "the mere retention of possession, where the instrument is recorded, is, therefore, no longer either per se fraudulent, or a badge of fraud in law. It may be a circumstance, with others, to prove fraud in fact." After a citation of authorities, the opinion proceeds:

"We admit that, if the instrument is fraudulent in fact, it is invalid; but this was not pretended. A mortgage may be fraudulent in fact because there is no real debt, or, if one, because it is knowingly and purposely overstated, to deceive and keep off other creditors. When these facts are proved, fraud is an inference of law, and the jury is, under the direction of the court, bound to find it. Or, though there be a real debt, yet, if it can be shown that the controlling motive and object in making and taking the mortgage was not to secure the debt, but to hold the instrument as a shield to protect the debtor from his other creditors, this would make the mortgage fraudulent. court should so instruct, and the jury should so find. These are merely instances of actual fraud, and other cases may be easily imagined. Any instrument is fraudulent which is a mere trick or sham contrivance, or which originates in bad motives or intentions, that is made and received for the purpose of warding off other creditors. * * * But, if the debt be real, and the creditor, in good faith, desires security, what objection is there, in reason, to just such a transaction as that which is disclosed in the mort-gage now before us? * * * Why, we ask, should he not be permitted to stipulate for time, and for the right to dispose of his goods, and apply the proceeds to the payment of his debts?

"No reason can be given, unless the arrangement be such, from its intrinsic nature or inevitable tendency, as unnecessarily and injuriously to affect or impair the rights of other creditors. 'A creditor ought not,' says Gibson, J., in Clow v. Woods, 5 Serg. & R. 275-280, 'to be suffered to secure himself by means which will ultimately work an injury to third persons.' This is right. Nor ought a debtor in failing circumstances be permitted, by deed, mortgage, or assignment, so to dispose of his property as to reserve a portion for himself, or to postpone his creditors. * * * The most that could be claimed by the defendants would be that the special provision enabling the mortgagor to sell the goods would be evidence of fraud in fact, the value and strength of which would depend upon the other circumstances of the case. If the value of the goods largely exceeded the amount of the debt, permission to sell for a limited time, in the usual retail way, especially if the stipulated proceeds were strictly applied towards the reduction of the debt, would of itself be no very satisfactory evidence that the mortgage was fraudulent; that is, that it was taken to delay and keep off other creditors, and for the benefit of the mortgagor. But if the debt exceeded the value of the goods, if the sales were made and the proceeds not applied, and the property was depreciating, or being gradually dissipated, or appropriated to the mortgagor's use, this would be quite satisfactory evidence, certainly, unless rebutted and explained, that the mortgage was intended, not as a security to the mortgagee, but as a shield to the mortgagor, and therefore fraudulent."

In this case of *Hughes* v. *Cory* the mortgage provided that the mortgagor might sell the goods in the usual way of trade; being bound, however, to make additions thereto, so that the amount of the stock should not be substantially diminished, and being further bound to apply 33½ per cent. of the sales to the payment of the mortgage debt. Of course,

if the provisions of the mortgage were carried out, the result would be that the mortgage debt would be paid, and the mortgagor would have then on hand a stock equal in value to that possessed by him when the mortgage was given. The trial court held the mortgage to be fraudulent upon its face, and excluded it from the evidence submitted. The supreme court reversed this ruling, and laid down the principle to be applied in such cases as follows:

"What the court decides in the present cause is that the mortgage was not conclusively fraudulent on its face, or fraudulent per se, as a matter of law; and that whether fraudulent in fact or not should have been decided upon all the evidence, including, of course, the terms of the instrument itself."

In Clark v. Hyman, 55 Iowa, 14, S. C. 7 N. W. Rep. 386, the court reaffirmed the rule announced in Hughes v. Cory, that the reservation of the right to sell the mortgaged goods in the usual course of trade did not, as a matter of law, render the mortgage fraudulent, even though the mortgage did not require the mortgager to account for and pay to the mortgage any part of the proceeds of the goods, and that the mortgage was valid, unless it was fraudulent in fact, and that a careful examination of the whole evidence failed to show that the mortgage took the mortgage for the purpose of delaying or defrauding creditors.

In Sperry v. Etheridge, 63 Iowa, 543, S. C. 19 N. W. Rep. 657, it is stated that—

"There was evidence tending to prove that, when the mortgages were given, there was a parol agreement between plaintiffs and Hamilton to the effect that Hamilton should remain in possession of the property, and should continue to carry on the business of the store, selling the goods in the usual course of trade, and applying the proceeds to the payment of his debts, and to the purchase of other goods to replenish his stock, and to the payment of the running expenses of the store, and for the support of himself and family. The evidence also tends to prove that Hamilton was insolvent at the time the mortgages were given. * * * The ruling of the circuit court was, in effect—First, that the facts which the evidence tended to prove, if proved, would not render the mortgages fraudulent in law; and, second, that said facts would not have any tendency to prove that the mortgages were given and received with any actual intent to defraud the other creditors of Hamilton."

As to the first point, the supreme court held that the doctrine of *Hughes* v. Cory sustained the circuit court in holding that the mortgages would not be declared fraudulent as a matter of law; but upon the second point the supreme court ruled—

"That the circuit court erred in refusing to submit to the jury the question whether the mortgages were fraudulent in fact. It cannot be said that there was no evidence tending to prove that they were executed with intent to defraud or delay the other creditors of Hamilton. It is said in Torbert v. Hayden, 11 Iowa, 435: 'Whether a chattel mortgage, when the mortgagor holds possession, and deals with the mortgaged property as his own, is fraudulent or not, is a question of fact for the jury, and not one of law for the court.' And in Hughes v. Cory it is said that, while the mere retention by the mortgagor of the property, where the instrument is recorded, is no longer either per se fraudulent or a badge of fraud, it may be a circumstance, with others, to prove fraud in fact. The evidence given on the trial tended to establish a number of circumstances, in addition to the fact that the mortgagor retained

possession; such as the insolvency of the mortgagor, and the parol agreement that he might sell the property, and appropriate a portion of the proceeds to his individual use, which the defendant had the right to have considered in determining the question whether the mortgage was given with an actual fraudulent intent."

In Jaffray v. Greenbaum, 64 Iowa, 492, S. C. 20 N. W. Rep. 775, on behalf of the attaching creditors, it was contended that the court should declare the mortgage fraudulent in law, because it was provided in the mortgage that the mortgagors should retain possession of the goods, with the right to carry on business for one year; being bound, however, to pay the expenses of carrying on the business, and to keep up the value of the mortgaged property by making additions thereto. It was held that, under Hughes v. Cory, the mortgage could not be declared fraudulent as a matter of law; it being stated, however, that "a mortgage upon a stock of goods which should provide for sales that would exhaust the stock, without any provision for an application of the proceeds on the mortgage debt, might well be declared fraudulent. Such a mortgage could hardly be deemed to have been taken as security; and, if it was not taken as security, the inference would be that it was solely for the debtor's protection by hindering other creditors."

In Meyer v. Evans, 66 Iowa, 179, S. C. 23 N. W. Rep. 386, the rule

laid down in Hughes v. Cory is again affirmed and followed.

We have thus cited the leading cases to be found in the Iowa Reports upon the question of chattel mortgages, and without exception they refer to Hughes v. Cory as the case which fully and authoritatively construes the statute of Iowa regarding chattel mortgages, and the changes worked thereby in the rule of the common law. Upon that case, then, we are justified in relying, when called upon to ascertain the view taken by the supreme court of Iowa of the provisions of the Iowa statute, and

the validity of chattel mortgages thereunder.

What, then, are the general rules to be deduced from the opinion in Hughes v. Cory, as illustrated and explained by the later decisions based thereon? They are: (1) That, under the statute of Iowa, the recording of a chattel mortgage takes the place of the change of possession required by the rule of the common law. (2) That the fact that the mortgagor of chattels remains in possession of the property, with the right to use the same, or even, in the case of a stock of goods, with the right to sell the same in the usual course of trade, will not justify a court in holding the mortgage to be fraudulent as a matter of law. (3) That, in such cases, the question of invalidity on ground of fraud is a question of fact, to be determined, in each case, upon all the facts and circumstances of the particular transaction, including the provisions of the written instrument or mortgage. (4) That the mere fact that the mortgagor, by the reservations in the mortgage, contracts for and exercises the right to sell the mortgaged goods in the usual course of trade, does not necessarily show that the mortgage is fraudulent in fact. Regard must be had to the object and purpose of this right thus reserved, and the actual use made thereof. If, by reason of such sales, the mortgaged stock is being de-

preciated materially in value, and the proceeds of the sales, instead of being used in payment of the mortgage debt, are used for the special benefit and advantage of the mortgagor, such fact justifies the finding that the mortgage is intended and used as a means of warding off other creditors, and securing the enjoyment of the property to the mortgagor, in which case the mortgage would be fraudulent in fact. (5) That, where the facts proven show either that there is no real debt due from the mortgagor to the mortgagee, or that the amount is knowingly overstated for the purpose of deceiving creditors, or that, though there be a real debt of the amount stated in the mortgage, the controlling motive and object in making and taking the mortgage is not solely security for the debt, but to hold the instrument as a shield for the protection of the debtor against other creditors, or as a means of warding off other creditors, or wrongfully hindering and delaying them, for the benefit of the debtor, then, the facts being proven, fraud is an inference of law, and the court is bound to instruct the jury that, the facts being proven, fraud is the necessary legal inference; or, to quote the exact words used in Hughes v. Cory: "When the facts are proved, fraud is an inference of law, and the jury is, under the direction of the court, bound to find it."

Let us now examine the rulings made by the federal courts, and see what principles are recognized or announced therein on this subject.

The leading case decided by the supreme court is that of Robinson v. Elliott, 22 Wall. 513. The court, after considering the special provisions of the Indiana statute, and the construction thereof by the supreme court of that state, proceeds to say:

"There is, therefore, nothing in the way of the consideration of the main question involved in this controversy on its merits. If chattel mortgages were formerly, in most of the states, treated as invalid, unless actual possession was surrendered to the mortgagee, it is not so now, for modern legislation has, as a general thing, (the cases to the contrary being exceptional,) conceded the right to the mortgagor to retain possession, if the transaction is on good consideration and bona fide. This concession is in obedience to the wants of trade, which deem it beneficial to the community that the owners of the personal property should be able to make bona fide mortgages of it, to secure creditors, without any actual change of possession. But the creditor must take care, in making his contract, that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, a court of equity will not lend its aid to enforce the contract. These principles are not disputed, but the courts of the country are not agreed in their application to mortgages with somewhat analogous provisions to the one under consideration. The cases cannot be reconciled by any process of reasoning, or any principle of law.

"As the question has never before been presented to this court, we are at liberty to adopt that rule on the subject which seems to us the safest and wisest. It is not difficult to see that the mere retention and use of personal property until default is altogether a different thing from the retention of possession, accompanied with the power to dispose of it for the benefit of the mortgager alone. The former is permitted by the laws of Indiana, is con-

sistent with the idea of security, and may be for the accommodation of the mortgagee; but the latter is inconsistent with the nature and character of a mortgage, is no protection to the mortgagee, and of itself furnishes a pretty effectual shield to a dishonest debtor. We are not prepared to say that a mortgage, under the Indiana statute, would not be sustained which allows a stock of goods to be retained by the mortgagor, and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and unpreferred creditors. But there are features engrafted on this mortgage which are not only to the prejudice of creditors, but which show that other considerations than the security of the mortgagees, or their accommodation, entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the bona fide security of the debts then existing, and their payment at maturity, it is based on the idea that they may be indefinitely prolonged."

The court then proceeds to discuss the facts, and, viewing the instrument in the light thrown thereon by the acts of the parties, the conclusion is reached that, "whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time." And, as the court found that the mortgage on its face showed that this was the object and intent of the parties, the law would impute to it a fraudulent purpose, and therefore declare it void; which conclusion, in effect, is the same as that announced in Hughes v. Cory, to-wit, that, "when these facts are proven, fraud is an inference of law, and the jury is, under the direction of the court, bound to find it."

Turning now to the decisions made in this circuit, we find that in *Cragin* v. *Carmichael*, 2 Dill. 519, it was ruled that in the state of Iowa, under the construction of the statute of the state as made by the state supreme court, "an unrecorded mortgage of chattels, where the mortgagor retains possession, is valid against attaching creditors with notice of its

existence at any time before levy."

In Crooks v. Stuart, 2 McCrary, 15, S. C. 7 Fed. Rep. 800, it appeared that the mortgages were not recorded for about a year after their execution, and that the mortgagors, with the consent of the mortgages, continued in possession of the stock of goods, selling the same in the usual course of trade, and using the proceeds for their own purposes. The circuit judge held that, under the construction of the statute by the state supreme court, the fact that the mortgages were not recorded would not defeat the same, in favor of creditors who had notice of the existence of the mortgages at any time before they obtained a lien thereon by levy or otherwise, and that this construction of the statute was binding upon the federal court, but that the question whether the mortgages should be held void independently of the statute, upon the ground that the mort-

gagor had, with the assent of the mortgagee, remained in possession for over a year, selling the property as his own, and using the proceeds for his own purposes, was a question of general jurisprudence, not depending upon the state law, and to which the decision of the supreme court in Robinson v. Elliott was applicable; and that, under the doctrine of that

case, it must be held that the mortgage was void.

In Argall v. Seymour, 4 McCrary, 55, it appeared that the mortgage did not by its terms permit the mortgagor to remain in possession and sell the goods, but the evidence showed that the mortgagor did, with the assent of the mortgagee, remain in possession for about 60 days, and dealt with the property as his own; but there was no other evidence of actual or intentional fraud, or of an intent to cover up the property, and protect it from other creditors, and the court held that there was not evidence enough to show fraud in the mortgage, and therefore it was held valid as against all creditors except such as might have been misled into dealing with the mortgagor during the time the mortgage had been withheld from the record, leaving the property in possession of the mortgagee. The opinion in the case clearly recognizes the doctrine of Robinson v. Elliott to be that if the facts of the case, whether these are shown by the recitals in the mortgage or by proof of the acts of the parties, or by both, show that the mortgage, instead of being intended as a bona fide security for the debt, is used as a means of hindering and delaying other creditors, then it is fraudulent in fact, and that the law will so declare it. This case also enunciates and enforces the doctrine that if the mortgagee withholds the mortgage from the record, permits the mortgagor to remain in possession and deal with the property as his own, and thus enables the mortgagor to buy goods on credit upon the faith of being the owner of an unincumbered stock of goods, the rights of the innocent vendor may be superior to those of the mortgagee.

In Simon v. Openheimer, 20 Fed. Rep. 553, it appeared that the mortgage was withheld from record for some eight months, the mortgagors remaining in possession, selling the goods as their own, and using the proceeds for their own benefit, and buying on credit goods to a large amount; the parties selling the same having no knowledge of the existence of the unrecorded mortgage, which goods were placed in the stock covered by the mortgage, and were subsequently taken possession of by

the mortgagee; and, in view of these facts, it was held-

"That the mortgagee is estopped from asserting that he has, under his mortgage, a valid lien superior and prior to the rights of the creditors. Knowing that the mortgagor was dealing with the stock as his own, and that third parties would be justified in believing that the stock belonged to Openheimer free from any lien, the mortgagee stands by, and permits him to hold himself out to the world as the owner of the stock free from liens, and to buy on credit a very large quantity of goods, which were added to the stock, and thereby made subject to the lien of the mortgage, as between the mortgagor and mortgagee. Having chosen to keep the knowledge of the existence of his mortgages from the public, when he should, in good conscience, have given publicity thereto, and having thereby misled the creditors into making large sales of goods on credit to the mortgagor, he should not now, when it

is to his advantage, and to their injury, be allowed to assert that he holds a valid prior lien upon the stock of the common debtor, the larger part of which consists of the very goods sold by the creditors in ignorance of the existence of the mortgage."

In Rumsey v. Town, 20 Fed. Rep. 558, the same rule is recognized.

The case of Wells v. Langbein, Id. 183, is cited as an authority for the doctrine that the mere fact that the mortgage upon its face provided that the mortgagor should remain in possession, with the right to sell in the usual course of trade, renders the mortgage absolutely void, without reference to the question of the manner and purpose of the sale. Taking certain sentences, found in the opinion, by themselves, as intended to lay down an abstract proposition, and this construction would find support; but that is not the true construction of the opinion. The main question discussed in that case was as to the effect to be given to the fact that the mortgagee had taken possession of the goods before a levy was made thereon. Upon the other proposition, the statement is that the mortgagees came within the rule announced in Robinson v. Elliott and Crooks v. Stuart, and it was not intended to extend in any manner the rule as recognized and announced in these cases.

The view actually entertained is more fully set forth in the subsequent case of Maish v. Bird, 22 Fed. Rep. 576, in which it was strongly contended by counsel, upon petition for rehearing, that the mortgage, by its terms, showed that it was the intent of the parties that the mortgagor should remain in possession, and sell the goods in the usual way of trade, and that, therefore, it must be declared void as a matter of law; but it was held that "it is clear, therefore, that the mere fact that the mortgagor remains in possession, and sells the goods at retail, does not ipso facto determine the question of the validity or invalidity of the mort-The query is, does he sell them for his own benefit, or for the benefit of the mortgagee? Now, this question may be answered from the stipulation expressly stated in the mortgage, or from information derived from the acts of the parties. If from either or both sources it appears that the sales are made by the mortgagor, with the consent of the mortgagee, for the benefit of the former, then the case is brought within the rule announced in Robinson v. Elliott." The mortgage was sustained on the ground that the evidence failed to show that it was used or intended as a cover and protection to the mortgagor.

These cases are all that are reported in the Iowa districts, and fairly represent the views held by the federal courts in Iowa upon the questions therein involved. It will be noticed that these cases present two

different questions:

First. The rule to be followed where the mortgagee has intentionally withheld the mortgage from record, permitting the mortgagor to remain in possession, and to deal with the stock covered by the mortgage as his own, and thereby aiding the mortgagor to buy goods on credit, which otherwise he could not have done, which goods, when so bought on credit, and added to the stock, pass, by the terms of the mortgage, to the mortgagee. The cases cited hold that the fact that the mortgage was not recorded is a matter open to explanation; but, if it appears that the mortgagee intentionally withheld the instrument from record, keeping the existence thereof secret, and permitted the mortgagor to remain in possession of and deal with the stock of goods as his own, and to buy additions to the stock on credit, thereby aiding the mortgagor in making purchases of goods on a false credit, the goods, when thus purchased, being added to the stock covered by the mortgage, the mortgage will be estopped, as against parties thus misled, from asserting the existence of a lien under his mortgage.

In the leading case of *Pickard* v. *Sears*, 6 Adol. & E. 469, it was stated that "the rule of law is clear that where one, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time;" or, as stated in the subsequent case of *Gregg* v. *Wells*, 10 Adol. & E. 90: "A party who negligently or culpably stands by, and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute

deceiving."

In Morgan v. Railroad Co., 96 U. S. 716, in discussing the effect of an estoppel in pais, it is said:

that fact in an action against the person whom he has himself assisted in

"The principle is an important one in the administration of the law. It not unfrequently gives triumph to right and justice when nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. He is not permitted to deny a state of things which, by his culpable silence or misrepresentations, he had led another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side, and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage."

In the cases in which an estoppel has been applied to defeat the mortgage lien, it appears that there was error on part of the creditors, who were induced to sell their goods on credit to one whom they supposed was in fact the owner of an unincumbered stock of goods, and whom they were justified in believing was in truth the full owner of the goods, with the undoubted right to sell the same and apply the proceeds to the payment of the debts created in replenishing the stock, whereas, in fact, if the mortgage be held valid, he was not such owner, and the goods, so soon as added to the stock, became bound for the mortgage debt, and this error arose from the fault of the mortgagee, in that, while he permitted the mortgagor to remain in possession and deal with the stock as his own, he also intentionally withheld the mortgage from record, thereby enabling and aiding the mortgagor, by means of a false credit, to buy goods on credit, and thus subject to the lien of his mortgage property procured from the owner by means of a misrepresentation to which he has given aid and countenance by withholding the mort-

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gage from record. No decision upon this exact question by the supreme court of Iowa has been called to my attention, but that court has always fully recognized and enforced the doctrine of estoppel in cases demanding its application, and will doubtless do so, in cases involving chattel mortgages, when the facts are such as to require and justify the application of the principle.

The second question presented and decided in the cases arising in the federal courts is the rule to be applied when it appears that the mortgagor has, with the assent of the mortgagee, been left in possession of the stock covered by the mortgage, with the right to sell the goods, and use the proceeds for his own benefit, and not for the purpose of paying the mortgage debt. The doctrine of the cases is that where it appears from the provisions and stipulations of the mortgage, or from the acts of the parties, or from both sources, that it was the intent of the parties that the mortgagor should remain in possession of the stock of goods, and sell the same in the usual course of business, and apply the proceeds to his own uses and benefit, and not to the payment of the mortgage debt, this is evidence showing that the mortgage, instead of being intended as a bona fide security for a debt, was intended and used as a means of hindering and delaying other creditors, and as a protection to the debtor, enabling him to carry on his business, and sell the property for his own benefit under the shield of the chattel mortgage; and where, in fact, this has been the use made of the mortgage, the inference of fraud is an inference of law. It will also be borne in mind that parties are presumed to have intended that which is the necessary and natural result of their own deliberate acts; and that, in determining the intent of parties, the evidence of their acts is of more weight than their mere statements or declarations, even though under oath.

We find, then, that the decisions in the federal courts hold that, under the statute of Iowa, the mere failure to record a chattel mortgage does not, as between the mortgagor and mortgagee, render the same invalid; that it has full force, and is valid as to third parties who have actual knowledge of its existence, the same as though recorded; and that, in the absence of fraud or grounds of estoppel, it takes effect when it is finally recorded, and becomes a lien as against all parties who have not acquired rights by purchase, or liens prior to the date of record in ignorance of the existence of the mortgage; that the retaining of possession of the mortgaged property, with the right to sell the same in the usual course of trade, is permissible under the Iowa statute, provided such possession and selling are not used as a means of defrauding other creditors. inson v. Elliott, Cragin v. Carmichael, Crooks v. Stuart, supra. questions, which are mainly dependent upon the construction of the Iowa statute, the federal courts follow the rulings made by the supreme court of Iowa.

As to the rule to be applied when the mortgagee intentionally withholds the mortgage from record, and aids the mortgagor in purchasing goods on credit from parties who do not know of the existence of the secret lien, the doctrine of estoppel is applied, in order to prevent the perpetration of a fraud upon innocent parties. This is the application of a familiar principle, not dependent upon the Iowa statute.

On the question of invalidity as against creditors, the rulings made in the federal courts find ample support in the doctrines announced in Hughes v. Cory. That case expressly holds that, granting the right to execute a mortgage upon a stock of goods, with a stipulation that the mortgagor may, for a time, remain in possession and sell the goods, applying the proceeds to the payment of his debts, still "a creditor ought not to be suffered to secure himself by means which will ultimately work an injury to third persons; nor ought a debtor in failing or insolvent circumstances be permitted by deed, mortgage, or assignment so to dispose of his property as to reserve a portion for himself, or to postpone his creditors;" and, further, that in case permission to sell for a limited time is given, "especially if the stipulated proceeds were strictly applied towards the reduction of the debt, this would of itself be no very satisfactory evidence that the mortgage was fraudulent; that is, that it was taken to delay and keep off other creditors, and for the benefit of the mortgagor. But if the debt exceeded the value of the goods; if the sales were made, and the proceeds not applied, and the property was depreciating or being gradually dissipated or appropriated to the mortgagor's use, -this would be quite satisfactory evidence, certainly, unless rebutted and explained, that the mortgage was intended, not as a security to the mortgagee, but as a shield to the mortgagor, and therefore fraudu-

What is required in the administration of the law in cases of the character under consideration is, on the one hand, to recognize and enforce the right of a creditor to obtain, and the debtor to give, security for the payment of an honest debt, even though the form of the security may be such as to prevent other creditors from levying upon the property of the common debtor until the secured creditor is paid in full, and, on the other hand, to prevent such a use being made of a security given as that it operates as a shield and protection to the debtor, enabling him to use and consume for his own benefit the property covered by the mortgage, and yet leaves the debt supposed to be secured thereby unpaid; for, if this is allowable, it clearly follows that the security, instead of being in fact a security for the benefit of the creditor, turns out to be a security to the debtor against the claims of other creditors, who are consequently unjustly hindered and delayed in obtaining satisfaction of the debts honestly due them.

Where a creditor takes security by way of mortgage upon a stock of goods, leaving the mortgagor in possession with the right to sell in the usual course of trade, the circumstances require of him that he shall not permit his security to be used as a cover and shield to the debtor, to the injury of other creditors. The execution of the mortgage upon the stock of goods practically prevents the other creditors from levying upon the stock until the debt is paid; and, as the mortgagee knows this fact, he should do that which equity and good conscience require under the circumstances. To illustrate the situation. Suppose a mortgage, to se-

cure a bona fide debt of \$5,000 due in five years, is executed upon the stock in trade of a merchant, and duly recorded; he being left in possession, with the right to sell in the usual course of trade. Third parties obtain judgments against the mortgagor, and can find no property to levy on, save the stock in trade covered by the mortgage. As the mortgagee is not in possession of the goods, a lien cannot be established on the goods by a garnishment of the mortgagee, nor can a personal claim against him be created thereby. Curtis v. Raymond, 29 Iowa, 52; First Nat. Bank v. Perry, Id. 266. The interest of the mortgagor in the goods is not such that the same can be levied upon under the execution. Campbell v. Leonard, 11 Iowa, 489; Gordon v. Hardin, 33 Iowa, 550. Under the usual form of chattel mortgages in Iowa, if the execution is levied upon the goods, the mortgagee can at once retake the goods; and, when this right is asserted, there is no interest left in the mortgagor which can be made subject to the execution. Wells v. Chapman, 59 Iowa, 658; S. C. 13 N. W. Rep. 841.

In Hughes v. Cory it is suggested that, if the mortgagee has the right to possession, the creditors might garnish, and then, under section 3216 of the Revision, have a receiver appointed. The later decisions, just cited, show, however, that no interest in or lien upon the goods can be created by a garnishment, and hence no foundation can be laid for asking the appointment of a receiver. Furthermore, section 3216 of the Revision, now section 2970 of the Code, is confined to cases of attachment, and cannot be made available in aid of an execution.

Again, in Hughes v. Cory, it is said that, if the creditor admits "the validity of the mortgage, he can levy on the goods,—certainly after a tender." It has been since decided that the mortgagor has no interest left in the mortgaged goods which can be levied upon. How, then, can the execution creditors become clothed with the right to make a tender? Ordinarily, the debtor cannot compel the creditor to accept payment of the debt until the same becomes due. If the creditors have no lien upon the goods, and cannot create any until after a tender, upon what is the right to make the tender and compel its acceptance based? But even if the right to make a tender exists, and by making the same the right to levy upon the stock covered by the mortgage is thereby conferred, still, in many cases, it would be but a barren right. The judgments held by the unsecured creditors may be for amounts due to laborers, or persons of limited means, who would be wholly unable to raise the sum of money needed to make the requisite tender. Indeed, in the great majority of cases, the necessity of tendering, and, if accepted, paying, the amount due upon the mortgage, would practically preclude the creditors from making a levy upon their executions, even if the right so to do was beyond question.

Therefore, in the supposed case of a valid mortgage for \$5,000, payable in five years, upon a stock of goods left in possession of the mortgagor, with the right to sell in the usual course of trade, in what way could execution creditors reach the debtor's property included in the mortgage? In fact, does any legal method exist? Are not the credit-

ors, in the supposed case, under the decisions of the supreme court of Iowa, compelled practically to wait until the goods are released from the protecting lien and shield of the mortgage, by the payment of the debt secured thereby? If there exists any shorter path, it has not yet been made plain, and he who makes the venture must do so knowing that many dangers and pitfalls surround the way, even if no absolutely insurmountable barriers are encountered.

I am not arguing that the doctrines found in the several decisions of the supreme court of Iowa construing the rights of creditors under the statute of Iowa are not correct expositions of the law. Just the contrary. It is because, under the statute of Iowa as expounded by the supreme court of the state, creditors are placed at such a disadvantage when a mortgage is executed upon a stock of merchandise, leaving the mortgagor in possession, that it becomes the duty of the mortgagee not to increase this disadvantage by laches on his part. It seems too often to be assumed by counsel and clients that if, in fact, there is an honest debt due, and a mortgage to secure its payment at a future day can be procured upon the stock in trade of the debtor, that the only duty incumbent upon the mortgagee is to see to it that the stock is not reduced below the amount needed to ultimately pay the mortgage debt, and that, therefore, the mortgagor may permit the debtor to remain in possession, selling the goods in the usual course of trade, and using the proceeds to carry on the business and pay the family expenses of the debtor, or for any other purpose the mortgagee may see fit; and that, as the motive of the creditor was simply to get his debt secured, and, that being accomplished, he is willing that the debtor may continue his business for an unlimited time in his own way, and without accountability for the proceeds realized from the mortgaged property, it cannot be said that the intent of the parties was to unjustly hinder and delay the other creditors.

This view of the question wholly ignores the rights of the other creditors, and the duty the mortgagee owes to them. In taking the mortgage upon the stock in trade of the common debtor, and leaving him in possession with the right to sell, the mortgagee knows that the legal effect of his act is to place the stock under the protection of the mortgage, and thereby, so long as the mortgage remains in force, practically to shield the property from being seized in satisfaction of the debts due the unsecured creditors. He knows that, equitably if not legally, the surplus of the stock over and above so much as may be needed to satisfy his claim belongs to the creditors; that is to say, is justly liable for the debts due them. He has no right to waste or destroy this surplus, nor is he justified in aiding the debtor in so doing, nor is he justified in permitting the debtor, under the shield of his mortgage, to consume the surplus for his (the debtor's) use and benefit. If he does do so, then he is aiding the debtor in using the mortgage as a means of keeping the other creditors at bay, while the property is being appropriated, not to the payment of the mortgage debt, but to the uses of the debtor. In order to prevent just such a result, it is the duty of the mortgagee, in order that the other creditors may not be unjustly debarred from subjecting the property of the debtor to the payment of their claims, to see to it that the proceeds of the stock are fairly applied to the payment of the debt secured by the mortgage, and are not consumed by the debtor for his own benefit, and thus placed forever beyond the reach of the other creditors, whose claims

and equities are as meritorious as his own.

All that is required of a mortgagee, under the doctrines laid down in the decisions of the federal courts, is that, for the protection of third parties from whom the mortgager may otherwise buy goods on credit, they being ignorant of the existence of the mortgage lien, the mortgagee must place his mortgage on record promptly, which is nothing more than is required of him by the statute of Iowa; and he must not permit the mortgagor, under cover of the mortgage, to sell the property, and, instead of applying the proceeds to the payment of the debt secured by the mortgage, use the same for his own benefit. Certainly, these requirements are not burdensome upon the mortgagee, and experience shows that, unless they are enforced, chattel mortgages become in fact an easy means of hindering and delaying creditors for the benefit of the mortgagor,—a result which proves the wisdom of the rule which holds that it is the duty of the mortgagee to observe the requirements above named.

Properly construed and applied, the principles announced in Hughes v. Cory sustain every ruling found in the cases subsequently decided by the federal courts, and, instead of there being a want of substantial harmony between the principles enforced by the federal courts and by the supreme court of Iowa upon these questions, it seems to me that, practically, they are in accord. It is this belief, and the hope that a comparison of the decisions would show such substantial agreement, and tend to make clear the rules to be applied in cases of this character, that has led me into preparing so lengthy an opinion in the present cause. Whether I have succeeded, in any degree, in accomplishing the object aimed at, may be doubtful; but I only hope that I have not made "confusion worse confounded."

Coming at last to the facts of this particular case, what do we find? The mortgage was executed August 30, 1884, to secure three notes maturing September 29, October 29, and November 28, 1884. None of these notes were paid at maturity, yet the mortgage was not recorded until in March, 1885. Why? The mortgagor testifies that it was understood and agreed that it should not be recorded, as it would injure his credit. The officers of the bank deny that there was any agreement not to record the mortgage, but give no explanation why it was withheld from record, except that they relied on the mortgagor's promise to pay. When the notes matured, they were not paid, and the bank officers testify that they repeatedly urged and demanded payment of the notes, but unsuccessfully. Under such circumstances, it is not possible that the bank was actuated by any purpose in withholding the mortgage from the record other than that of aiding Porterfield to maintain a false credit, and by means thereof to purchase goods on credit, which, being added to the mortgaged stock, became subject to the lien of the mortgage held by the bank. As against complainants, therefore, who were misled into

selling nearly \$4,000 worth of goods on credit, and which now form a large part of the stock upon which the bank claims a prior lien under its mortgage, it must be held that the bank is estopped from asserting any

rights under its mortgage.

Furthermore, it appears from the evidence that, after the last note secured by the mortgage came due, to-wit, November 28, 1884, the mortgagee permitted the mortgagor to remain in possession until March 20, 1885, and to sell the goods, using the proceeds for his own purposes. It appears that the bank held a mortgage upon the homestead of Porterfield to secure a debt of \$5,000. From the money realized from the sale of the mortgaged goods, the bank received and applied \$2,000 in part payment of the real-estate mortgage; thereby relieving the homestead, which is exempt from execution, from so much of the debt resting This was the exact equivalent of handing the money to Mr. Porterfield to be hidden away by him beyond the reach of legal process. The officers of the bank testify that they felt a sympathy for Mrs. Porterfield, and that Porterfield would not agree to apply the money on the chattel mortgage debt, and that they yielded, and made the application upon the homestead mortgage. This is no excuse. The money was in the bank, and the bank had the undoubted legal right to charge up against it the overdue notes. Again, the money, as the proceeds of the mortgaged stock, was legally applicable to payment of the debt secured on the stock.

The bank, having full legal, as well as actual, control over the money, instead of applying the same to the payment of the mortgage debt, permitted Porterfield to apply it in payment of the debt secured on the homestead; thereby effectually withdrawing the sum thus paid from reach of the other creditors. Not only this, but the moneys realized from the sale of the stock during the seven months Porterfield remained in possession, and which were not deposited in bank, were not used in reducing the debt due the bank, but were otherwise used by Porterfield.

The bank officials and their counsel are unquestionably honest in the belief they express, that no just exception in any particular can be taken to the action of the bank in the premises; and it is for this reason that I have said that a mischievous misconception seems to be entertained by many in regard to the rights and duties of mortgagees towards other creditors. In effect, it is claimed on behalf of the bank that it had a perfect right to leave the mortgagor in full possession of the stock of goods. and yet withhold the mortgage from the record, not only until the debt secured thereby came due, but for months afterwards, and by so doing to aid the mortgagee in keeping up a false credit, and to buy on credit large quantities of goods from parties who had no knowledge of the existence of the mortgage, which goods, when bought, were added to the stock, and thus rendered liable to the secret lien of the mortgage; and, further, that the bank was entirely justifiable, not only in permitting the mortgagor to sell the goods up to the date of the maturity of the mortgage, but for months thereafter, using the proceeds, not in payment of the mortgage debt, but for other purposes beneficial to the mortgagor, but also in permitting the mortgagor to use \$2,000 of the money in hands of the bank, in payment of a lien upon his homestead; thus practically withdrawing this sum from the reach of other creditors, the payment being made when the bank knew that Porterfield was hopelessly insolvent.

The most liberal construction of the doctrines announced in *Hughes* v. *Cory* would not suffice to sustain the validity of this mortgage under the undisputed facts of the case, and it must therefore be declared void as against complainants.

As the case involves other issues, and the rights of other parties, which are not yet ready for a hearing, the decision now made is confined simply to the question arising between complainants and the savings bank; and is to the effect that, as against complainants, the chattel mortgage held by the bank is invalid and void.

COBURN and others v. CEDAR VALLEY LAND & CATTLE Co., Limited.

CEDAR VALLEY LAND & CATTLE Co., Limited, v. Coburn and others.

(Circuit Court, W. D. Missouri, W. D. July, 1886.)

1. SETTLEMENT—PENDING LITIGATION—PRESUMPTION AS TO COMPLETENESS AND FINALITY.

Wherever parties are in litigation, having antagonistic claims, and a settlement is proposed and accepted, it will be presumed that all matters in controversy in that litigation were included within the settlement, unless the contrary clearly appears.

2. SAME—EVIDENCE REVIEWED—COSTS.

The evidence in this case reviewed at length, and held, that there has been a full settlement of all the matters in controversy, and that the several bills and cross-bills must be dismissed, each party paying his own costs.

In Equity. Bill and cross-bill.

For a statement of the facts in this case, see 25 Fed. Rep. 791.

Coburn & Ewing applied for a rehearing, see post, 586.

Karnes & Ess and J. G. Waters, for Coburn & Ewing.

George W. McCrary and Adams & Field, for the Company.

Brewer, J. There have been two actions pending between these parties in each of which both bill and cross-bill were filed. While thus pending, negotiations for settlement were entered into, which have resulted in a settlement, and the question now presented is the extent of that settlement. After several propositions had been made by both parties, on the twenty-seventh of February, the cattle company sent to Coburn & Ewing a letter in which all propositions of theirs were declined, and in which it was stated that "the only terms upon which the board can agree to compromise the claim of the com-

pany are as follows:" This proposition was unconditionally accepted, and its terms have been complied with by Coburn & Ewing. Now they insist that all that was settled was the claim of the company as presented in its pleadings, while their claims remain open and undisposed of. The company, on the other hand, insists that all the matters in controversy, including all the claims of both parties presented in these two actions, were included in the settlement and are disposed of by the same. I think the company is right, and for these reasons:

1. Wherever parties are in litigation, having antagonistic claims, and a settlement is proposed and accepted, it will be presumed that all matters in controversy in that litigation are included within the

settlement, unless the contrary clearly appears.

2. It is perfectly obvious that the cattle company intended by its proposition to cover all the claims in controversy. It is true, in the letter it says "the claim of the company;" and in a narrow and technical sense that undoubtedly means simply its cause of action, and would not embrace any distinct cause of action in behalf of the adverse party. But it is not a strained or unnatural use of language to construe it as applicable to the amount which the company claimed as the balance due after the adjustment and settlement of the respective claims of both parties. That such was the intent of the company is obvious from a preceding paragraph of that letter in which the company uses this language:

"The board have under their very careful consideration Messrs. Karnes & Ess' letter, dated the twenty-sixth of January, 1886, containing two alternative offers by Messrs. Coburn & Ewing for the settlement of the claims made by the Cedar Valley Land & Cattle Company upon them."

In this is seen it speaks of offers made for settlement of the claims of the company, claims made by the company upon Coburn & Ewing. Turning to the letter referred to, we find that it was in terms a proposition for settlement of the entire controversy, and including the claims of both parties. Thus, in its letter proposing this settlement, the company placed an unmistakable interpretation upon the expression "claim of the company."

Further, immediately upon receipt of the letter accepting this proposition, counsel for the company wrote a letter, which was received by Coburn & Ewing, in which he stated, "of course it is understood that the settlement embraces all the matters involved in the pending litigation in the several suits between the parties." So not only is the intent of the company clear, but it is also clear that Coburn & Ewing had full notice of that intent. Now, a contract (and this settlement is nothing but a contract) implies the agreement of two minds as to certain matters. What the company intends is clear, and that Coburn & Ewing had knowledge of that intent is equally clear. Of course, if they proceeded with the settlement with notice of what the

company meant by the terms used, they accepted the contract upon that basis.

Further, on the twenty-ninth of April, after the acceptance of this proposition of settlement, a bond was presented to Mr. Coburn which contained this language: "In accordance with our letter of date February 27, 1886, accepting terms of compromise between us." Not satisfied with this language, Mr. Coburn, in his own hand-writing, interlined these words after the word "compromise," "of all pending litigation," which clearly shows that he understood that the settlement covered all the claims in controversy.

Finally and chiefly, these actions were pending in a court of equity, and such a court will see that good faith and fair dealing are observed by both parties. After this proposition had been made and accepted, and before anything had been done except handing to counsel some certificates of stock, Coburn & Ewing were clearly notified of what the company intended by this proposition. Much remained to be done; cattle were to be valued, counted, and delivered; it was an easy thing to hand back the certificates of stock. If they were unwilling to accept the settlement when informed what the company understood and intended by the proposition, it was their duty to say: "We have misunderstood the scope of your proposition. If you mean all that you now say, we did not accept it; we have never come to any agreement." Instead of that, after full notice they go on and comply with all the terms of the proposition. It is too late for them now to say: "We did not suppose that the proposition meant all that the company now claims; we thought it meant only a settlement of half the case, and insist upon the right to prosecute the other half."

I think the parties are entitled to a decree, reciting that upon the evidence presented the court finds that there has been a full settlement of all the matters in controversy, and ordering that the several bills and cross-bills be dismissed, each party paying its own costs.

CEDAR VALLEY LAND & CATTLE Co. v. COBURN and others.

(Circuit Court, W. D. Missouri, W. D. November, 1886.)

EQUITY—SUPPLEMENTAL BILL—WHEN NECESSARY.
 Matters transpiring after the filing of the original bill or cross-bill in equity,
 changing or affecting the issues, should be presented by supplemental bill.

2. Same—Compromise—Matters of Form—Estoppel.

But where it appears that after the issues were joined the parties entered into an agreement of compromise, and a dispute having arisen as to the true meaning and intent of that agreement, the parties appeared before the court, presented a petition for a decree, and submitted all the facts as fully and clearly as this might have been done under a supplemental bill, no objection

on account of form being suggested, and where the court, upon such hear ing, construed the agreement of compromise, and entered decree in accordance therewith, neither party will be permitted thereafter to raise a mere question of form. The decree thus rendered cannot be attacked on the ground that there was no supplemental bill filed, nor upon the ground that the proof submitted was in the form of affidavits, and no cross-examination was had, all this having been done without objection.

In Equity. Application by defendants for rehearing. See ante, 584.

George W. McCrary and Adams & Field, for the Company. Karnes & Ess and J. G. Waters, for Coburn & Ewing.

Brewer, J. Coburn & Ewing petition for a rehearing. They object that the decree as entered shows a final settlement of all matters in controversy, and dismisses the bills and cross-bills, when in fact there was no final settlement, and when under the pleadings no such question was in issue or could be determined. The facts are these: After bills and cross-bills had been filed, some compromise was effected. Of that there is no dispute. The Cedar Valley Company filed a petition alleging that all claims in dispute had been settled, and asking a decree accordingly. A hearing was had; affidavits and other testimony presented without objection. Both parties appeared and argued the question. No objection was made to the form of the proceeding; the only objections being that in fact the settlement was only partial instead of total, and that the court had no right to inquire into the matter, but could only dismiss the bills and cross-bills. Now it is insisted that if anything had transpired since the filing of the original bills and cross-bills, changing and affecting the issues. such new matter should have been presented by supplemental bill. I think counsel are right and that such is the true practice. But that is a mere matter of form. All the facts were presented as fully and as clearly as though stated in a supplemental bill. No objection on account of form was suggested. Will a party be permitted to test the judgment of the court on the substance of the controversy, and upon defeat then for the first time raise a mere question of form? Nothing can be plainer. When cases of an equitable nature are removed from a state court seldom is the plaintiff's pleading in the full and precise form of a bill in equity. If parties insist, repleading is But if not, and all the facts are stated, will the court, after decree, set it aside, simply because the pleading does not contain all the formalities of a bill? Such a proceeding would give a bitter irony to the appellation of the court as a court of equity. So here, it is not pretended that all the facts were not stated but only that they were not presented through the formalities of a supplemental bill. Coburn & Ewing were cut off from no right, were not prevented from making a full defense. They had every opportunity they asked.

Again, it is insisted that affidavits were used, and not depositions; that no cross-examination was had, etc. But all this was by con-

sent, or at least without objection. They offered affidavits themselves, and had all the time they sought for presenting their testimony. They never asked to take depositions, or the privilege of cross-examination, or time to produce more testimony, of which they now say they have an abundance. They made no objection as to the manner in which the testimony was presented, and I doubt not that if all the testimony had been by oral examination of witnesses in open court such irregularity, if acquiesced in at the time, would have furnished no ground for setting aside the decree based thereon. He who keeps silent when he should speak must keep silent forever thereafter.

Of the merits of the case, I shall add nothing to what I said before, when ordering the decree; and of the duty of the court to render such a decree upon the application of either party, when there has been in fact a full compromise and settlement, I have no doubt. The application for a correction of the decree and for rehearing is denied.

GREGORY v. PIKE and others.

(Circuit Court, D. Massachusetts. December 17, 1886.)

1. EQUITY—CROSS-BILL—NECESSARY TO COMPLETE DECREE.

Plaintiff, by his bill in equity, claimed to be the equitable owner of certain notes in the possession of defendant P., and asked that P. be compelled to deliver the notes to him, and that defendant S., the maker, be restrained from making payment thereon to any one but plaintiff. Defendant S., in his answer, averred that V. had an interest in the notes, and asked that V. be made a co-defendant, which was granted. V. appeared and answered, setting up his interest. He asked leave to file a cross-bill, in order that the court might make a complete decree. Held, that he should have leave to file his cross-bill, as, since the plaintiff sought to restrain defendant S. from making payment to any one but himself, that was the only way in which defendant V. can obtain full relief.

SAME—SERVICE.
 A cross-bill being auxiliary to the original bill, service may be had on the
 attorney of record, and it is no objection to it that the party is out of the ju risdiction of the court.

In Equity.

F. A. Brooks, for complainant.

F. H. Talbot, for defendant Pike.

Gray & Swift, for defendant Swift.

W. F. Wharton, for Kemp Van Ee.

Colt, J. Under the rules of equity pleading, I have no doubt of the right of Kemp Van Ee to file a cross-bill in the case. In the original bill Gregory claims to be the equitable owner of the notes in controversy, and he prays that defendant Pike may be compelled to surrender the notes, and deliver them to him, and that defendant Swift, the maker,

may be restrained from dealing with any other person than the plaintiff, as the lawful owner of the notes, and from making payment of the same, or any part thereof, except to the plaintiff. Upon this bill it was proper for the defendant Swift, the maker of the notes, in his answer, to ask that J. C. Kemp Van Ee and George W. Butterfield, who claimed an interest in these notes, should also be made parties before any decree should be entered binding him, and the court properly directed that they be made parties defendant. Kemp Van Ee thereupon appears and answers, setting out his claim to one-half of one of the notes in controversy. As he cannot obtain full relief as a co-defendant, he now asks leave to file a cross-bill, in order that a complete decree may be obtained, and to bring the whole question in controversy before the court.

It is strongly urged by the plaintiff that Kemp Van Ee has no interest in the subject-matter of the original suit, and that, therefore, he has no right to file a cross-bill. The controversy, it is said, is between Gregory and Pike for the possession of certain notes, with which controversy Kemp Van Ee has no concern. It is manifest, however, that a decree in favor of Gregory, which would transfer to him possession of these notes under claim of ownership, and which enjoins Swift, the maker, from making payment of the same, or any part thereof, except to him, would necessarily affect the interests of Kemp Van Ee. Suppose Gregory, on obtaining possession, should transfer these notes to other parties, or should collect them of Swift. If Gregory should obtain possession of these notes, it would be necessary for Kemp Van Ee to bring suit against Gregory, seeking to enjoin any transfer or disposition of the notes until his interests were passed upon. Under these circumstances, it is the clear duty of the court to permit this cross-bill to be filed to settle. as far as possible, the whole controversy, by making a complete decree. The plaintiff might possibly have framed his bill so as to have confined the controversy to himself and defendant Pike, but Kemp Van Ee having been made a party defendant, and his alleged interest appearing to the court in his answer, it would be manifestly irregular to dismiss him from the case, or to deny him the right to file a cross-bill, and so obtain full relief. A cross-bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. Ayres v. Carver, 17 How. 591; 2 Daniell, Ch. Pr. (4th Ed.) 1548; Story, Eq. Pl. § 389; 1 Hoff. Ch. Pr. 345. It may be brought (1) to enable the defendant to support his own case by a discovery from the plaintiff; or (2) where it is too late to use the same defense by way of plea or answer,—as after a replication and issue joined; or (3) to obtain relief against the plaintiff in the original cause; or (4) to settle conflicting claims between co-defendants which it is found necessary to adjust before a complete decree can be made upon the subject-matter of the original suit, and the rights of the parties therein. 1 Hoff. Ch. Pr. 345. Cross-bills may generally be considered as a defense, or as a proceeding to procure a complete determination of a matter already in litigation. Daniell, Ch. Pl. & Pr. (4th Ed.) 1549.

This cross-bill is, in effect, a defense to the original bill. It seeks, as against Gregory, the plaintiff, to establish an equitable claim to one-half of one of the notes mentioned in the bill, and it also seeks to settle the conflicting claims between co-defendants, which, of itself, is a good ground for filing such bill. Story says:

"It also frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross-bill to bring every matter in dispute completely before the court." Eq. Pl. § 392.

The case of Weaver v. Alter, 3 Woods, 152, is cited by counsel to the point that a cross-bill only designed to settle the controversy between codefendants is irregular. The doctrine of Weaver v. Alter is that, unless the settlement is necessary to a complete decree upon the case made by the original bill, a controversy between co-defendants to a bill in equity cannot form the subject-matter of a cross-bill. In that case the subject-matter brought forward in the cross-bill was entirely independent and distinct from the subject-matter of the original bill, which is not the case here. Nor do I think the cross-bill is irregular in joining Butterfield as a party defendant, or in the relief it seeks against Swift. Butterfield was ordered to be made a party defendant in the original suit, and may still appear, while the relief asked for against Swift is proper to a determination of the whole controversy. So far as the jurisdiction of the court has attached to the controversy and the parties, it is co-extensive with all the equities of the cause.

The objection that a cross-bill will not lie because the defendant Pike is not within the jurisdiction of the court is untenable, because in the United States courts, where a cross-bill, which is auxiliary to the original bill, is filed, substituted service may be had upon the attorney of record. Eckert v. Bauert, 4 Wash. C. C. 370; Ward v. Sebring, Id. 472; Lowenstein v. Glidewell. 5 Dill. 325.

PATTEN and others v. Union Pac. Ry. Co.

(Circuit Court, D. Colorado. December 11, 1886.)

1. CARRIERS—OF GOODS—LIEN FOR FREIGHT—RAILROAD COMPANIES—TRANS-PORTATION BEYOND LINES—SPECIAL INSTRUCTIONS TO FIRST CARRIER AS TO FORWARDING.

A carrier receiving goods for transmission over his own line, and consigned to a place beyond, has the apparent authority to forward the same to the place of destination by any of the ordinary routes thereto, and a second carrier, receiving the goods in the usual and ordinary course of business, without notice of any special instructions to the first carrier, and transporting them to the place of destination, is entitled to demand the ordinary and usual freight therefor.

2. Same—Notice of Special Instructions.

The fact that, when the second carrier received the goods from the first, they were loaded in an appropriately marked car of the particular railroad over which the first carrier was instructed to forward them, does not amount to implied notice to the second carrier of such instructions.

At Law. Replevin.

R. D. Thompson, for plaintiffs.

Teller & Orahood, for defendants.

Brewer, J. The facts in this case are these: Plaintiffs shipped from Kirksville, Ohio, to Denver, Colorado, a car-load of lumber. They delivered it to the Baltimore & Ohio Railroad Company, at Kirksville, for transportation by it to Chicago, with instructions to forward it by the Chicago & Alton and the Atchison, Topeka & Santa Fe They had made contract arrangements with the latter company for special rates. Disregarding the instructions, the Baltimore & Ohio Company delivered the carat Chicago, in the usual course of business, to the Chicago, Rock Island & Pacific Company, which, in its turn, delivered it to the defendant, by whom it was finally brought to Denver. Defendant, having paid all prior charges for freight of the Baltimore & Ohio and the Chicago, Rock Island & Pacific Companies, claimed a lien for these charges, as well as for its own. Plaintiffs declined to pay these charges, and brought this action of replevin. The contention of the plaintiffs is that the Baltimore & Ohio Company was a special agent, with limited powers, and that it disregarded its instructions, and exceeded its authority; that the carriage by the defendant company, as well as the prior carrier, the Chicago, Rock Island & Pacific, was without authority from and against the will of the owners, and, being thus unauthorized, created no charge against the owners for compensation,—no right to a lien.

The principal case cited by the plaintiffs in support of this view is that of Fitch v. Newberry, 1 Doug. (Mich.) 1, which unquestionably sustains their position. In a very elaborate and exhaustive opinion that court holds that the forwarding company is only a special agent, with limited powers; that whoever deals with such agent is bound to take notice of the extent of his authority; and that if such agent, disregarding his instructions, delivers the goods to the wrong carrier, the latter, although he carries them to the place of destination, does so at his own risk, is not the debtor of the owner, and has no claim for freight or lien upon the goods. I cannot think, under the present conditions of transportation business, the rule therein announced is the correct one. The true rule is this: that a carrier, receiving goods for transmission over his own line, and consigned to a place beyond, has the apparent authority to forward the same to the place of destination by any of the ordinary routes thereto, and that such second carrier, receiving the goods in the usual and ordinary course of business, without notice of any special instructions to the first carrier, and transporting the goods to the place of destination, is entitled to demand the ordinary and reasonable freight therefor. The question evidently turns upon the authority of the first carrier, and whether the delivery to the second carrier is in pursuance of the apparent authority conferred upon the first. I am aware of the distinction that has frequently been drawn between the case of a general and that of a special agent; that the former is presumed to have all the ordinary powers necessary for the accomplishment of the business intrusted to him, while the latter is one with limited and special powers; and the further rule that one dealing with a special agent is bound to take notice of the exact powers conferred. But this general rule has been of late years subject to considerable modification.

The rule as recognized to-day is well stated in 1 Pars. Cont. 44, as follows:

"It may, indeed, be said that every agency is, under one aspect, special, and under another, general. No agent has authority to be, in all respects, and for all purposes, an alter ego of his principal, binding him by whatever the agent may do in reference to any subject whatever; and therefore the agency must be special, so far as it is limited by place or time, or the extent or character of the work to be done. On the other hand, every agency must be so far general that it must cover, not merely the precise thing to be done, but whatever usually and rationally belongs to the doing of it. Of late years, courts seem more disposed to regard this distinction, and the rules founded upon it, as altogether subordinate to that principle which may be called the foundation of the law of agency; namely, that a principal is responsible, either when he has given to an agent sufficient authority, or when he justifies a party dealing with his agent in believing that he has given to this agent this authority."

It is sometimes expressed in another way; and that is that the principal is bound by the acts of his agent, done within the apparent scope of the authority conferred; and that, whether he be technically either a general or special agent. I think that rule determines this case, and that a common carrier, having goods in its possession consigned to a point beyond its own line, is clothed with the apparent authority to forward those goods by any of the ordinary and usual routes. In Whitney v. Beckford, 105 Mass. 271, the court uses this language:

"But when the freight is earned in good faith, under a contract of transportation made with an agent of the owner, who, according to the usages of the business, is clothed with apparent authority by its principal, then the charges for freight will constitute a valid lien upon the property, although the agent, by an accidental or intentional departure from his instructions, sends the goods by a route not intended, or to the wrong place."

Any other rule would work a serious hinderance to the immense transportation business of to-day, while this rule protects both carrier and owner. If the first carrier disobeys his instructions, by which loss results to the owner, such carrier is liable to an action of damages, and, as is proper, the wrong-doer suffers the loss. At the same time, the second and innocent carrier, having done the work of transportation, receives, as it ought, the just freight therefor. The first carrier is the agent of the owner. If he has done wrong, why should not the principal be remitted to his action against his wrong-doing agent, and why should the burden of litigation be cast upon the innocent second carrier? Plaintiffs say that, in this case, they

would have to go to Ohio to maintain their action; but, if they select an agent in Ohio, and that agent does wrong, why should not they go to Ohio to punish him for his wrong. And why should the defendant, innocent of any wrong, be forced to go thither to litigate with their agent? And why should the owner, who has had his goods carried to the place of destination, be permitted to take them from the carrier without any payment for such transportation? Is the route by which the freight is transported a matter so vital to him that, carried over the wrong route, he is entitled equitably to the possession

of his goods free from any burden of freight?

One other matter requires notice. That the Chicago, Rock Island & Pacific Company received this car at Chicago, in good faith, in the usual course of business, and without actual notice of the special instructions to the Baltimore & Ohio Company, is shown by the testimony beyond dispute. The lumber was in fact loaded in a car belonging to the Chicago & Alton Railroad, and so marked. It is insisted by the plaintiffs that the use of such a car was implied notice to the Chicago, Rock Island & Pacific Company that the car was to be shipped over the Chicago & Alton road. I do not think this is true. Courts must be presumed to be familiar with the ordinary facts of transportation; and one of those facts is that the freight cars of each road are constantly used by other roads. Everywhere one goes he sees cars belonging to multitudes of railroad corporations in use upon roads other than their own. The frequency of this is such that it seems to me no implication can fairly be drawn from the fact that the goods are loaded in a car belonging to one road that special instructions have been given to ship over that road.

These being the only questions in the case, judgment must be entered in favor of the defendant, for a return of the property, or, upon failure to do that, for the amount of the freight charges, both its own

and those of the prior carriers.

In re Pease.

(District Court, N. D. Illinois. January 4, 1887.)

1. Bankruptov—Expunding Claim—Rule 34—Rev. St. U. S. § 5081.

A claim allowed against a bankrupt's estate can be re-examined and expunged, under rule 34 of rules in bankruptcy, on the application of the bankrupt as well as that of the assignee or creditor, although the rule only names the latter; Rev. St. U. S. § 5081, expressly providing that any claim may be re-examined on application of the assignee, any creditor, or the bankrupt.

2. Same—Notice of Register's Decision.

A register in bankruptcy need not give notice to either party of his findings and decision on a proceeding to re-examine and expunge a claim.

8. Same—Review of Register's Decision.

The last clause of bankruptcy rule 34, relating to proceedings for proof of debts before the register, providing that "all orders thus made by the register v.29f.no.12—38

may be reviewed by the court on a special petition; and, upon showing satisfactory cause for such review," gives to a party not satisfied with the action of the register, in proceedings for the re-examination of a claim, the right to review it by petition, although no objection was made before the register, and no issue was made up and certified into court, as is elsewhere provided in the rule may be done in proceedings for re-examination.

4. SAME—FINDING—MERGER OF CLAIM.

In proceedings to expunge the proof of a claim made against a bankrupt's estate, held, that the evidence showed that, although there was originally an account due the claimant from a firm of which the bankrupt was a member, yet that the claim was merged in acceptances afterwards given by that firm and its successors, indiscriminately, which acceptances were either paid, or were outstanding in the hands of other parties, and that the claim should therefore be expunged.

5. Same—Purchase of Claim—Estoppel of Bankrupt—Promissory Note.

A bankrupt is not estopped from applying to have a claim proved against his estate expunged, because he included it in his schedule of debts, if it was described in the schedule as evidenced by a promissory note, but was proved as a sum due upon an open account, as against a purchaser of the claim without the note.

6. SAME-PURCHASER WARNED.

No estoppel can arise in favor of the purchaser of a claim, against a bankrupt's estate, included by the bankrupt in his schedule of debts, who is informed by the bankrupt, before purchasing, that the assignor has no valid claim against the estate.

7. Release and Discharge—Joint Debtors.

One of several joint debtors is, under the Illinois law, discharged by action brought and judgment obtained against the other without joining him.

In Bankruptey.

Cook & Upton and M. W. Fuller, for the bankrupt.

Dent & Black, for claimant.

BLODGETT, J. This is a proceeding to expunge the claim of J. W. Gregg for \$21,000, proven against the bankrupt's estate, and allowed by the register. Pease was adjudged bankrupt, August 29, 1878, on his own petition, and his assignee appointed October 7, 1878. Among the indebtedness scheduled by the bankrupt is an indebtedness of J. W. Gregg for \$13,000, on a promissory note, with a memorandum that it was an indebtedness of the firm of T. S. Dobbins & Co., of which firm bankrupt was a member. On January 29, 1883, Gregg proved the claim now in controversy, against the estate, for \$21,000, as a balance of account due for work and labor as a contractor on the Chicago & Pacific Railroad. upon a contract with T. S. Dobbins & Co., of which firm the bankrupt was a member. Soon after his claim was thus proven and allowed, it was assigned to William Ritchie, who has since appeared and claims to be subrogated to Gregg's place as a creditor of the estate. In fact, the proof shows that Ritchie had made a conditional purchase of the claim before it was proven. At some time after this claim was proven, but the date is not disclosed in the record, the bankrupt filed a petition for expunging this claim, which it is stated, and I assume it is true, was lost or mislaid by the register; and on November 28, 1885, an amended petition was filed by the bankrupt for the same purpose, on which voluminous proofs were taken, and the register, upon such proof, has found

that this claim should be wholly disallowed and expunged, and so ordered.

The creditor has filed exceptions to the register's finding, and a petition for the review of the register's action in the matter, in which he states his reasons why the finding of the register should be reviewed and reversed.

- 1. That no authority is given the bankrupt to apply for the expurgation of a claim proven against his estate. It is true that rule 34 in bankruptcy only states "that when the assignee, or any creditor, shall desire a re-examination of any claim filed against the bankrupt estate," etc., proceedings shall be had to that end; but section 22 of the original bankrupt act (now section 5081, Rev. St.) expressly provides that any claim may be re-examined on application of the assignee, any creditor, or the bankrupt; and the practice of this court has been to re-examine and expunge under rule 34, on application of the bankrupt as well as that of the assignee or a creditor. This also seems to have been the practice elsewhere. In re Patterson, 1 N. B. R. 100; In re Lathrop, 3 N. B. R. 413.
- 2. That the report and finding of the register was filed without notice to the creditor, or his attorneys. There is no requirement, either in the bankrupt law or the rules under it, that the register shall give notice to either party of his findings and decision on a proceeding to re-examine and expunge a claim. The register is required, on a petition being filed for the re-examination of a claim, to fix the time for hearing the petition, of which due notice shall be given to the creditor, which notice it will be presumed he gave from a memorandum by the register on the petition, and the subsequent action of the parties creditor and bankrupt in proceeding to take proofs; but there is no provision for notice to be given the creditor of the register's final conclusion or action in the proceeding. That becomes a matter of record, of which a creditor who has proven a claim is bound to take notice, the same as he would, if he were a party to a suit, of the final action or judgment of the court on such suit. In re Paddock, 6 N. B. R. 132; In re Kyler, 2 N. B. R. 650.

While there does not appear to have been a close adherence to technicalities in the proceedings before the register in the re-examination of the claim, it does sufficiently appear that the parties to this contention appeared before him, took voluminous proofs, and filed briefs, and discussed at length the law and evidence involved in the proceeding. This testimony, with an abstract of it and briefs of counsel, was returned into court with the register's report of his findings, from which it sufficiently appears, as it seems to me, that this creditor has had all the notice to which he was entitled under the law and rules in bankruptcy. It is contended on the part of the bankrupt that the creditor cannot now be heard to question the action of the register, because no objection was taken to the proceedings before the register, and no issue made up at the request of the parties, and certified into court; but my interpretation of rule 34 is that a petition for a review of the register's action may be filed even where the register, without objection, proceeds to hear the proof and

adjudge upon the claim. The last clause of the thirty-fourth rule reads as follows: "All orders thus made by the register may be reviewed by the court on a special petition, and upon showing satisfactory cause for such review." This clause evidently does not apply to the re-examination of claims where the register simply takes the proof, requires an issue to be made up, and, at the request or on the objection of either party, certifies the proofs and issue to the court; but it gives either party not satisfied with the action of the register the right to a review of the register's action by a petition.

3. That the register has, without sufficient proof, found that there was no indebtedness due from the brankrupt to Gregg at the time this claim was proven. This involves a consideration of the testimony taken in the case by the register, and which is fully discussed by the register in his report. I have read this proof, and the briefs of counsel analyzing and discussing it, and am of opinion that the register's finding is abundantly supported by the preponderance of proof. The bankrupt was a member of the firm of T. S. Dobbins & Co., a firm formed, in 1870 or 1871, for the purpose of constructing the Chicago & Pacific Railroad, or a portion of it, and was dissolved July 1, 1874, by the limitation of its articles of copartnership. In August, 1873, Gregg and his partner, Munger, took a contract for grading the second division of the railroad, which extended from Elgin to Byron, in Ogle county, in this When the firm dissolved in July, 1874, Dobbins assumed the indebtedness of the firm, and continued the work in which the firm had been engaged, and Gregg completed his grading contract in November, 1874.

At or about the time he so finished the grading, there was due Gregg a balance of about \$15,000, as shown by the books of T. S. Dobbins. When the firm of T. S. Dobbins & Co. dissolved, the first of July, 1874, their books showed a balance due Gregg of about \$21,000; but this account had been carried on to the books of T. S. Dobbins, and on the seventh of November, 1874, had been reduced to about \$15,000. The question is whether this balance proven by Gregg, which probably was intended to represent the balance of July 1, 1874, has ever been settled, or whether it still remained due to Gregg at the time the claim was proven in bankruptcy.

T. S. Dobbins & Co. dissolved July 1, 1874, as I said, by the limitations of their articles of copartnership. Dobbins assumed the debts of the concern, and continued the business alone, until November 7, 1874, during which time Gregg was going on with and substantially completing the grading contract, when a new firm, consisting of T. S. Dobbins, John S. Wilcox, and George S. Bowen, was formed under the firm name of Dobbins & Co.; the new firm assuming the indebtedness of the old firm of T. S. Dobbins & Co., and of T. S. Dobbins, and continuing the same work undertaken by T. S. Dobbins & Co. Gregg's account on the books of T. S. Dobbins & Co. was transferred to the books of T. S. Dobbins on the dissolution of the firm of T. S. Dobbins & Co., July 1, 1874, and on the formation of the new firm of Dobbins

& Co. the balance then due Gregg was carried on to the books of the new firm, this balance being at that time about \$15,000. The proof also shows that Gregg, in November, 1874, took a contract from Dobbins & Co. to lay the iron on the second division of the road from Elgin to Byron, which he completed some time in the spring of 1875; and that for the balance due him on the grading contract, and for what was earned on the ironing contract, Gregg, before the first day of June, 1876, received acceptances of T. S. Dobbins & Co., and Dobbins & Co. so as to fully balance the account, -that is, drafts drawn by Gregg, and accepted by T. S. Dobbins & Co., or Dobbins individually, or Dobbins & Co., were put in circulation representing the entire amount due Gregg on these contracts; and the proof also shows that all these acceptances, except drafts aggregating about \$12,000, had been paid prior to July 1. 1876, and that most of these unpaid drafts were drawn on and accepted by the firm of Dobbins & Co., of which the bankrupt, Pease, was never a member, and that such drafts are still outstanding and unpaid, and not held by Gregg, or by Ritchie, who claims to be Gregg's assignee of this claim.

There are contradictions between Gregg and Barnhart, called in support of this claim, and the witness Ogden, called in behalf of the bankrupt,—Ogden having been the book-keeper of T. S. Dobbins & Co., and of Dobbins, and Dobbins & Co., and was the man who issued these acceptances and balanced the books; but his testimony is so direct, clear, and intrinsically probable as, in my estimation, to far outweigh that of Gregg, and his book-keeper, Barnhart, who testified without books, and from memory only, -Gregg's books having been destroyed in 1875, soon after he completed his contract. The fact that the proof shows, especially the deposition of Bowen, that many of the drafts drawn on account of the grading contract were drawn on and accepted by Dobbins & Co., is very convincing, aside from the testimony of Ogden that Gregg had made a novation with Dobbins & Co., by which he had accepted them as his debtors for whatever balance might be due or earned by him on the old grading contract. The proof to which I have referred shows a series of drafts drawn on account of grading by Gregg on Dobbins & Co., which must have been for payment of this old grading account, and the proof also shows that the balance due on that account was carried on to the books of Dobbins & Co., and, in fact, that neither Dobbins & Co., nor T. S. Dobbins, nor T. S. Dobbins & Co., were ever indebted to Gregg, except on account of this grading and ironing contract; and it also shows that this account is balanced by the drafts drawn against it and The proof, I think, is so convincaccepted, mainly, by Dobbins & Co. ing as to leave no reasonable doubt that the amounts earned under the grading contract, and under the ironing contract, were carried along on the books of Dobbins & Co. as one account, and that this account was fully balanced by acceptances, which have been either fully paid, or are now outstanding, and are not held by either Gregg or Ritchie.

Gregg took no steps to prove any claim against the bankrupt's estate until Ritchie, the present owner of the claim, finding, as it would seem

from the proof, and also from papers in the files in this case, that his interest might be indirectly, if not directly, subserved, if he should appear as a creditor of Pease, opened a correspondence with Gregg, and proposed to purchase his claim when it should be proven to the satisfaction of the The ordinary ex parte proof was made, and Ritchie paid Pease upwards of \$2,000 for the claim. Gregg, therefore, stands where he must be expected to support this claim, which was established by his oath, and must be treated as a witness directly interested in the result of the case. Barnhart only testified as to what Gregg's books showed in 1875, as he remembers them, which is extremely unreliable testimony, while Ogden testifies from an examination of his books, with the advantage of having his memory quickened and refreshed by such examin-Ogden is also corroborated by the course of business. Gregg drew, in addition to cash payments which he received from time to time, drafts in favor of his subcontractors and others, which were accepted, payable in 30, 60, or 90 days after date, and these drafts appear to have been accepted by whatever firm was then in charge of this railroad work as principal contractor. This is so natural, and so much in the regular course of business, as to be probable; and although Gregg testifies that he knew nothing in regard to these changes in the firm with which he was dealing, yet I think it hardly possible that he did not know that the firm of T. S. Dobbins & Co. did not include the same persons who composed the firm of Dobbins & Co., as the proof shows that he made a written contract for laying the iron with Dobbins & Co., and drew drafts on such firm on account of grading. Also it is extremely improbable that so large a balance as \$21,000 would have stood unadjusted in Gregg's favor upon the books of this firm, from early in 1875 to the time this claim was proven. It is much more probable that these drafts or acceptances, or some evidence of indebtedness, would have been given to balance this account.

It appears that Dobbins & Co. went into bankruptcy shortly before Pease, and scheduled among their debts a balance of \$13,000, due Gregg, as stated in their schedule, in promissory notes. Pease, when he filed his schedule, not having access to the books of T. S. Dobbins & Co., and assuming that he might be in some way liable as a member of that firm, took the item in question from their schedule, and scheduled himself as indebted, as a member of the firm of T. S. Dobbins & Co., to the amount of \$13,000 on a promissory note. Dobbins & Co.'s schedule, having probably been made from their books, would naturally state the amount of the indebtedness on these old contracts with Gregg, but might err as to the form of the indebtedness, whether it was evidenced by notes or acceptances or drafts.

It is also urged that the bankrupt is liable upon certain drafts, amounting in the aggregate to over \$1,700, accepted in favor of one Ryan by the firm of T. S. Dobbins & Co., of which he was a member; but, if the bankrupt was ever liable upon these acceptances, I think there can be no doubt that he has been relieved by the action of Ryan, as Ryan has brought suit and obtained judgment upon the acceptances against Dob-

bins, Wilcox, and Bowen, and did not join the bankrupt, or make him a party to the suit, thereby, in the light of the Illinois authorities, releasing the bankrupt from liability on these acceptances, even if he was ever liable thereon. Wann v. McNulty, 2 Gilman, 355; Thompson v. Emmert, 15 Ill. 415; Mitchell v. Brewster, 28 Ill. 163; People v. Harrison, 82 Ill. 84.

It is also claimed that a draft of \$500 was given as a guaranty draft to indemnify Munger, who was at one time a partner of Gregg in this grading contract; that when Munger and Gregg dissolved partnership there were some small unsettled claims against the firm of Munger & Gregg, and, as Gregg assumed the business and the liabilities of the firm, this draft of \$500 was drawn and given to Munger to indemnify him against possible liability upon some small outstanding claims against the firm. There is no proof that Munger or Gregg has ever returned this draft, or that it has in any way been settled or adjusted; and it would clearly seem, from the proof, that it was Gregg's business to have obtained this draft from Munger, and surrendered it for cancellation to the firm that issued it, before he can claim a credit for it.

It is possible, from the proof, that, upon an adjustment between Gregg and some of these firms, a small balance might be found due him for extra work, or on this guaranty draft, if it has subserved its purpose, and can be produced and canceled; but this was proven as an omnibus claim for the full balance claimed to be due in November, 1874, and not for any small balance which might be found due on a careful accounting and rectification of all mistakes and debits and credits in the dealings of the firms, and I understand this creditor's position to be that the whole of that claim as proven, or nothing, is due. Yet, if this position should be changed, I do not see how, as the proof stands, anything can be found due on this claim. The proof is, as I think, convincing and conclusive that the entire balance due Gregg for this railroad work is represented in outstanding drafts and acceptances by either T. S. Dobbins & Co., or Dobbins, individually, while he was carrying on the business alone, between July 1 and November 7, 1874, or Dobbins & Co.; and none of these drafts are produced by Gregg, nor does he pretend that he owns If they have not been paid, the indebtedness they represent has been merged in them, and is due to whoever holds them, and not to It therefore seems to me that the register was fully justified in determining that Gregg was not a creditor of Pease at the time this claim was filed and proven.

The further point made in the petition is that, inasmuch as this is a petition on the part of the bankrupt himself to expunge this claim, he is estopped by his schedule from denying its validity as against Gregg, or Ritchie, Gregg's assignee, because he has scheduled a claim in favor of Gregg for \$13,000, and verified his schedule by his oath, and that Ritchie has been induced to pay value for the claim because of this schedule and verification. This schedule states expressly that the indebtedness is evidenced by a promissory note given in 1875 on account of debts of T. S. Dobbins & Co. Read, according to its legal effect, it is a statement

that, in 1875, the firm of T. S. Dobbins & Co. gave J. W. Gregg a promissory note for \$13,000. Waiving the question whether it is possible to apply the doctrine of estoppel to a case in bankruptcy, where the bankrupt in filing his schedule is acting for his creditors as well as himself, it is sufficient to say that the claim scheduled by the bankrupt is not the one proved by the alleged creditor. The claim is not upon notes, or a note, and no notes are produced, and the record is barren of proof that Gregg held any notes or negotiable securities such as this schedule represents evidenced this claim. It is probable from the proof that this balance of indebtedness described in the schedule of Dobbins & Co., copied by Pease from that schedule, was evidenced by drafts and acceptances, and not by notes, although this fact is not conclusively proven. That is, it is quite probable from the evidence that, when Dobbins & Co. made out their schedules, they knew that there was an unpaid liability of between twelve and thirteen thousand dollars on account of this old indebtedness of Gregg, and it was accordingly scheduled as due on the notes, and Pease copied it into his schedule, when, in fact, it was due on acceptances. But enough appears upon the face of the schedule to put Ritchie, the purchaser of this claim, upon inquiry; and if Gregg could not produce the note, or commercial paper of some kind, he had no right to deal with him as the owner of the claim scheduled. A debtor, after the lapse of some time, and who has never personally transacted the business out of which his liability has arisen, and has not kept the books, might naturally enough make a mistake as to whether the liability was evidenced by notes, drafts, or acceptances; but a person negotiating for the purchase of a claim, which the bankrupt has scheduled as evidenced by note, is put upon notice that the note should be produced or accounted for, and, if he buys the claim without the note, he takes his chance that the claim, if it exists, will belong to the holder of the note, and not to the original payee in whose name it is scheduled. The proof also shows that, while Ritchie was negotiating for this claim, he was told by the bankrupt that Gregg had no claim against the estate, or against T.S. Dobbins & Co., which is, of itself, a conclusive answer to the estoppel proof and argument.

In the light of these facts, therefore, I do not think that Pease is estopped to contest this claim as proven. The petition for review and the creditor's exceptions to the register's report are therefore dismissed

for want of equity, and costs adjudged against the petitioner.

Since this petition for review was filed, the petitioner has taken proof, in support of this petition, especially bearing upon the question of estoppel. I incline to the opinion that when a petition for review is filed by a creditor, or any other person, under the last clause of rule 34, no new testimony can be taken in the case, as the review must be upon the record as made by the register, and not on new proof, unless, perhaps, the court should see fit to send the case back to the register for further proof; but, as both parties have taken proof on this petition, I have looked into and considered it, and do not deem it necessary to exclude this proof from the record.

THE HENRY WARNER.

(District Court, D. Massachusetts. December 11, 1886.)

1. COLLISION—VESSEL AT ANCHOR—DANGEROUS ANCHORAGE—FAILURE TO KEEP LOOKOUT.

When a vessel is at anchor in a place where other vessels are frequently passing, and where navigation is difficult and dangerous, special care and vigilance, in order to give warning of her presence to passing vessels, is required. She must have a good lookout, and an anchor light of the regulation pattern lit and burning; to have a watch on deck is not sufficient, if there be no one on lookout at the time of the collision.

2. Maritime Lien—Advances to Pay Wages and Stevedores' Bills—Assign

MENT OF CLAIMS TO PAYEE.

One who advances money to pay debts which are liens, and who takes an assignment of the claims, is not entitled to look to the fund arising from the sale of the vessel, after he has been actually repaid, or if circumstances exist from which payment must be presumed.

Libel in rem by the owners of one of the colliding vessels and the underwriters of her cargo against the other vessel and her freight.

L. S. Dabney and H. Wheeler, for the Ibis.

C. T. Russell and W. E. Russell, for the Henry Warner.

W. W. Dodge, for the Insurance Companies.

This case was a libel by the owners of the bark Ibis, against the barquentine Henry Warner and her freight, for collision. The China Mutual Insurance Company and the Atlantic Mutual Insurance Company, who were the underwriters of the cargo of the Ibis, consisting of 1,299 bales of cotton, lost in the collision, and who have paid the loss, also intervened for their own interest, and prayed that the damages decreed against the Henry Warner should be paid to them.

The collision occurred on the evening of January 6, 1886, on the Nantucket shoals, about half way, and nearly on a direct line, between the Handkerchief and the Shovelful light-ships. The Ibis was on a voyage from Galveston to Boston. Off Holmes Hole she took a pilot, and, continuing on her course, rounded the Handkerchief light-ship between 4:30 and 5 P. M. At 5:30 P. M., when half way between that light-ship and the Shovelful light-ship, she dropped her anchor, furled her sails, and set an anchor light in the starboard fore rigging. She continued lying at anchor in that position until the collision.

The Warner was on a voyage from Buenos Ayres to Boston. After rounding the Handkerchief, the wind being N. W. and favorable, her course was laid directly for the Shovelful light. Nothing was seen or heard of the Ibis by the lookout, or by any one on the deck of the Warner, until the two vessels were within two or three ship's lengths apart, and until it was too late to do anything to prevent the collision; and at 7 o'clock, or a little later, the Warner ran into the Ibis, striking her on the port bow, a little forward of the cat-heads, and cutting her down

Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

to the water's edge. The Ibis floated until the next morning, when she was abandoned by her crew, and soon after sunk. The Warner lost her anchor and all her head-gear. The latter continued on her course after the accident, and succeeded in passing the shoals, but, owing to the loss of her head-sails and anchor, was driven off the coast, and did not arrive in Boston until the 14th.

It is insisted on the part of the Warner that the evidence fails to show that at and immediately before the collision, the anchor light of the Ibis was up and burning; or, if it was, that it was not the powerful eight-inch globular lantern required by the sailing regulations, but was one of inferior capacity. It must be admitted that some of the circumstances of the case tend strongly to support this view. The evening, though dark, was perfectly clear. The second mate and another seaman were on the lookout forward on the Warner, and the master was on deck in charge, and was keeping a lookout ahead with his night glass. Yet none of them saw the light on the Ibis. It is agreed that the light was out immediately after the collision, while the vessels were in contact. lantern was not produced in court. The master of the Ibis testified that it was left hanging in the rigging, and went down with the vessel. a diver, who examined the wreck on the bottom a few days afterwards, searched for it, but did not find it. On the other hand, the master of the Ibis, the pilot, the two mates, the men in the watch, and all the other men on board who were in a position to observe, swear with great positiveness that they saw the lantern burning brightly and clearly in the rigging as the Warner approached. All describe it as the regulation eightinch globular lantern. The mate's account of it is somewhat confused, but not sufficiently so to throw discredit on the others. When taken down after the collision, the top was found to be broken in, but the glass was uninjured. It was repaired with canvas, and again lighted and set, and continued to burn until the vessel went down. The master of another vessel which lay by the Ibis during the night saw it, and describes it as the usual regulation light. The light was also seen by the men in charge of the Handkerchief and Shovelful light-ships, two miles off, for some time before the collision, and as late as 7 o'clock.

With all this evidence before me, I find it impossible to come to any other conclusion than that a proper anchor light was set and burning on the Ibis. That being so, the Warner was bound at her peril to see it, and avoid the vessel at anchor. It is certainly more likely that the men on the Warner failed to see it through inattention, or by confusing it with the lights of the numerous light-houses and light-ships to the eastward, than that so many witnesses should be guilty of the grossest falsification, as they undoubtedly must be if the light was not there. The lantern must have been put out in the collision, but whether by the jibboom of the Warner, as the libelants claim, or by the concussion, or in some other way, it is impossible to say. The shroud on which it was hung was found broken by the diver. The dent in the top shows a blow of some sort. What happened to it at the bottom of the ocean, must, of course, remain a mystery.

The claimants of the Warner also object that the Ibis was anchored in an improper place, and that the collision was also due to that cause. But there was no want of room for vessels to pass on both sides of her. The channel for ships at that place is a mile and a half wide. The reason given by the master and pilot for anchoring here is that the wind was N. W., and increasing, and the vessel, being loaded with cotton, was high out of the water, and they thought there was danger that she might be blown off the coast after passing the shoals. But whether this showed good seamanship or not is immaterial. The place was the open ocean, which is free to all for anchoring as well as for sailing, with this limitation: that the anchoring vessel is under obligation to observe the usual and prescribed precautions to notify her position to other vessels.

The remaining question is whether the Ibis used such precautions. She was brought up in a place where vessels were frequently passing, and where the navigation was difficult and dangerous. It was therefore incumbent on her to exercise especial vigilance and care to give warning of her presence to passing vessels. The starboard watch, consisting of the second mate and three hands, was on deck from half past 6. But no anchor watch was set, and no lookout kept. The watch were collected under the lee of the forward house, and, though this was the side on which the Warner approached, they saw nothing of her lights until she was within two or three lengths, when they might and should have seen them soon after the Warner rounded the Handkerchief. light was seen two miles off by the men on the light-ships. a minute's earlier warning, the Warner would have gone clear. as she was, it was her plain duty to have, in addition to her anchor light, a good lookout kept. There can be little doubt that an earlier hail than was given would have attracted the attention of the men on the Warner, and, had the latter's wheel been put down a moment sooner, the Ibis would have escaped wholly, or with the loss of her head-gear only. For her failure to keep a lookout the Ibis must also be held to blame.

The case was also heard on the petition of eight seamen, constituting the crew of the Warner, for the payment of their wages earned on this voyage out of the proceeds in the registry of the court. A petition was also presented by a firm of stevedores for the payment of their bill for discharging the cargo at Boston. It appeared that all these claims had been assigned to Mr. Gore, the average adjuster, who advanced the money for their payment. The amount advanced to the seamen has already been repaid to him by the firm of N. W. Rice & Co., of Boston, and Mr. Gore testified that he expected repayment of the sum advanced to the stevedores from the same source. I have no doubt that, by this time, this has also been repaid. I think the evidence indicates, with sufficient certainty, that these claims were really paid in the interest of the owners of the Warner, and that the assignments were taken with the object of keeping alive whatever lien the petitioners might have for their payment, as against the owners of the Ibis and her cargo. They should therefore be treated as actually paid, and any lien on account of them that may have once attached to the vessel and freight as already discharged.

The petitions will be dismissed.

The decree for the owners of the Ibis will be for divided damages, and for the insurance companies, as representing the cargo-owners, for full damages. Ordered accordingly.

THE HOWARD.1

GANNON v. THE HOWARD.

(District Court, D. New Jersey. January 5, 1887.)

1. Maritime Lien-Material-Man-Home Port-New Jersey Act March 20, 1857

The lien given the material-man by state statutes will be enforced by proceedings in rem in admiralty, provided the transaction be based on the credit of the vessel. No lien exists for materials furnished to the charterer in the home port of the vessel, under an agreement to accept in part payment the note of the charterer, if from the evidence it appears that the material-man was aware of the terms of the charter-party, and did not suppose or believe, at the time the work and materials were contracted for, that they were to be supplied on the credit of the boat or its owners.

2. SAME-LIEN.

State statutes confer no lien in the home port, if from the evidence it appears that the vessel's credit was not an element of the contract.

In Admiralty.

Edwin G. Davis, for libelant.

John Deady, for respondent.

Wales, J. This is a libel in rem to enforce a lien, given by a statute of New Jersey, for the recovery of the balance of the price agreed on for putting into the propeller Howard a "Multiple Effect Surface Condenser." The home port of the vessel is at Newark, in this district, and the libelant and the owners also reside in New Jersey. The materials and work were furnished at Jersey City. Since the decision of the supreme court of the United States in The Lottawanna, 21 Wall. 581, the law has been settled that a material-man may proceed in rem, in admiralty, for supplies furnished to a domestic vessel, when the state statute affords a lien for such supplies, provided they were furnished on the credit of the vessel. The question here is one of fact. To whom, or in what manner, was credit given by the libelant? Before the condenser was ordered the Howard had been chartered to H. H. Penny, of New York, by the managing owners, and the following clause was inserted in the charter-party:

"It is also agreed that the charterers may place an approved condenser in the vessel before leaving New York, and that one-half of the actual cost thereof shall be allowed to them by the owners, payable in equal amounts, to be deducted from the third and fourth payments on account of this charter."

Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

The condenser was not necessary for the use of the vessel in its general and ordinary business, but the charterer deemed one to be indis-

pensable to the special use for which he chartered her.

The libelant is his own principal witness, and says that he furnished the condenser on the credit of the vessel, as well as on that of the charterer; but his recollection is at fault on several material points, and he is directly contradicted, in more than one instance, by the witnesses for the claimants. Capt. Rose, the master of the Howard, testifying for the owners, states that he distinctly informed the libelant that the charterer was to pay for the condenser, and that the libelant must not look to the owners or to the vessel for payment. The contract for the condenser was, in fact, made with Penny, who agreed to pay the libelant \$1,000 in cash, and to give him his note at three months for the balance, with the interest included. The cost of the condenser was \$2,000. Penny paid the cash, and gave his note at the time agreed on. The note was protested for non-payment at its maturity, July 18, 1885, and this libel was filed February 26, 1886. The libelant admits that he knew of the terms of the charter-party, and it is proved that he made inquiries about the pecuniary responsibility of Penny. He knew that the owners were to allow Penny a deduction of \$1,000 from the charter-party money, in consideration of his putting in the condenser for his own use, and made no objection, and he admitted—if Capt. Rose is correct in his recollection—that he made a mistake in not having that money paid to himself instead of to Penny. The owners did allow to Penny the deduction stipulated for in the charter-party, and it does not appear that they at any time gave any word or sign that they held themselves liable to the libelant for any part of the cost of the condenser, in any event, nor is it pretended that any one but Penny ordered or contracted for the con-The only interference on the part of the owners was that they expressed, through Capt. Rose, a preference for the libelant's condenser, and prevailed on the charterer to have one of that kind placed in the vessel, if he should have any.

Capt. Rose had several interviews with the libelant, both before and after the contract with Penny, and, if his testimony be untrue, his statement of the whole transaction, and of his conversations with the libelant, is a most ingenious fabrication; but, while he is contradicted only by the libelant, he is substantially corroborated by the other witnesses. The libelant testifies that he never inquired about the financial standing of Penny, but Penny and Edwards say that he did. He further says that he never asked Penny for a reference, but the latter says that he did, and that the required reference was given. It is true that Penny refused to give an indorser or security for the note, telling the libelant that the boat was security enough. This, however, cannot avail the libelant, since it was not in the power of Penny, as a charterer, to combine with a material-man to impose a lien on the chartered vessel at her home port, which was also the residence of the owners, and against the known instructions of the latter.

As a conclusion of fact, from the evidence, the libelant did not sup-

pose or believe, at the time the condenser was contracted for, that it was to be supplied on the credit of the boat or its owners. This appears to have been an after-thought. Having in the beginning, with a knowledge of the terms of the charter-party, contracted with and given credit to the charterer, it is now too late for the libelant to charge the vessel for work and materials which were not ordered by the owners, and for which the decided weight of the evidence shows he was notified in advance they

would not be responsible.

It was insisted on behalf of the libelant that as the boat had received the full benefit of the work and materials, and only half the bill had been paid, the owners are now equitably liable for the balance. But it does not follow that because the owners were willing and agreed to pay \$1,000 to the charterer for putting in the condenser, that, therefore, they must also pay the libelant an equal sum for the same work. The owners paid as much as they thought the condenser was worth to them, and the amounts and terms of payment were known to the libelant before he entered into the contract with Penny. The law does not recognize the existence of a lien on such facts as have been disclosed by the testimony in this case. The Secret, 3 Fed. Rep. 665; The Norman, 6 Fed. Rep. 406; The William Cook, 12 Fed. Rep. 919.

Let a decree be entered dismissing the libel, with costs.

THE GENERAL SEDGWICK.1

THE REPUBLIC.

FLEMING v. THE GENERAL SEDGWICK and another.

(District Court, D. New Jersey. January 12, 1887.)

1. Admiralty-Amendment of Libel-Substitution of Proceedings in Per-

SONAM FOR PROCEEDINGS IN REM.

While it may be the practice, upon final hearing, to sometimes allow the substitution of proceedings in personam for proceedings in rem, where the record shows a clear right of recovery against those who have appeared and contested the claim on its merits, no such practice exists where the claimants have appeared solely for the purpose of excepting to the libel, and when the application to substitute proceedings in personam for proceedings in rem is founded upon the allowance of the exceptions. Such amendments cannot, under the rules, be permitted, unless it be that both remedies could originally have been joined in the same libel.

2. SAME-WHEN ALLOWED.

The substitution of proceedings in personam for proceedings in rem will not be permitted, unless both remedies could originally have been joined in the same libel.

In Admiralty. Exceptions to libel, and motion to amend.

Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

Ludlow McCarter, for libelant. Alexander & Ash, for respondent.

Wales, J. A contract was made between the libelant and the claimants, for the transportation of passengers on vessels belonging to the claimants. The contract was a maritime one, but wholly executory, and no performance of it had been entered upon. The libelant has sued in rem for a breach. The vessels were attached under process, and released on bond. The claimants have appeared by their proctor only to except to the libel, and to object to the jurisdiction of the court. They have put in no answer. It is conceded that no lien exists on the vessels, and application is now made by the libelant's proctor for leave to amend the libel, by praying process and judgment in personam against the owners.

It has been decided in this circuit that proceedings in rem and in personam cannot be joined in the same libel, except as provided for in The Alida, 12 Fed. Rep. the supreme court rules in admiralty. 343. The present case does not fall within any of the exceptional provisions. It was held in The Monte A., 12 Fed. Rep. 338, that such amendment could not be allowed where, under the rules, both remedies could not be conjoined in the same libel. In that case the owner had appeared, and put in his answer, and much testimony had been taken before it was discovered that no lien existed upon the vessel; and at the hearing, under the peculiar state of the pleadings and evidence, the libelant was permitted to amend, and proceed in personam. It has been said (under a semble) to be the practice of the admiralty court in some cases -in suits in rem, where the record shows a clear right to recover in personam, against one who has appeared and contested the suit—to allow the libelant to proceed to a decree in personam, (The Zodiac, 5 Fed. Rep. 222;) but the case at bar does not belong to that class.

Exceptions sustained, motion to amend refused, and ordered that a

decree be entered dismissing the libel, with costs.

THE BURGUNDIA.1

STRAUS and others v. THE BURGUNDIA, etc.

(Circuit Court, E. D. New York. June 21, 1886.)

CARRIERS—OF GOODS—SHIPS—DAMAGE TO CARGO—IMPROPER STOWAGE.

On the delivery of a consignment of eight drums of glycerine, two were found to be broken. On suit brought for the loss, held, that if all eight were stowed in an equally proper place, then the stowage of the two could not, in detail and arrangement, have been proper or sufficient. If the two were

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

stowed in a less safe place than the six, considering the peculiar character of the drums, that was improper stowage; and therefore that the carrier had not relieved himself from the presumption of negligent stowage as the cause of the loss, and that the vessel was liable for the loss.

In Admiralty.

L. H. Arnold, Jr., for libelants.

Lorenzo Ullo, for claimant.

BLATCHFORD, Justice. I concur in the conclusion of the district judge that there must be a decree for the libelants. The case is substantially like that of The Surrey, in this court. The six drums came in good order, whatever perils of the sea there were. If the two drums which were broken had been stowed properly, they would not have been injured. If all eight were stowed in an equally proper place, then the stowage of the two could not, in detail and arrangement, have been proper or sufficient. If the two were stowed in a less safe place than the six, considering the peculiar character of the drums, that was improper stowage. On the whole evidence, including the new testimony taken in this court, the carrier has not relieved itself from its liability, or successfully rebutted the presumption of negligent stowage as the cause of the damage.

There must be a decree for the libelants for \$649, with interest from March 1, 1884, and their costs in the district court, taxed at \$129.86, and their costs in this court, to be taxed.

BLATCHFORD, Justice. On the new proofs taken in this court it appears that on the same voyage the vessel carried 35 drums of glycerine consigned to one Korneman, which were delivered on arrival in the same good order as when received. In view of this fact, and of all the evidence in the case, it cannot be held that the carrier has relieved himself from the liability thrown on him by his bill of lading, by showing the existence of a sea peril sufficient to account for the damage to the libelants' drums, and to rebut the presumption of negligent stowage as the cause of such damage. Let there be a decree for the libelants, with a reference to ascertain the damages.

¹The decision of the district judge was not accompanied by an opinion.—[Reps.

²The following is the opinion of Mr. Justice Blatchford in the case of Marx v. The Surrey, in the circuit court, E. D. of New York, July 2, 1885, (not heretofore reported.)

Union Trust Co. v. Rochester & P. R. Co.

(Circuit Court, W. D. Pennsylvania. December 6, 1886.)

1. Corporations—Consolidation of Corporations Organized under Laws of Several States—Jurisdiction of Circuit Court—Judgment—New York

STATUTE-PENDING SUIT IN STATE COURT.

In a suit in the circuit court for the Western district of Pennsylvania, brought by a corporation of the state of New York against a corporation formed under statutes of New York and Pennsylvania, by the consolidation of several corporations, some of which were organized under the laws of one of said states and some under the laws of the other, upon a judgment duly obtained in a state court in New York, held (1) that, for the purpose of jurisdiction, the defendant must be considered a citizen of Pennsylvania; (2) that, by virtue of such consolidation, the constituent companies merged into each other, and became one corporation; (3) that the judgment obtained against the consolidated corporation in the state of New York is binding upon the corporation everywhere, and the case is not open to any inquiry upon the merits; (4) that the New York statutory provisions forbidding suit to be brought on a judgment rendered in a court of that state, without the previous permission of such court, is intended only to regulate the practice in New York state courts, and has no application here; (5) that the jurisdiction of the court over the subject matter of this litigation is not affected by pending proceedings in the court of common pleas of Elk county, Pennsylvania, in which the custody of certain railroad property of the defendant was committed to a receiver.

2. JUDGMENT—ACTION ON JUDGMENT OF ANOTHER STATE—PLEADING—COLLU-

SION.

In an action in one state on a judgment obtained in another state, an alleged collusive arrangement between the plaintiff and the officers of the defendant corporation, whereby no defense was interposed, but a recovery was promoted, is not pleadable.¹

8. SAME-ACTION OF DEBT PENDING APPEAL.

An action of debt will lie on a judgment of another state, notwithstanding the pendency of an appeal or writ of error.

At Law.

Action in debt sur judgment. Sur rule for judgment for want of a sufficient affidavit of defense.

George Shiras, Jr., for the rule.

Samuel Dickson and R. C. Dale, contra.

Acheson, J. 1. It has been authoritatively adjudged that, where a corporation created by the laws of several states is sued in a federal court in any one of those states, it must be regarded, for the purpose of jurisdiction, as a citizen of that state, whatever its citizenship may be elsewhere. Railway Co. v. Whitton, 13 Wall. 270; Muller v. Dows, 94 U. S. 444. Hence it is not a valid objection to the jurisdiction of this court that the plaintiff is a corporation of the state of New York, and the defendant is a corporation formed under statutes of Pennsylvania and New York, by the consolidation of several corporations, some of which were organized under the laws of the former state, and the others under the laws of the latter.

¹See note at end of case. v.29f.no.13—39

2. By virtue of such consolidation, the constituent companies merged into each other, and became one corporation. Railway Co. v. Georgia, 98 U. S. 359; St. Louis, etc., Ry. Co. v. Berry, 113 U. S. 465; S. C. 5 Sup. Ct. Rep. 529; Graham v. Boston, etc., R. Co., 118 U. S. 161; S. C. 6 Sup. Ct. Rep. 1009, and 25 Amer. & Eng. R. Cas. 53. Hence the judgment here sued on, which was duly obtained against the consolidated corporation in a state court in the state of New York, is binding upon the corporation everywhere. Horne v. Boston, etc., R. Co., 12 Amer. & Eng. R. Cas. 287; Nashua, etc., R. Co. v. Boston, etc., R. Co., 16 Amer. & Eng. R. Cas. 488; Graham v. Boston, etc., R. Co., supra.

3. Whether or not the provisions of the constitution of Pennsylvania, relied on as invalidating the defendant's issue of bonds, the subject-matter of the judgment, have any application to obligations of this consolidated company, issued in the state of New York, under the authority of and in accordance with the laws of that state, it is not necessary to consider, as the judgment rendered is conclusive upon the defendant, and the case not open to inquiry upon the merits. Dickson v. Wilkinson, 3 How. 57:

Christmas v. Russell, 5 Wall. 290.

4. The alleged collusive arrangement between the plaintiff and the officers of the defendant company, whereby no defense was interposed, but a recovery promoted, is not available here; it being well settled that to an action in one state, on a judgment obtained in another state, such fraud is not pleadable. Christmas v. Russell, supra; Maxwell v. Stewart, 22

Wall. 77; Graham v. Boston, etc., R. Co., supra.

5. The New York statutory provisions, forbidding suit to be brought upon a judgment rendered in a court of record of that state without a previous order of the court in which the original action was brought, granting leave to bring the new suit, must be held as intended only to regulate the course of procedure in the New York state courts. Such was the conclusion of Judges Dillon and Love in respect to a similar statute of the state of Iowa. Phelps v. O'Brien Co., 2 Dill. 518; 11 Myers, Fed. Dec. § 593. It is an established principle that state legislation cannot in anywise impair or limit the jurisdiction of the courts of the United States. Id.; Hyde v. Stone, 20 How. 170; Railroad Co. v. Whitton, supra.

6. An action of debt will lie on a judgment of another state, not-withstanding the pendency of an appeal or writ of error. *Merchants'* Ins. Co v. De Wolf, 33 Pa. St. 45; Bank v. Wheeler, 28 Conn. 433.

7. The jurisdiction of this court over the subject-matter of this litigation is not affected by the pending proceedings in the court of common pleas of Elk county, Pennsylvania, in which the custody of certain railroad property has been committed to a receiver; nor will the prosecution of this action to judgment in any degree interfere with the receiver in the discharge of his duties.

Upon the whole, it seems to the court that the affidavit of defense discloses no valid ground for denying judgment in favor of the plaintiff. Therefore the rule to show cause why judgment should not be entered against the defendant must be made absolute; and it is so ordered.

mus of 100.714 **Note.**

In an action on a judgment obtained in another state the jurisdiction of the court rendering it is the only question that will be examined. Renaud v. Abbott, 6 Sup. Ct. Rep. 1194; Hanley v. Donoghue, Id. 242; Downs v. Allen, 22 Fed. Rep. 805; Glass v. Blackwell, (Ark.) 2 S. W. Rep. 257, and note.

No defense that might have been pleaded in the original action can be interposed in an action on the judgment, Dimock v. Revere Copper Co., 6 Sup. Ct. Rep. 855; nor can a plea that the judgment was procured by fraud, Allison v. Chapman, 19 Fed. Rep. 488; or that the action in which said judgment was obtained, was brought in such other state for the purpose of avading the laws of the state of which the defendant is a citizen. Witten for the purpose of evading the laws of the state of which the defendant is a citizen, Wittemore v. Malcomson, 28 Fed. Rep. 605.

FOURTH NAT. BANK OF CITY OF NEW YORK v. AMERICAN MILLS Co. and others.

(Circuit Court, S. D. New York. January 19, 1886.)

1. Principal and Agent-Del Credere Commission-Lien-Bill of Sale-INSOLVENT PRINCIPAL

An agent under a del credere commission has a lien for all commissions and advances to his principal, and, if these exceed the value of the goods, a bill of sale to him by insolvent principal, though perhaps technically illegal, will be sustained as a foreclosure of the lien.

2. Same—Set-Off.

In such a case, where the agent has used large acceptances of his principal for his own benefit, he is not obliged, for the benefit of creditors of his principal, to set these off against his acceptances for his principal, and release the security of his lien to that extent.

In Equity.

David Willcox, for complainant.

Alex. Thain, for defendants Graeffe and another.

Samuel W. Bower, for defendants American Mills Co. and others.

Coxe, J. The complainant is a national banking association. The defendant the American Mills Company was at the time in question a manufacturing corporation organized under the laws of New York, having its principal office in the city of New York, and its manufactory at Warwick. in the state of Rhode Island. The defendant Albert J. Graeffe was treasurer and a trustee of this company, and the commission merchant in New York to whom its goods were consigned. On the twenty-eighth of February, 1881, Graeffe had in his possession merchandise of the company, in value about \$45,000. He had, prior to this time, accepted, for the benefit of the company, its drafts drawn upon him, against the consignments, for upwards of \$50,000. Other acceptances, amounting to \$32,-500, had been used by Graeffe personally in his business without advantage to the mills company. None of the drafts, whether used by Graeffe or the company, were due on the twenty-eighth of February. On that day the company transferred to Graeffe, as absolute owner, the goods in his possession, he taking them in discharge, pro tanto, of the company's indebtedness to him. On the following day Graeffe sold the

goods to his wife, Mary J. Graeffe, for \$45,064, in part payment of a debt due from him to her. The sale was made through her agent, the defendant Garner.

On the third of March Graeffe made a general assignment for the benefit of his creditors. The mills company failed at the same time. On the thirtieth of March, 1881, the complainant recovered a judgment against the mills company and Graeffe for \$2,533.84, in the supreme court of the state of New York, and on the twenty-second of June, 1881, it recovered another judgment against the same parties for \$18,224, in the court of common pleas of the city of New York. Executions issued upon these judgments were returned nulla bona, September 1, 1881. Subsequent to the failure, and before July 1, 1881, other judgments were obtained against the company in New York and Rhode Island for over \$70,000.

The complainant now seeks to recover from Mary J. Graeffe the amount due upon its judgments, upon the theory that she is indebted to the mills company for the value of the goods; the transfer to her being, it is alleged, without consideration, and constructively fraudulent. No accusation of actual fraud is made against any of the defendants. It is not disputed that there was a bona fide indebtedness from the defendant Graeffe to his wife of over \$100,000. This being true, he had, undoubtedly, a strict legal right, if he owned the goods, to transfer them to her in payment, although the propriety of such a proceeding upon the eve of bankruptcy may well be doubted. The important question, therefore, and practically the only question to be determined, is, did the mills company, on the twenty-eighth of February, prior to the transfer, have any tangible interest in the goods out of which the complainant could have made its debt? Did the transfer in any way injure the complainant?

In determining this question,—in deciding what the parties could and could not do, -attention should be directed, not to subsequent events, but to the situation as it existed upon and prior to the twenty-eighth of February, 1881. On that day the defendant Graeffe had in his possession goods consigned to him by the mills company under a del credere commission, the market value of which was about \$45,000. His books show that he had advanced, as against these goods, by cash and acceptances, a sum considerably in excess of their value,—about \$54,000. For this sum he had a valid lien. When, therefore, the bill of sale was given, the mills company held the legal title, but it was valueless. goods were incumbered for more than they were worth. They could not have been disposed of except with this charge upon them. A creditor of the mills company, by taking the goods in execution, could not have When the parties met, the mills company, recognizdivested the lien. ing the lien and admitting liability in excess of the security, passed the title to Graeffe. He received no preference or advantage. He acquired no rights that the law would not have given him. It was, in effect, agreeing to a foreclosure of the lien without the expense and delay of legal proceedings.

Assuming, as it seems to be assumed, that there was in all this no actual fraud, why was it not a legitimate transaction,—why was it not a disposition of the property which the parties, if they desired to do so, had a legal right to make? If the mills company had only a contingent interest in the goods, it would seem a harsh and inequitable use of the doctrine of merger to hold that because Graeffe received the bill of sale, which was, perhaps, technically illegal, he therefore lost his lien, and by this inconsequential mistake the complainant is to receive \$20,000 which it could receive in no other way. It is true that Graeffe, instead of securing his wife, should have paid the joint indebtedness; it is not easy, however, to perceive how his failure in this regard can avail the complainant.

But it is denied that the lien amounted to the value of the goods. On the contrary, it is asserted that it amounted only to \$21,715, and this, for the reason that Graeffe had used other drafts of the mills company, amounting to \$32,500, for his own personal benefit, and, as between themselves, the company was under obligation to discharge a net balance of acceptances amounting to \$21,715, and no more. The views of counsel are so at variance upon this proposition that the record has been searched for a rational explanation of this somewhat abnormal transaction, but with only partial success. The acceptances involved do not appear upon Graeffe's books in his account with the mills company. At one time he asserts that the proceeds were received by him and used in his business; at another, his testimony would indicate that they were used to meet maturing acceptances, in order to continue the accommodations to the mills company. The motives which actuated the parties, the terms of the agreement under which these drafts were used by Graeffe, and the consideration therefor, are not satisfactorily explained. It seems, however, that it was a separate and distinct transaction, and was so regarded by the parties. As between themselves, fair dealing would seem to demand that they should have made an agreement in the form stated by the complainant; but, on the contrary, Graeffe, being liable to pay \$54,000 received by the mills company, was not called upon, unless he desired to do so, to release his security, or any portion thereof, because the company was liable to pay \$32,500 of acceptances of which he had had the exclusive benefit. Instead of demanding any concessions from him in this respect, the company expressly recognized his claim for the full amount. It is true that he might have relinquished a part of his security,—quite likely he ought to have done so, -but the lien which the law gave him he chose to retain, and the company acquiesced in his action in this regard. The transaction was unilateral, but not unlawful.

The case is a difficult one in many of its aspects, but the conclusion cannot be resisted that the complainant is without relief in this action. The bill is dismissed.

BLACKWELL v. WEBSTER, and another, Adm'r, etc.1

(Circuit Court, E. D. New York. June 4, 1886.)

CONFLICT OF LAWS—CHAMPERTY—CONTRACT TO COLLECT A LEGACY ON SHARES
—MADE IN MAINE—SUIT TO ENFORCE, BROUGHT IN NEW YORK.

An agreement was entered into in the state of Maine between plaintiff, a resident of the state of New York, and defendant, a resident of Maine, whereby plaintiff, in consideration of prosecuting defendant's claim to a certain legacy, was to receive one-third of what money defendant might recover. A statute of the state of Maine makes criminal the act of making an agreement to prosecute a suit on shares. The suit was brought in the state of New York, where such agreements are legal. Held, that the validity of the contract was to be determined by the law of Maine, and that the effect of the above statute of Maine was to render the agreement void. Whether New York could be held to be the place of performance of this agreement, quara.

Action in Equity for an Accounting. Frank E. Blackwell, plaintiff in person. Stanley, Clark & Smith, for defendants.

Benedict, J. The plaintiff's right to recover in this action depends upon the validity of an agreement made between him and the defendant Charles S. Webster, whereby, in consideration of services to be performed by the plaintiff as attorney in prosecuting the defendant Webster's claim to a legacy of \$10,000, left a deceased daughter by the last will and testament of her uncle James Brady, one-third of the money that the defendant Webster might recover under said will, as heir at law of his daughter, was assigned to the plaintiff. At the time of the making of this agreement the plaintiff was a resident of the state of New York; the defendant Webster a resident of the state of Maine. The agreement was entered into in the state of Maine, and there it was reduced to writing, and executed. At that time, as now, there was in force in the state of Maine a statute providing that "any person agreeing to prosecute or defend a suit at law or equity upon shares shall be punished by a fine not exceeding one thousand dollars, nor less than twenty dollars, or by imprisonment not more than one year;" and one of the questions presented for decision here by the defendants is whether the effect of this statute of Maine is to render void the agreement upon which the plaintiff bases his right to

In determining this question it is to be observed that the act made criminal by the statute of Maine is not the act of prosecuting a suit

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

²A contract valid where made, is enforceable in the courts of another state according to whose laws it would not be valid, Hickox v. Elliott, 27 Fed. Rep. 830; S. C. 22 Fed. Rep. 13; Swann v. Swann, 21 Fed. Rep. 299; Brown v. Browning, (R. I.) 7 Atl. Rep. 403; but not if such contract is repugnant to its policy, or injurious to its interests, Pittsburgh & S. L. R. Co.'s Appeal, (Pa.) 4 Atl. Rep. 385. A contract prohibited by the laws of the state where made, is not enforceable in the courts of another state according to whose laws it would be valid. Stewart v. Garrett, (Md.) 4 Atl. Rep. 399.

on shares, but the act of making an agreement to prosecute a suit on shares. It is also to be observed that the statute is not confined to agreements respecting suits to be prosecuted in the courts of Maine, but includes all agreements to prosecute a suit on shares, without regard to the place where the suit is to be instituted. Its plain object is to prevent the making of agreements of the character described, within the state of Maine. It is also to be observed respecting the agreement in question here that it contains no language limiting its operation to the prosecution of suits outside the state of Maine, but included suits instituted in the state of Maine as well as elsewhere. It is, however, true that the circumstances attending the making of the agreement show that the object of the agreement was to procure the institution of a suit in New York; that a suit in Maine was not contemplated, and all the services rendered by the plaintiff in pursuance of the agreement were performed in New York. Upon the facts, the plaintiff, in opposition to the contention of the defendant, insists that his agreement was an agreement to be performed in New York, and therefore is to be judged according to the law of New York, and not according to the law of Maine.

Upon this question my opinion is that the validity of the agreement in question is to be determined by the law of Maine, and that the effect of the statute of Maine, already referred to, is to render the agreement void; for the plaintiff, when he entered into the agreement in question, did an act made criminal by the law of the place where the act was done. The statute of Maine forbade the doing in the state of Maine precisely what the plaintiff did when he agreed to prosecute Webster's suit on shares. As soon as the agreement was made, the plaintiff became liable to indictment in the courts of Maine for making the agreement, and to such an indictment it would have been no answer to say that he contemplated doing other acts in New York in accordance with the agreement. A criminal act can never be the foundation of a lawful agreement. The agreement was void at its inception, because the making of such an agreement was made criminal by law. For this reason the agreement could not be enforced in a court of Maine, and, if not enforceable in Maine, it is not enforceable Says the supreme court of the United States in Coppell elsewhere. v. Hall, 7 Wall. 549: "The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." So, also, the court of appeals of New York in Hyde v. Goodnow, 3 N. Y. 269, says: "Assuming that the contracts in question had been made in Ohio, and that by the laws of that state such contracts are declared void, the courts of this state would be bound also to declare them void, though by their terms they were to have been performed here, and though, if made here, they would have been valid."

But the plaintiff contends that this contract was lawful because the place of performance was in New York. But it seems to me to be plain that, inasmuch as the act of making the agreement could not lawfully be done in Maine, the circumstance that other acts were intended to be done in New York in pursuance of the agreement cannot render lawful the act that was done in Maine. In such a case as this there is no room to apply the fiction of the law that the place of performance of a contract is to be deemed the place of making it. Here the question of the illegality of the agreement arose before anything was done in New York, because of the character of the agreement, and not because of the character of acts intended to be performed in pursuance of the agreement. The plaintiff, for what he did in performance of his agreement within the state of New York, could not be indicted in Maine, but for what he did in Maine he could be there indicted, and that act is the foundation of his claim to recover in this action. He is asking the law to enforce a claim founded on a violation of the law. It is upon this point that I base my decision, and I find nothing in any case cited, including Pritchard v. Norton, 106 U.S. 124, that should compel a different conclusion.

But it may be added that it is far from clear that New York can be held to be the place of performance of the agreement in question. As executed in Maine, the agreement constituted a present assignment, then and there made by Webster, of an interest in a claim then belonging to him, a citizen of Maine. The plaintiff was to be paid one-third of such sum as might be received by Webster by virtue of the will. A reception of the money by Webster, before any division with the plaintiff, was clearly contemplated, and there is nothing whatever to indicate that such division was to be made in New York. The situs of Webster's personal property is Maine, and what the agreement provided for is a division of a portion of his property. It seems difficult, therefore, to hold that New York was by the agreement made the place of performance. My decree, therefore, is that the plaintiff cannot recover, and his action is accordingly dismissed.

Inasmuch as no appeal can be taken from my decree, I have delayed promulgating this opinion in order to submit it to Mr. Justice BLATCHFORD, when holding court in this district, and, having so submitted it, I am authorized by him to say that he concurs therein.

United States v. Chase and others.

(District Court, N. D. New York. January 28, 1886,

Post-Office—Money-Order Department—Employment of Clerks—Power of Postmaster.

A postmaster has no authority to employ clerks to assist him in the moneyorder department, and to pay them out of government funds in his hands, without the authority of the postmaster general.

George B. Wellington, Asst. U. S. Atty., for plaintiff. George F. Comstock and George Doheny, for defendants.

COME, J. From January 1, 1876, until January 1, 1884, the defendant Austin C. Chase was postmaster at the city of Syracuse, New York. During that period he retained, from moneys received by him officially, the sum of \$5,894.91, which he expended for clerk hire in the moneyorder department of the office. This action is to recover that sum, with interest, the plaintiff contending that the expenditure was unauthorized.

Prior to October 1, 1876, the yearly salary of the postmaster at Syracuse was \$4,000, and he was allowed the sum of \$500 per annum for clerk hire in the money-order department. On that day his salary was reduced to \$3,000, and he was allowed, in addition thereto, whatever sum, not exceeding \$1,000 per annum, might accrue as commissions on the transaction of the domestic and international money-order business of the of-The allowance of \$500 for clerk hire was discontinued, and no new allowance was made. The letter announcing these changes was dated at Washington, September 25, 1876, and was signed by the superintendent of the money-order system. The postmaster was also notified that the employment of any portion of the time paid for, out of postal funds, of his clerks in performing money-order service, was strictly prohibited, and that all clerical service requisite for the transaction of money-order business, not authorized to be paid for out of the allowances made by the post-office department, must be performed by him in person, or paid for out of the commissions accruing to him from his money-order business. This letter simply stated the law as it existed in the statutes and regulations of the department.

The defendants insist that the \$1,000 allowed as commissions was intended for the postmaster personally, as compensation for his services and responsibility in taking charge of and managing so extensive a business; that it was not the intention of the department to reduce his salary, but simply to divide it, paying \$3,000 for the general business, and \$1,000 for the money-order business. He retained this sum, \$4,000 annually, as his own; and, finding it impossible to transact the business of the money-order department without assistance, he employed two clerks, and paid them as before stated. It is because the department refused to allow this disbursement that the deficiency appears in his account.

The question to be determined is whether the postmaster was justified in employing these clerks, and paying them out of government funds, without the authority of the postmaster general. The defendants insist that he (Chase) was justified in so doing by the necessities of the situation; that it was impossible for him to transact the business alone, and, as the department failed to furnish the necessary assistants, it was permissible for him to procure them himself. It is thought that there is no authority in the law to support this contention. It was the evident design of congress to vest in the postmaster general the management and control of the various post-offices throughout the country. He was the general agent of the government, charged with the supervision of the

moncy-order system. It was for him to determine what sum, if any, should be expended for clerk hire. Nowhere is this duty devolved upon the postmaster. If the postmaster general failed to make an allowance, —assuming his power to do so under the Revised Statutes,—it did not, for that reason, become proper for the postmaster, disregarding the express instructions of his superiors, to employ such clerks as in his judgment were necessary. To concede such power to the postmaster would permit him to usurp the authority which the law has vested in the postmaster general. If the contention of the defendants is correct, a postmaster is at liberty to employ as many clerks as he sees fit, and the question of necessity is for a jury, and not for the post-office department, to determine. Surely this was not the intention of the law-makers.

In the present case the employment was not only without authority of law, but it was in the face of an express prohibition by the department. The postmaster was plainly informed that after October 1st his salary would be \$3,000; that, for transacting the money-order business, he would be allowed commissions not exceeding \$1,000, with nothing for clerk hire. If he found it impossible to do the work personally, he could lawfully procure assistance, but it is entirely clear that, if he saw fit to do this, it was his duty to pay for it. The post-office department may have acted with injustice; the postmaster may have received less than his services were worth; but this does not answer the proposition that the order of September 25th was one which the department was authorized to make, and one which it was the postmaster's duty to obey.

The case of *U. S.* v. *Dick*, if the report furnished to the court correctly states the facts, cannot be regarded as a controlling authority, as the question now presented was not involved.

The plaintiff is entitled to the judgment demanded in the complaint.

CENTRAL TRUST Co. of N. Y. and another v. WABASH, St. L. & P. Ry. Co. and others.

(Uircuit Court, E. D. Missouri, December 30, 1886.

1. RAILROAD COMPANIES — RECEIVERS — ORDERS CONCERNING SURRENDER OF PROPERTY EAST OF THE MISSISSIPPI, AND MANAGEMENT OF WHAT IS RETAINED —JURISDICTION—COURT OBLIGATIONS.

The Wabssh system of roads was originally placed in the hands of receivers in a suit instituted by the Wabssh Company itself. A suit to foreclose a general mortgage on the Wabssh property was subsequently instituted, and consolidated with the first suit. The receivers first appointed were retained in possession, and have administered the whole property ever since. They have been appointed by the courts of ancillary administration, as well as by this court. Recently they were removed in the Seventh circuit, and a receiver, appointed by the circuit court of that circuit in a foreclosure suit pending before it, ordered to take possession of the main Wabash lines within the jurisdiction of that court. In the suit instituted here the mortgage has been fore-

Reported by Benj. F. Rex, Esq., of the St. Louis bar.

closed, and the property sold, but has not yet been delivered. Upon the application of the receivers of this court for instructions, it is ordered (1) that said receivers shall relinquish control of roads east of the Mississippi, of which the receiver appointed by the circuit court of the Seventh circuit shall, under the orders of said court, take possession; (2) that said receivers shall cease the further operation of lines east of the Mississippi, whose earnings have not been in excess of their operating expenses, unless within 30 days some satisfactory guaranty is given that all future deficit arising from such operation shall be promptly paid to them; (3) that they shall deliver to the receiver appointed in the Seventh circuit all books of account which they have in their possession in which the accounts of the roads passed into the hands of said receiver are alone kept, if any there be, but shall retain possession of all general books of account, giving said receiver, however, full facility of inspection and copy; (4) that they shall retain possession of all moneys now in their hands, or which may hereafter be received, from the earnings of roads in their possession, or from the purchasing committee, subject only to the orders of this court: (5) that they shall surrender all rolling stock, if there be any, which is covered by the mortgages in whose foreclosure the new receiver was appointed in the Seventh circuit; (6) that any controversy which may arise between them and the receiver in the Seventh circuit, in determining what property shall be surrendered, shall be reported to this court; (7) that the operation of the lines in the hands of the receivers appointed by this court shall be independent of all other lines; (8) that there will be no dismissal of the case pending in this court as to any parties or interests or causes of action, or any relinquishment of any jurisdiction which is now vested in this court; (9) that the burden of the court obligations, including receivers' certificates, be apportioned to the different branches, and that the master report the earnings and expenses of all lines and branches separately, and the time of their operation by the receivers, up to December 31, 1886.

2. Same — Delivery of Possession to Purchasing Committee — Payment — Rond.

It is further ordered that the said purchasers of the Wabash property shall pay, within 60 days, into the registry of this court, \$1,000,000 in cash or receivers' certificates, and give bond in the sum of \$1,000,000 to pay the further awards, and to comply with all further orders of this court, and take possession of the entire property, subject to the right of this court to retake possession on non-compliance with further orders; and also subject to all the terms and provisions of the final decree and the order of confirmation.

In Equity.

Application of the receivers for instructions as to the surrender of certain property to Thomas M. Cooley, who has been appointed Wabash receiver by the circuit court of the Seventh circuit, in the foreclosure suit of Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. Rep. 161.

W. H. Blodgett, for receivers.

Brewer, C. J. During the last two days we have received a petition from the receivers of this court, reporting to us the action that has been taken by the circuit court of the Seventh circuit, and asking instructions from this court as to their action. We have also received an application of the purchasing committee, and the form of an order which they desire.

I may be pardoned if, preliminary to a formal statement of the orders that will be entered, I refer to some matters in the history of this litigation. The Wabash road was a road extending through several states,—states within the jurisdiction of several circuit courts of the United States. There was one general mortgage covering the entire property, and underlying mortgages upon several local lines which had entered into and be-

come part of the Wabash system. Proceedings were commenced in this court as a court of primary jurisdiction, and receivers were appointed by this court. Of the propriety of a foreclosure in one court operating upon the entire property running through several states, and of the validity of a sale made in pursuance of that foreclosure, and the completeness of the title which will pass by such sale, there can be now no longer a question. In the case of Muller v. Dows, 94 U.S. 444, that question was put at rest. In the early history of foreclosure proceedings of this nature it became customary, not merely that foreclosure proceedings should be conducted in the one court, but that, to avoid all questions of title, ancillary proceedings should be conducted in the courts of other circuits; and to conserve the property pending the foreclosure—to guard it against local suits, and preserve it from dismemberment—the custom has also been for the receivers appointed in the court of primary administration to be also appointed in the courts of ancillary administration. That proceeding was had in this case: Messrs. Tutt and Humphreys were two and a half years ago appointed receivers of the entire property by this court as a court of primary administration. Their appointment was confirmed in the several courts exercising ancillary administration, and they have continued in such administration of the entire property up to the present time. So far as concerns the receivers themselves, it is fair to them to say that Mr. Humphreys was named to the court by not only the mortgagor, but by the mortgagees in the general mortgage, and indorsed by a large majority of the trustees in all the mortgages. Doubtless he was suggested to them by reason of his long connection with and knowledge of the affairs of the road, and by his large experience in railroad matters. The other gentleman was named by this court, with the thought that it would be well to have a local receiver sharing in the administration of this property, and in naming him the court selected a citizen of this state distinguished for his business capacity, and for purity of character. Their administration has been so successful that, during the length of two years and a half in which it has been carried on, not only has there been no challenge in the court of primary administration of the propriety of their appointment, but there has not even been a suspicion suggested here of any impropriety of conduct on their part, or of any lack of fitness for the duties intrusted to them.

The records which exist show that in 1883, a year prior to their appointment, the earnings of the road were, per mile, (leaving out the cents,) \$4,715; the expenses, \$3,826. In the year 1884, the first five months of which the road was operated by the company, and the last seven months by the receivers, the earnings were \$4,650, and the expenses \$3,895. In the year 1885, of which they had charge during the entire year, the earnings were \$4,738; the expenses, \$3,995; and in 10 months of this year their earnings have been \$5,296 per mile; their expenses, \$3,997. When, in addition to that, it is borne in mind, as a fact well known, that the road, prior to their taking possession, was in many places in a very unsafe condition, and that they have expended \$445,000 in placing steel rails in the track, \$1,303,000 in bridges, and have the

road to-day, in nearly its entire extent, in the best possible condition, I think it safe to say that results attest the wisdom of their appointment, and that such results entitle them to receive, from any unbiased mind, commendation rather than blame.

As appears from the certified copies of orders that have been presented to us, the circuit court of the Seventh circuit district, disregarding the comity which has heretofore existed between the federal courts, has removed these receivers, and appointed a distinguished citizen of the state of Michigan as their successor, for the lines within the jurisdiction of that court,-I say in disregard of the comity which has existed between courts of different circuits; for the pretext of enforcing local liens, said orders are too transparent to deceive any one, and for two reasons: First, there will be no line extending through various states without the creation in those states of local liens by mortgage, judgment, or otherwise; and, secondly, a foreclosure of those local liens may proceed independent of any receivership. But that court is a court of equal jurisdiction—of equal power and rank with this, and this court disclaims any intention of questioning or reviewing its action. We have no appellate jurisdiction, and the practical question which comes before us is, what action shall be taken by this court upon the basis of the present status? As by the act of removing these receivers from the custody and control of certain portions of the Wabash line, some measure of power for protecting the entire property is taken away, the duty of this court is to take special care of the property left in the hands of its receivers, and to see that it is fully protected, and managed for the best interests of all concerned. Full jurisdiction, under the Wabash foreclosure, over the trustees in all the mortgages, having been acquired by this court, the power of foreclosing, as it did, the general mortgage, the power of apportioning the burden of receivers' certificates, and every court indebtedness, among all the varied lines that went into and formed this single system, remains with this court, and, under the circumstances, it is fitting that such apportionment shall be proceeded with at once.

In the final decree which was entered, there was no attempt at any foreclosure of the underlying mortgages. The decree was the common one of a foreclosure of a junior mortgage, and the direction of a sale of the property subject to the burden of the underlying and prior incumbrances. The purchasers, when they purchased, took the property burdened with these underlying mortgages; but did not by that purchase assume the payment of them. The holders of these mortgages had, notwithstanding that purchase, no other security than their mortgages, and the property upon which they were liens. It was provided, however, in the decree, that the purchasers at such sale should take the property subject to the duty of paying off all receivers' certificates, and all debts created by this court. They made their purchase with full notice of these provisions in the decree. They have paid the purchase price. The sale has been confirmed; the deed made. As provided in the decree, the possession has been and is still retained by the receivers, and is to be retained until such time as payment shall be made of these

court obligations, or such security furnished as shall be deemed adequate.

We are well aware that in managing so vast a property, and in the organization of a new corporation of such magnitude as that proposed, some time must be taken; and we are aware of the fact that there has yet been no order entered by this court as to the time within which the purchasers must pay these obligations, and take the property from the hands of the court. We think that time enough has been given for the perfecting of the organization of the new company, and for all other preliminary matters; and that the time has now come when the court should make an order for the payment or security of the debts created in the administration of this estate, and for the taking possession of the property by the purchasing committee.

With these preliminary statements, I proceed to formulate some orders which will be entered. It is expected that counsel will prepare orders that embrace the ideas which will be presented, for I have not had

time to draft, in full form, the orders.

In the first place, the receivers will relinquish control of all roads east of the Mississippi, of which Receiver Cooley shall, under the orders of the circuit court for the Seventh circuit, take possession. We are advised by the petition of the receivers that there are several minor branches or lines within the limits of that circuit which do not appear within the terms of the order directing Receiver Cooley to take possession. They are lines disconnected from the lines west of the river, whose sole connection, so far as the Wabash system is concerned, is with the lines east of the river, of which Mr. Cooley is ordered to take possession. It further appears from the report of the receivers that every one of those lines, with perhaps one exception, has been operated at a loss during the last two years and a half. It would be folly for these receivers, having no possession of the main line with which those branches are connected, to continue to operate, at a loss, those local lines. So the order will be that they will cease further operation of all the lines east of the Mississippi river whose earnings have not been in excess of their operating expenses, unless within 30 days some satisfactory guaranty is given that all future deficit arising from such operations shall be promptly paid to them.

Second. They will deliver to Mr. Receiver Cooley all books of account which they have in their possession, in which the accounts of the roads passed into the hands of Mr. Receiver Cooley are alone kept, if any there be. They will retain, however, possession of all general books of account, giving to Mr. Receiver Cooley full facility of inspection and copy. The intent, of course, is that every facility shall be accorded which is possible to enable him to administer the trust confided to him, successfully.

Third. They will retain possession of all moneys now in their hands, or which may hereafter be received from the earnings of roads in their possession, or from the purchasing committee, subject only to the orders

of this court.

rourth. They will surrender all rolling stock, if there be any, which is covered by the mortgages in whose foreclosure Mr. Receiver Cooley was appointed. Any controversies which may arise between them and Mr. Receiver Cooley in determining what property shall thus be surrendered, will be reported to this court.

Fifth. The operation of the lines in the hands of the receivers will be independent of all other lines. They will make the best traffic and running arrangements with Mr. Receiver Cooley, or with the managers of

other railroad lines.

Sixth. The officers, and employes under them, will confine themselves to such employment. In other words, if there is to be an independent administration across the river, it will provide the officers and

employes to carry on such independent management.

Seventh. There will be no dismissal of the case pending in this court as to any parties or interests or causes of action, or any relinquishment of any jurisdiction which is now vested in this court. The burden of the court obligations, including receivers' certificates, will be apportioned to the many different branches; and the master will report the earnings and expenses of all lines and branches separately, and the time of their operation by the receivers, such report to be carried up to December 31, 1886.

Eighth. And this refers to the requirements of the court in respect to the purchasing committee. We are not satisfied with the suggestions that they have made to us in their petition or order presented. It appears from the statement that has been furnished to us that there are now due, or will become due by the close of February, about \$750,000 of receivers' certificates. Therefore the purchasing committee should be directed to pay, within 60 days, into the registry of this court, \$1,000,000 in cash or receivers' certificates, and to give bond in the sum of \$1,000,000 to pay the further awards, and to comply with all further orders of this court, and to then take possession of the entire property, subject to the right of this court to retake possession on non-compliance with further orders; and also subject to all the terms and provisions of the final decree and the order of confirmation.

TREAT, J., (orally.) In order that this matter may not be misunderstood, for it is important in its vast-reaching consequences, it should be stated that this was not an application by a mortgagee to foreclose. It was an application by the corporation itself, concerning which a great deal of comment has been made elsewhere. The application was originally made to myself, in this circuit, which is limited in extent. I hesitated. I found that Judge Shipman, a very learned and able judge, had gone over in extenso that class of thought. After further consideration with respect thereto, I reached the conclusion that his views were correct, to-wit: Here is a vast system, extending through many states and many judicial districts. A default, it was certain, would be made in a few days. What should be done? The interests of all concerned required that some judicial action should be had for the conservation of those inter-

ests,—stockholders, bondholders, creditors at large, etc. And after patient thought, I reached the conclusion that Brother Shipman was right. Since that time, fortunately, the supreme court of the United States has said that it is right. Now, if any one in or out of judicial position chooses to dispute the action of this court, that party may settle that controversy with the supreme court of the United States, which is authoritative, so far as the action of this court is concerned. It was a judicial question.

Now it so happens, as the records of this court show, that in the year 1876,—one of the earliest matters connected with this line of administration,—in the Case of Ohio & Mississippi Ry. Co., extending from Cincinnati into this circuit, parties thereto had suit instituted against it in the circuit court of Indiana. That was the court of primary administration which is within the Seventh circuit. The whole course of that proceeding went forward, not in comity alone, but in the wisdom of administration. Application was made to this court. Application was made to the Southern district of Illinois; and, in the course of the administration, the court of primary jurisdiction had occasion to make changes, by resignation or otherwise, in the receivership of the general system of the line, to which, without exception, this court assented, the court of the Southern district of Illinois assented, and that whole line of administration went forward, as the records of this court show, with the signature of the then judge there, without dispute.

It so happened, I may remark in passing, that, in the absence of my brother judge. I have at every term of this court called upon the counsel -I do not know whether they are now present or not-to know why those accounts are not closed. It seems, from these frequent reports here, for that long series of years those accounts have not been closed. Why? This court might have exacted a final settlement of the accounts of those receivers, the property having long ago been turned over to the parties of record in the United States court of Indiana, retaining them on their liability on their bonds. That delay has existed to this hour. That court has been not quite so exacting as this court is. should have been settled, but it is unsettled at this hour. of administration of these matters we have found that not by comity alone, but by the wise administration of the law in regard to these interstate matters, we have proceeded with perfect harmony. At last we encounter a difficulty. How shall it be solved? Without affirming or denying what has been done elsewhere, -without being unjudicial enough to comment upon what has happened elsewhere, -this court yields its administration to no one except an appellate tribunal. Thus standing, being thoroughly satisfied that the original action of this court was correct, not only in taking possession of these vast properties, but also in the appointment of its receivers, I have only this to say: An intimation has been made, which I see before me, that the district judge (myself) refused to pass the original order. It is true in one sense; it is false in another sense. After having satisfied myself that the order was proper, it occurred to me, as the limits of my jurisdiction were only within this

one district, it was wiser and better that the order should come from the circuit judge, whose jurisdiction, so far as these properties are concerned, extended over all the properties west of the Mississippi river. It was not because I thought that the order should not be granted. I fully concurred with what was done. It was a mere suggestion that the order from the circuit judge would be wiser and better, and I so informed my brother judge at the time, and I assume the full measure of responsibility, if there is any, to be attached to it. I hold, however, that the action was right from the beginning to the end, and I stand on that proposition. It was the duty of this court, under the circumstances presented, to take possession of this property, and conserve the interests of all concerned.

It is said, and no one more than the judges of this court can be satisfied that it is true, that there had been an unwise administration of this property. If there had not been, there would have been no need to make an application to this court for the appointment of receivers. But what has this court to do with it? We are not to go back through the past administrations of these properties to ascertain whether, wisely or unwisely, the persons to whom that administration was committed, blundered, or otherwise. The simple proposition submitted to this court was this: Here is a vast property, in a bankrupt condition,—whether through mismanagement or otherwise, was immaterial to this court. Connected with that property were the rights of stockholders and general bondholders, bondholders under underlying mortgages, general creditors, and, further than that, the duties of these corporations to the public at large, and to the state which granted them their franchises.

What is the first inquiry with regard to these matters? The franchise was granted by which the obligations of a common carrier were imposed. All the persons along the line of these various roads, extending through several states, possibly, have contributed their money, in one form or another, for the purpose of having railroad facilities. That matter, to a greater or less extent, has been presented to the consideration of this court heretofore. When franchises of this kind are granted, as was often stated by this court long before my brother judge came upon the bench, to which I suppose he will not dissent, their primary obligation was to the sovereign who granted them the franchise. They undertook, first, to pay their dues to the government, in the nature of taxes; second, they undertook to run a safe operating road,—safe to life and to the transportation of property. Did they do it? Suppose they cannot do it? Then they fall within the judicial administration to compel them to do the best they can. That is all there is in that branch of the inquiry.

Now, in the course of such administration—it not being new at all, having, so far as my memory serves me as to the course of proceeding, originated in the Indiana district, and been followed up by this court, and by all the other courts,—we have had no difficulty. The court orders that the receivers shall first pay the taxes; second, make the road

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which they are running as receivers safe, and, whatever expenditures are necessary therefor, the court directs them to make, and, if they do not receive funds enough directly for the accomplishment of that purpose, the court will direct them to issue receivers' certificates, which shall be prior in right to all underlying mortgages. And why not? If the parties who have underlying mortgages choose not to come into court, and ask the surrender of their property to the parties interested therein, what shall be done? One of two things is necessary,—the court must either stop running the road, or an expenditure be made for the benefit of all parties in interest, the underlying mortgagees as well as everybody else, in order that it shall be made a going concern. Otherwise, in the expressive language of a distinguished friend, you have nothing but a streak of iron-rust on the prairie. The value of these properties consists in their being in operation. Who shall pay for the operation? body. Now this court has said from the beginning to the end of this matter, -it is nothing new or recent, but as old as the organization of this court, as old as that Indiana case, the Ohio & Mississippi Case,—if you desire us to run your property at a dead loss beyond the operating expenses, receivers' certificates have to be issued in order to get the money to do it, and you must take your portion, when the matter is equitably adjusted, of the costs of so doing. So stands the case to-day. Whenever a party has appeared in this court from the beginning to the end of this controversy, objecting that "You don't pay the rental" in some cases, and the interest on underlying mortgages in other cases. the thought with the court has been, what shall be done? If you wish that road to be run, and there are no funds in the hands of the receivers to run it, who shall pay for the running? It must run at your expense. It so happens that, with regard to many of these sectional divisions. there have been surplus earnings above the fixed charges, bearing in mind all the while that this is a general mortgage. What shall be done with them? So long as these underlying mortgages have their interest paid, there being a surplus, no difficulty will arise, and such has been the line of administration by this court. If there be a failure to pay rentals, where it is a rented road, or if there be a failure to pay the interest on underlying mortgages, make your application, and the court will surrender your property to you. No difficulty has occurred in regard to it until recently.

I do not know how many of these cases have occurred. I cannot recall them in my present memory, but a great many have so occurred, and the roads have been surrendered from time to time. I remember the Cairo line. I remember a line over in Indiana; and I remember also, in the wisdom of administration, while the party insisted upon his right as trustee under a mortgage to take possession of a subdivision, and the court granted it, that this court was afflicted a few days afterwards with an application of that trustee, the road having no rolling stock whatsoever,—leaving it a mere piece of old iron on a road-bed,—to permit an order on the receivers to operate it for the benefit of the concern. I hesitated about it. Brother Brewer was not here, but

finally the order was passed, if my memory is correct, to this effect: "This will be permitted, but at your expense."

So, as to the practical operation of these matters, there being no difficulty in theory in my mind with regard to them, we reach the question, "What shall be done?"

Without affirming or denying, as I have heretofore stated, what has occurred elsewhere, as to its legal force or otherwise,—that will remain for other parties to test at a proper time, before an appellate tribunal, if it is so desired,—these orders which I assent to, as suggested by the circuit judge, will be that this court retains its jurisdiction in the manner stated, and what is done with regard to the receivers of this court in turning over to Judge Cooley the matters included within the orders of the circuit court of the Seventh circuit will be so done; but Brother Brewer did not state what is in my mind, and I do not know whether he will concur with me when I state it; I state my individual view.

In taking possession of these lines, which is permissive, nothing else, whereby our receivers may be discharged from obligations hereafter arising with respect thereto, it is only a discharge of our receivers to that extent. These roads will remain, and must remain, subject to all the obligations heretofore created with regard to them. The receiver takes them as they are, as stated by Brother Brewer, as an independent system. If there should be any rolling stock, it belongs to that concern independent of the general system. Under the order, the receivers will turn it over. If there is none, Brother Cooley will have to do the best he can to run his roads.

Now, one word more. Under the maps submitted to this court, it appears there are little fragments of roads left. As I remarked pleasantly, the other day, those fragments begin and end nowhere. They are not included in the terms of the order of the Seventh circuit. What shall be done with them? I presume that they are important for local conveniences of administration. What is to be done with them? They are all behindhand, Brother Brewer says, -all except one. I am not sure about that. I think they are all in that condition. I am speaking of the Illinois roads,—those little fragments presented to us on the map. They have been run at a dead loss. If our receivers retain possession, who is going to pay for the running of them? Where is the money to come from? Unless somebody will guaranty our receivers whereby they may be saved harmless, they must drop the operation of them; and, if the misfortune falls upon the good people in that neighborhood of having no railroad facilities, that will be the result of the order in the Seventh We have nothing to do with that.

If others choose to break up the line, and deprive people of railroad facilities, the consequence is not with this court. The exception to which reference has been made is this Butler line to Detroit, which, under the terms of the order as presented to the court, still remains in the possession of our receivers. It turns out that that has been operated profitably, and it still remains with our receivers to operate it. It is obvious, however, unless it is operated in connection with the system which

passes to the hands of Judge Cooley, it may be very much damnified, and also that portion of property which Judge Cooley will take possession of will be in a still worse condition. With that outcome in dollars and cents this court has nothing to do at this time.

Now, to summarize. 1. The original application of this case was presented to myself. After full consideration, I had no doubt that it was rightfully presented, and that an order should issue with respect thereto. I affirm, further, that since that time the supreme court of the United States has affirmed that doctrine. Now, if any one chooses to dispute that doctrine, that is a controversy between himself and the supreme court of the United States. We choose to rest on our original judgment, fortified by the decision of the supreme court of the United States.

2. The intimation that I refused that application, and my brother judge—the circuit judge—overrode my views with regard to it, is not correct. I did not refuse it. I simply suggested that it should come

from the circuit judge.

3. In the administration of these matters the course pursued is no new one. If an insolvent body, like this vast corporation, cannot meet its obligations, what is to be done? That was the question presented to the court. Proceed to conserve the rights of every one, and in doing so, if any one of the varied parties, by sectional divisions or otherwise,—creditors at large, no matter who they were,—are dissatisfied, we say, make your application to the court, if you prefer, and get out of the system. The court will give you leave so to do, and it has so permitted many of them to do; and in the very terms of the final decree that is expressed distinctly, that all these parties in the underlying mortgages may proceed to foreclose their underlying mortgages in the proper tribunal, if those parties so desire. A great many have been separated in the course of this administration, thinking they could do better under a separate system, and the court uniformly has so ordered. Now, what is the fact? If these parties—the underlying mortgagees—choose to proceed to foreclose them, they have the unquestioned right so to do, and so this court has decided, over and over again, and expressly so stated in its final de-But this court is not to discharge, and will not discharge, during the operation of the receivers of this court, those sectional divisions where there are underlying mortgages, until they meet their requirements, as fastened upon them by the operations of our receivers. They remain subject to all charges prior in right, even to their mortgages, or they might have come here long ago, and been discharged.

CONNER v. PIONEER FIRE-PROOF CONST. Co.

(Circuit Court, D. Minnesota. December 16, 1886.)

Negligence—Defective Scaffolding—Conflict of Testimony—Verdict
 —Motion for New Trial.

In an action to recover damages for a personal injury, caused by the negligence of the defendant in not providing safe scaffolding for plaintiff to stand upon while tiling a ceiling, where the testimony of a number of witnesses for defendant is that the tilers who used them built the scaffoldings, and a less number, for plaintiff, testified positively that defendant employed two persons for the special purpose of building the scaffoldings, held, that there was sufficient evidence to justify the jury in finding defendant responsible for the defective scaffolding.

2. Same — Pleading — Special Damages — Evidence — Wages before and

AFTER INJURY.

In such a case, although no special damages are alleged, the plaintiff being an ordinary mechanic, testimony showing the difference between the wages earned by him before the injury, and those he was able to earn afterwards, is competent to show the extent of his injuries. Such testimony is not proof of special damages.

8. SAME—INSTRUCTIONS—DECREE OF CARE.

The court having instructed the jury at the commencement of the charge that an employer is bound to exercise reasonable care and diligence in providing a safe place for his employes to work, it is not error to refer to the matter without using the word "reasonable," in giving instructions on other questions.

At Law. Motion for new trial.

A. J. Rogers, for plaintiff.

O'Brien, Eller & O'Brien, for defendant.

Brewer, J. In the case of Conner against the Pioneer Fire-proof Construction Company, tried before me, wherein the jury returned a verdict for the plaintiff, a petition for a new trial was allowed. I was in hopes that this application would be submitted to Justice MILLER, as the case is one upon which I have great doubt. The facts, in a general way, are these: The plaintiff was employed as a tiler in the West Hotel, in Minneapolis, the defendant having the contract for the In pursuance of that work, it was necessary for the tilers to go upon a platform in order to reach the ceilings, which were quite high. In some of the rooms the ordinary horses used by the plasterers were high enough so that they could reach the ceiling; in others, these horses were not sufficiently high, so they were in the habit of extending the legs by nailing boards upon them, which raised the height of the horses, and consequently of the platforms. Upon a platform placed upon horses thus raised, the plaintiff, with other tilers, went to work. Scarcely had he gotten thereon before something gave way, the platform fell to the floor, and he was injured.

It was claimed on the part of the plaintiff that one of the boards thus nailed was defective, and insufficient to support the weight that was put upon it; and that there was negligence on the part of the defendant in sending the plaintiff onto a platform thus defectively supported.

There was testimony showing that a man by the name of Simpson and his son were employed specially to prepare the platforms; and, on the other side, there was testimony showing that the tilers themselves had charge of the preparation of these platforms; that the horses, boards, and platforms were all there, and that the duty was placed upon the tilers generally to see to the preparation of their own platforms. The jury found for the plaintiff.

I charged the jury, substantially, that if the defendant had furnished the material, horses, boards, and platforms suitable and sufficient, and left with the tilers generally the duty of preparing their own platforms, and this platform, so prepared, was defective, that was the negligence of the employes, and the employer would not be liable; while, on the other hand, if the employer had employed special individuals—Mr. Simpson and his assistant—to attend to the work of preparing the platforms, and they failed to prepare a platform that was reasonably safe, their negligence was the negligence of the defendant, and the company would be responsible. That is really the pivotal question in the case, and it is one that, upon all the testimony, has greatly embarrassed me. sider that a very important question: in fact, if the matter were left to my judgment alone. I think I should be compelled to say that the preponderance of the testimony showed that the company left the preparation of the platforms to the tilers as a body, and had no special employes, or any particular individuals, to do that work. But there was the positive testimony of one or two witnesses that Mr. Simpson and his son were specially employed to do that work, and to attend to it solely; and what has embarrased me is whether or not I was justified in holding that there was sufficient evidence to uphold the action of the jury in finding that Mr. Simpson and his assistant were the parties upon whom this special work was cast.

Wherever there is a manifestly doubtful question of fact,—one that I feel a jury may, without any impropriety, find one way or the other, according as they believe that witness or this,—I never stop to review the action of a jury in its finding. In this case it has seemed to me uncertain whether it could be held that there was such a question. That was the reason I was in hopes that my Brother Miller would take this record, look at it, and pass his opinion upon it. As he did not, I must dispose of the case, and I have concluded that the testimony is sufficient to justify the action of the jury, and that the direct testimony of the fewer number of witnesses as to this special employment of Mr. Simpson and his assistant did present such a question of fact that I ought not to interfere with the decision of the jury in this respect.

That, as I said, is the pivotal question in the case. Several other matters are suggested, but it seems to me they are of minor significance.

It is insisted that the general scope and drift of the charge was such as to convey to the minds of the jury the idea that there was an absolute duty on the part of the employer to make the place of work safe, which, of course, is not the law. It is his duty to use reasonable care and diligence to provide a place of safety. At the commencement of my charge

I so stated the law. It is true that subsequently I did not every time use the word "reasonable," in speaking of this matter; because, having once laid down the rule, and realizing that the real question was as to whether that was in this case a duty borne by the employer, or cast upon the entire body of employes, I was trying to make plain to the jury the distinction between these two phases of the case. I do not conceive it to be the duty of the court every time it refers to a matter to incorporate all the limitations and all the restrictions which apply thereto, when they have been once stated. Such a repetition would be very apt to confuse,

rather than enlighten, the jury.

Further, it is insisted that no testimony should have been allowed to go to the jury as to the wages this plaintiff was earning prior to the accident and those he was able to earn thereafter. The petition does not allege any special damages. This plaintiff was an ordinary mechanic, and the testimony presented was to show the nature of his injuries, rather than to lay the foundation for any special compensation. I doubt not that if the plaintiff had been one gifted with some peculiar skill in the hands, or otherwise, as, for instance, a painter, who by his skill in the use of the brush is able to earn enormous sums of money, and thereafter, when that ability to earn is taken away by physical injury, he seeks relief to the extent of such loss, there should be a special allegation in the pleading, so as to call the attention of the defendant particularly to the claim. But when the case is that of an ordinary mechanic, (a mason,) and the question presented is simply as to the extent of the injuries suffered, I think the defendant is not prejudiced if, even without an allegation of special damages, the plaintiff is permitted to introduce testimony as to what he was able to earn before and after the accident. It is not one of those matters which I think, in the strictest and more technical sense, can be said to be special damages. At least, the error, if error it be, in admitting the testimony, did not work any substantial injury to the rights of the defendant.

There are one or two other matters of a similar nature that are suggested, but, as I stated before, the pivotal question is as to whether the defendant placed the work of preparing these platforms with the tilers, as a body, thus making them responsible for their construction; or whether it employed some other individuals to do it for them. That question the jury have determined, and I am constrained to say I think there was sufficient testimony to justify that conclusion.

Motion for new trial denied.

MILMINE v. Bass and others.

(Circuit Court, D. Indiana. December Term, 1886.)

1. EXECUTION — LEVY ON REAL PROPERTY — ABANDONMENT — SECOND LEVY —

RULE IN INDIANA.

If, in Indiana, the owner of an execution releases and abandons a levy made upon real estate sufficient to satisfy a part only of the writ, and causes a levy and sale of other real estate, the sale will not be deemed void, but, being irregular, it may be set aside, if necessary, in order to do equity between parties concerned.

2. Same — Payments not Credited — Levy for Full Amount — Good-Faith

PURCHASER-NOTICE.

If an execution be issued without proper notation of credits for payments upon the judgment, and land be levied upon and sold by virtue of such writ, to a purchaser without notice of the irregularity, the sale will not, on that account, be invalid.

8. Same—Equities of Junior Lien-Holder—Other Lands Available. An execution creditor whose judgment is a lien upon different bodies of land is not bound, when making a levy, to inquire into the equities of junior lien-holders; and if, while other lands are first equitably liable to seizure, a levy be made upon a tract which is subject to a junior lien, and the holder of such lien neglects to assert his rights in court before the sale, he cannot afterwards have the same annulled.

4. Same—Remedy of Junior Lien-Houder after Sale.

If the owner of lands subject to a judgment lien has mortgaged a part thereof to A., and afterwards has mortgaged or conveyed the remainder, worth more than the amount of the judgment, to B., and thereafter the land mortgaged to A. is levied on, and sold to satisfy the judgment, B. being the the purchaser, while A. may not have the sale annulled, he may, to the extent of his interest, require B. to account to him for the value of the mortgaged property so sold on execution.

5. Principal and Surety — Extension of Time — Unauthorized Consent —

PARTNERSHIP.

Where an agreement for an extension of time upon a judgment was made between the principal debtor and the creditor, acting on the faith of a written consent signed in the name of a firm which was liable as surety in the judgment, and it turned out that, excepting one, the members of the firm had not authorized, and were not bound by, this consent, the agreement for extension was not binding upon the creditor.

(Syllabus by the Court.)

In Equity.

On May 12, 1873, Stearns & Co. recovered a judgment in the state court against Gardner, Blish & Co., principals, and Bowser, Prentis, and Falls, as sureties, for \$2,212.85. At that time Bowser owned real estate in Allen county, Indiana, worth from \$20,000 to \$30,000, on which there were liens amounting to about \$6,000. On December 31, 1873, the principal debtors paid \$354.93 on the judgment, and on January 1, 1874, the same parties paid \$145.07. On May 1, 1874, the same parties paid interest on the judgment to that date. On June 20, 1876, the principal debtors paid the interest due and to become due on the judgment up to January 1, 1877. The interest so paid in advance, being at the rate of 10 per cent. per annum on the judgment, was paid upon the agreement that the day of payment should be extended to January 1, 1877. Before granting the extension, Stearns & Co. wrote to Bowser & Co., (a firm

composed of Bowser, Prentis, and Falls,) asking their approval. The letter was returned to Stearns & Co., indorsed: "Fort Wayne, April 13, 1875. We agree to the within proposition as stated. J. C. Bowser & Co.,"—in the handwriting of J. C. Bowser.

On June 12, 1877, execution was issued on the judgment, and levied on lots 116 and 117, old plat of the city of Fort Wayne. The execution was issued for \$2,212.85, and costs and interest. There was then due on the judgment, according to defendant's computation, \$1,971.06, and according to plaintiff's computation, the sum of \$1,552.05. The property was advertised, and offered for sale, but the execution was returned on July 21, 1877, indorsed, "Not sold for want of bidders." On October 9, 1877, execution was issued, and returned October 25, 1877, "No property found to levy on." On November 26, 1877, a writ of venditioni exponas was issued, reciting former levy on lots 116 and 117, and ordering their sale. On December 22, 1877, the sheriff returned that he had advertised the property, but had made no sale for want of bidders. On July 5, 1878, a second venditioni exponas was issued, commanding the sale of the same lots. On July 6, 1878, this writ was returned indorsed as follows:

"This execution is returned unsatisfied. The within levy released. The clerk will please issue alias execution.

"July 6, 1878.

[Signed]

"C. A. Munson, Sh'ff,
"By Platt J. Wise, Deputy."

The action of the sheriff in returning this writ was upon the express orders of Stearns & Co., the judgment plaintiffs.

The alias execution was issued, and the lands in controversy levied on and sold to John H. Bass, defendant, on August 3, 1878, for \$2,000, and, not being redeemed within the year, he now holds them by sheriff's deed. On the seventh of March, 1878, Bass became the owner of lots 116 and 117, by purchase at foreclosure sales and sheriff's deeds issued thereon, and by the purchase of outstanding tax titles, at a cost of \$10,-209.34. He also, subsequent to the execution of the Milmine mortgage, became the owner of a large amount of property, conveyed to him by said Bowser and wife.

The plaintiff, Milmine, claims title to the lands in controversy under a decree of foreclosure in his favor, rendered by the superior court of Allen county on July 24, 1879, for \$6,838, upon a note and mortgage executed by Jacob C. Bowser and wife, of date June 1, 1875, to one Smith, the assignor of the plaintiff. Bass was indorser and surety for the firm of Bowser & Co. to a large amount, and, to indemnify him, Bowser and Bowser & Co. had given him a mortgage on all Bowser's property, which mortgage was junior to Milmine's mortgage and Stearns' judgment.

The questions involved in the case, as stated by the master, to whom it was referred, are: (1) Did not the levy on lots 116 and 117 render void the subsequent levy of the execution issued on the same judgment upon the lands in controversy? (2) Was not the levy of the Stearns execution upon the land in controversy void as to all parties with notice,

made, as it was, in violation of the clear equities of the plaintiff, while other lands of ample value to make the execution were liable to the judgment lien? (3) Did not the extension of time by the original judgment creditors discharge the land in controversy from the judgment lien? (4) Did not the issuing of the execution upon which the land was sold for a larger amount than was due thereon, with the intent to collect this excess, render the execution and sale to Bass thereon void?

The master found that lots 116 and 117, which were first levied on under the Stearns judgment, were of sufficient value to satisfy a considerable portion of that judgment; that, under the decisions of the supreme court of Indiana, a levy on real property, sufficient to pay the execution, or a substantial part of it, operates as a satisfaction until such levy is legally disposed of by sale of the property, or in some other legal manner, which has become a rule of property in Indiana; that, in this case, the federal courts are bound by the decisions of the Indiana supreme court, notwithstanding the fact that federal decisions are to the contrary. Hence the release of the levy on lots 116 and 117, and the subsequent levy on the lands in controversy and the sale to Bass, were irregular and void. He also finds that said release of the levy on lots 116 and 117, and the levy on the lands covered by the Milmine mortgage, was with the knowledge and by the agency of Bass; that the extension of time by the plaintiffs to the principal defendants in the Stearns judgment was with the consent of J. C. Bowser, but without the consent of Prentis and Falls; and that Bass, not being made a party to the Milmine foreclosure suit, is not bound by the decree therein.

Questions raised on exception to the report by Bass.

L. M. Ninde and T. E. Ellison, for complainant.

R. S. Taylor and R. C. Bell, for defendant Bass.

Woods, J. I do not agree with the master that, under the Indiana decisions, the levy of the Stearns execution upon the property in question was void, though it was irregular, because of the previous levy upon other real estate. It is quite clear that the property first levied upon. considering the incumbrances upon it, and the wife's contingent interest, was not sufficient to satisfy more than a small part of the sum due upon the writ; and, this being so, the decision in Lindley v. Kelley, 42 Ind. 294, is direct authority that the second levy, and the sale under it, is not to be held void merely because of the first levy, which had been abandoned by the owner of the execution. It was doubtless an irregularity to take a new execution, as was done in this case, and such an irregularity as may justify an interference by the court in order to do equity between the parties, if it is apparent that substantial rights have been violated by the sale. But, the property first levied upon having been insufficient in value, that levy did not, in my judgment, operate, under the Indiana decisions, to satisfy the judgment in the full sense; and if, on account of the irregular issue of the second execution, the sale made under it should be set aside, it would result that the judgment, notwithstanding the first levy, must be considered as having been in force all the

time, and, by virtue of it, Bass, being subrogated to the rights of Stearns & Co., who were not made parties to the complainant's foreclosure suit, would be entitled to redeem from the sale made to the complainant upon his decree.

Upon the second point, it is quite clear that the complainant might have compelled the sale of the other property of Bowser to satisfy the Stearns execution, before resort to the property covered by their mortgage; but, the complainant not having gone to the courts for this relief, the execution plaintiff was not bound to inquire into the equities in this respect, and to direct the order of sale accordingly; and it follows that the sale is not void, nor to be annulled, on this account, at the instance of complainant. Sansberry v. Lord, 82 Ind. 521; Wiggin v. Suffolk, 18 Pick. 145; S. C. 29 Amer. Dec. 576; James v. Hubbard, 1 Paige, 228; Clowes v. Dickenson, 5 Johns. Ch. 235; S. C. (on appeal) 9 Cow. 403; Wise v. Shepherd, 13 Ill. 41.

Nevertheless the complainant, as some of the cases just cited show, is not without remedy; but from the defendant, who obtained an inequitable advantage by means of the sale as made, is entitled to compensation to the extent of that advantage, that is to say, to the extent of the value of the property so sold, not exceeding the amount due complainant upon his mortgage debt. The report of the master is perhaps not explicit on the point, but, as I understand, it is not questioned that the property of Bowser, which was purchased by Bass, and which ought to have been sold on the Stearns' execution before resort to the lands mortgaged to the complainant, was worth, over and above all incumbrances created before the execution of complainant's mortgage, more than the amount due upon that mortgage, treated as a subsisting security; and, this being so, the decree here ought to be that the defendant pay to the plaintiff, within a time stated, the amount due upon their mortgage, with stipulated interest to date of payment, and that, in default of this, the sale to the defendant be annulled, and the title of the complainant under his purchase be confirmed.

The rights of the parties are not affected, in my opinion, by the extension of time granted upon payment of interest in advance upon the Stearns judgment. The extension was granted upon the supposed consent of Bowser & Co., and, if Bowser's partners were not bound by that consent, the agreement to extend was not binding on the creditor, and execution might have issued at any time, the interest paid in advance being returned or treated as a payment upon the judgment. Albright v. Griffin, 78 Ind. 182.

The sale was not invalid because the proper credits for payments were not noted on the execution, Bass, the purchaser, having no knowledge of the facts. The purchaser at an execution sale is not bound to have examined the dockets to see if the clerk has done his duty in this respect. The presumption is that the officer has done his duty in such particulars. Fowler v. Griffin, 83 Ind. 297.

In so far as the master's report is inconsistent with the foregoing, the exceptions thereto are sustained, and in other respects overruled.

United States v. Wightman.

(District Court, W. D. Pennsylvania. December 30, 1886.)

1. OBSCENE PUBLICATIONS—MAILING OBSCENE MATTER—REV. St. U. S. § 3898. A letter, although exceedingly coarse and vulgar, and grossly libelous,—imputing to the person addressed an atrocious crime,—but which has no tendency to excite libidinous thoughts, or impure desires, or to deprave and corrupt the morals of those whose minds are open to such influences, is not "obscene, lewd, or lascivious," within the meaning of the first clause of section 3898 of the Revised Statutes, defining non-mailable matter, etc.1

2. SAME—LETTER IN ENVELOPE.

Whether said clause embraces a letter inclosed in a sealed envelope, bearing nothing but the address of the person to whom it is written, not decided.¹

Indictment for Mailing Obscene Letters. Sur motion in arrest of judgment.

Wm. A. Stone, U. S. Atty., for the United States. Thomas W. Lloyd, for defendant.

Acheson, J. In the view I take of this case, it is not necessary for me to express any opinion upon the unsettled question (U. S. v. Chase, 27 Fed. Rep. 807) whether the words, "every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character," as used in the first clause of section 3893 of the Revised Statutes defining non-mailable matter, etc., include an obscene letter inclosed in a sealed envelope, bearing nothing but the address of the person to whom the letter is written; for I have reached the conclusion that neither of the letters which are the subject of this indictment, either in language or import, is "obscene, lewd, or lascivious," within the purview of the statute. According to the well-considered case of U. S. v. Bennett, 16 Blatchf. 362, the test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences. This, it seems to me, correctly indicates the purport of the word "obscene," as employed in this statute. Like the terms "lewd" and "lascivious," with which it is associated, it implies something tending to suggest libidinous thoughts, or excite impure desires. Now, I do not think that either of the letters under consideration has any such corrupting or debauching tendency. Both letters are exceedingly coarse and vulgar, and one of them is grossly libelous, -imputing to the person addressed an atrocious crime, -but none of these characteristics, nor all combined, are sufficient to bring the letters within the inhibition and penalty of the statute. U.S. v. Smith, 11 Fed. Rep. 663.

I may add that the word "indecent," in the first clause of section 3893, seems to be confined to the "other publication" declared to be non-mailable. But, at any rate, the term as there employed has been held to mean that which "tends to obscenity," or "matter having that form of

¹ See note at end of case.

indecency which is calculated to promote the general corruption of

morals." U. S. v. Bennett, supra.

The opinion of the court, then, being that the letters in question do not contain anything of an "obscene, lewd, or lascivious" character, within the meaning of the statute, judgment must be arrested; and it is so ordered.

NOTE.

OBSCHME PUBLICATIONS. The test which determines the obscenity or indecency of a publication is the tendency of the matter to deprave and corrupt the morals of those whose lication is the tendency of the matter to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands such a publication may fall. U. S. v. Bebout, 28 Fed. Rep. 522; U. S. v. Britton, 17 Fed. Rep. 731. A letter which, if it should fall into the hands of an inexperienced or susceptible person, would excite impure thoughts and indecent ideas, is obscene and indecent. U. S. v. Britton, supra. An illustrated pamphlet, purporting to be a work on the subject of the treatment of spermatorrhea and impotency, and consisting partially of extracts from standard books upon medicine and surgery, but of an indecent and obscene character, and intended for general circulation, held to come within the provisions of section 3893 of the Revised Statutes. U. S. v. Chesman, 19 Fed. Rep. 497.

As to the application of the statute to the mailing of sealed letters, see U. S. v. Bebout, 28 Fed. Rep. 522, and note.

In re Burton, Bankrupt.

(District Court, W. D. Virginia. September 24, 1886.)

1. BANKRUPTCY—DISCHARGE—PURCHASE BY BANKRUPT OF HIS OWN DEBTS.

The discharge of a bankrupt, as a bar to the remedy for the recovery of the debt, is analogous to the bar of the statute of limitations,—neither destroys the debt, and both must be pleaded; and a purchase by a discharged bankrupt of his own debt operates to extinguish the debt, the characters of debtor and creditor meeting in one and the same person.

A bankrupt cannot purchase and take an assignment to himself of lien debts against his estate in bankruptcy, and collect the same for his own use out of assets in the hands of his assignee in bankruptcy, to the exclusion of subsequent lien-holders.

In Bankruptcy. On exceptions to reports of liens by special commissioner.

Morris, Brown & Nowlin, for creditors.

Mr. Bocock and Kean & Kean, for Burton, bankrupt.

PAUL, J. Special Commissioner William B. Tinsley, acting under decree entered October 1, 1884, made and filed, April 10, 1885, his report of liens and their priorities in this case. To this report exceptions were filed, and on the sixteenth of January, 1886, a decree was entered recommitting the report to said special commissioner, directing him to make certain amendments to his original report, and inquiries specially designated in said decree, and to report thereon. Said commissioner filed his amended report, March 11, 1886. In the amended as in the original report he reports in favor of E. J. Burton, the bankrupt, against his estate in the hands of the assignee in bankruptcy, the following liens: No. 3. John F. Slaughter v. E. J. Burton; amount, \$2,318.05. No. 4. G. B. Martin v. E. J. Burton; amount, \$317.17. No. 5. Poindexter's Adm'r v. E. J. Burton; amount, \$11,047.35.

The report shows the consideration for the assignment of these several debts to the bankrupt, E. J. Burton, to be as follows: For the Slaughter debt, \$50; for the Martin debt, \$100; and for the Poindexter's administrator debt, \$382.50.

To the allowance by the commissioner of these liens in favor of said E. J. Burton, the bankrupt, exceptions are filed on behalf of other creditors of the bankrupt; the grounds of the exceptions being that the payment by the bankrupt to the holders of these several sums, and taking an assignment of these debts to himself, amounted to an extinguishment of these debts.

The question thus presented for decision, viz., can a bankrupt purchase and take an assignment to himself of lien debts against his estate in bankruptcy, and collect the same for his own use, out of assets in the hands of his assignee in bankruptcy, to the exclusion of subsequent lienholders? is one, so far as the court is informed, that has not been judicially settled. The court, therefore, is left in its determination to the guidance of general principles, rather than to the control of established precedents.

It is conceded that when the characters of debtor and creditor of the same debt become united in the same person the debt is extinguished. Says Pothier, (1 Poth. Obl. 607:)

"It is evident that, by the concurrence of the opposite characters of debtor and creditor in the same person, the two characters are mutually destroyed, for it is impossible to be both at once. A person can neither be his own creditor nor his own debtor. From hence, indirectly, results the extinction of the debt, when there is no other debtor; for as there can be no debt without a debtor, and the confusion having extinguished the character of debtor in the only person in whom it resided, and there being no longer any debtor, there cannot be any debt."

See Bouv. Law. Dict. "Confusion."

To avoid the application of this principle in the case now under consideration, counsel for Burton (the bankrupt) contend that he no longer stands in the relation of a debtor to his creditors; that, by virtue of the order of discharge in bankruptcy, the debt is discharged, so far as the bankrupt is personally liable; that he is no longer legally a debtor; that the discharge in bankruptcy destroys the personal liability of the debtor, and transmutes the debt into a lien on the estate in the hands of the assignee.

Is this position correct? Is the bankrupt's character of debtor so completely changed as to exempt him from the operation of the principle above quoted? Is he so completely freed from all obligation to pay his debts that his character of debtor is destroyed, and that he occupies the position of an indifferent third person, so that he can, for a valuable consideration, become the assignee of his own debts, and collect them in full out of assets which he has surrendered for the payment of

his debts, and this to the exclusion of subsequent lien-holders? We think the authorities are abundant to show that his character of debtor does not undergo such a change as is contended for here. The discharge amounts to nothing more, if properly pleaded, than a bar to the remedy for the collection of the debt. A discharge in bankruptcy, to be available as a defense, must be pleaded both in law and in equity, (Fellows v. Hall, 3 McLean, 281; In re Ferguson, 2 Hughes, 286; 13 Myers, Fed. Dec. 624; Bump, Bankr. [8th Ed.] 747; Moyer v. Dewey, 103 U. S. 301;) and the discharge is personal to the party to whom it is granted, (Id. 302.)

So far from the bankrupt's character of debtor being changed, or the debt being destroyed, by a discharge in bankruptcy, the obligation to pay continues, and so strong is this obligation that, without any new or additional consideration, a new promise to pay the debt is binding, and the debtor's discharge in bankruptcy is no defense against an action brought on the new promise. The discharge of a bankrupt, as a bar to the remedy for recovery of the debt, has often been held analogous to the bar of the statute of limitations. The defense is personal to the debtor. He may avail himself of it, and be relieved from the payment of the debt, but the possession of this power to defeat the remedy does not destroy the debt. Says Lord Mansfield in Quantock v. England, 5 Burr. 2630: "It is settled that the statute of limitations does not destroy the debt; it only takes away the remedy. The deltor may either take advantage of the remedy of the statute of limitations, if the debt be older than the time limited for bringing the action, or he may waive this advantage." The existence of the old demand is not determined by the lapse of period prescribed; it is only the right of action which is taken away. Hence the old debt constitutes a sufficient valuable consideration for the new promise. 4 Minor, Inst. pt. 1, 512; Wetzell v. Bussard, 11 Wheat. 309.

In Campbell v. Holt, 115 U. S. 620; S. C. 6 Sup. Ct. Rep. 209, Mr. Justice Miller quotes from the opinion of Chief Justice Robertson, (in Smart v. Baugh, 3 J. J. Marsh. 364,) in which he says:

"The statute of limitations does not destroy the right in foro conscientiae to the benefit of assumpsit, but only bars the remedy. If the defendant chooses to rely on the bar, time does not pay the debt. * * The statute of limitations does not destroy nor pay the debt. * * This has been abundantly established by authority. * * * A debt barred by time is a sufficient consideration for a new promise. The statute of limitations only disqualifies the plaintiff to recover a debt by suit, if the defendant rely on time in his plea. It is a personal privilege, accorded by law for reasons of public expediency, and the privilege can only be asserted by plea."

And says Mr. Justice MILLER:

"That the proposition is sound, that in regard to debt or assumpsit on contract the remedy alone is gone, and not the obligation, is obvious from a class of cases that have never been disputed." Id. 625.

If, then, the debt is not destroyed by the discharge in bankruptcy, but the obligation to pay continues in existence, and which can only be defeated by pleading the discharge in bar of the remedy, it seems clear that the character of debtor continues and attaches to the bankrupt, so as to bring him within the scope of the principle that where the characters of debtor and creditor, of the same debt, become united in the same person, the debt is extinguished. There is no avoiding this conclusion. But, further, the debt not being destroyed by the discharge in bankruptcy, but the obligation to pay it continuing, when the bankrupt recognizing this obligation; voluntarily pays these debts; or compromises them with the holders; he declines to avail himself of the advantage of his discharge; he waives it as a bar to a recovery against him, and does what duty demands, and what the law (failing to plead his discharge) would compel him to do. It is clearly as complete and full satisfaction of the debts as can be made.

One of the debts claimed in this case by the bankrupt (the Slaughter debt, No. 3) illustrates the remarkable position the bankrupt might occupy, and the gross injustice that might be done if any other rule prevailed than that just laid down by the court. This debt was paid off by an indorser; whether by the first, second, or third indorser is not shown. Suppose it was paid by the second indorser, of course he would have a right to recover of the first indorser the amount paid. But he sells and assigns the debt, of course, with all his rights, to the bankrupt, here the principal debtor. Would there be any justice in allowing this principal debtor to recover of the prior indorser the amount paid by the second indorser in satisfaction of the obligation of the principal debtor? Yet this is exactly what might occur if the position contended for by counsel for the principal debtor here, E. J. Burton, be allowed as law. Again, suppose that one of three sureties had paid off the whole of this debt, he would be entitled to contribution from his two co-sureties. he assigns his claims to the principal debtor, who purchases it. be pretended that this principal debtor could or ought to be allowed to recover off of his own sureties two-thirds of a debt paid for him by a third surety? The statement of the question must answer it in the negative. It is therefore the opinion of the court that the debts of Slaughter, Martin, and Poindexter's administrator, assigned to E. J. Burton, and reported for his benefit in Commissioner Tinsley's report, are extinguished, and they must be stricken from the list of liens against the bankrupt's estate in the hands of the assignee.

WILLIS and others v. McCullen.1

(Oircuit Court, E. D. Pennsylvania. December 8, 1886.)

PATENTS FOR INVENTIONS—INFRINGEMENT—SALE OF MATERIAL BY LICENSEE TO NON-LICENSEES.

Where a licensee to sell materials for use in a patented process to other licensees, sells said materials, to be used for such process, to other persons known not to be licensees, he is guilty of infringement.

In Equity.

Alexander & McGill and Charles Howson, for complainants. John G. Johnson, for respondent.

McKennan, J. The respondent had a license to use the patented process, and also a license to sell materials for the process, to licensees. The use of the process by the respondent was limited to Philadelphia. Whether these license contracts have been kept in good faith, or violated, by the one party or the other, and whether the complainants could rightfully revoke their licenses, are questions which, under the circumstances here appearing, we cannot consider. Hartell v. Tilghman, 99 U. S. 547. The parties are citizens of the same state, and our jurisdiction, therefore, depends on the subject-matter involved. To the extent of questions arising out of the patent, and the respondent's acts in alleged violation of it, we have jurisdiction. Over controversies arising out of the license con-Thus the complaint of infringement by use of the tracts we have not. process in Philadelphia, and the sale of materials for use by licensees elsewhere, drops out of the case.

There is no license, or room for suggestion of license, to sell materials to others than licensees, for use in the process. That the respondent did sell to such persons for such use, knowing that the materials were purchased for this use, and intending that they should be so applied, is quite clear upon the proofs, if not admitted by the pleadings. Purchasers were solicited by advertisement and otherwise, with an especial view to this use. By these sales thus made the respondent became a party to their use. The question whether the complainants violated their contracts, and thus failed in the observance of good faith, urged upon us in justification of this, or as a reason why we should not interfere, cannot be considered. If they violated their contracts, the respondent has an ample remedy elsewhere. He cannot find or seek redress by infringing the patent.

A decree must therefore be entered against him, as respects such sales for use in the process to unlicensed persons.

¹ Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar. v.29f.no.13—41

SWIFT v. JENKS and others.

(Circuit Court, N. D. New York. January 31, 1887.)

PATENTS FOR INVENTIONS—DISCLOSURE OF INVENTION BY PRIOR PATENT—FAIL-

URE TO CLAIM—ABANDONMENT.

The fifth and sixth claims of letters patent No. 283,931, issued to Allen W. Swift, for an improvement in lubricators, are invalid by reason the invention covered thereby was disclosed by letters patent No. 255,853, issued to the same person, for an improvement in lubricators, and was abandoned to the public by failure to claim the devices set out by such claims.

2. Same—Fifth Claim of Patent No. 257,326.

The fifth claim of letters patent No. 257,326, issued to Ross J. Hoffman and owned by defendants, is for the same invention as that covered by the fifth and sixth claims aforesaid, and is also void.

In Equity. C. H. Duell, for complainant. Neri Pine, for defendants.

- COXE, J. This is an equity action for infringement founded upon letters patent No. 283,931, granted to the complainant August 28, 1883, for an improvement in lubricators. The application was filed June 13, The bill prays for an injunction and an account, and for relief under section 4918 of the Revised Statutes. The invention relates to lubricators, designed chiefly for lubricating the valves and cylinders of steam-engines. Automatic action is secured by the gradual admission of water to the interior of the oil-cup, displacing therein a corresponding quantity of oil, and forcing it, through the lubricant duct, to the steam-pipe, from whence it is carried to the steam-chest valve and cylinder of the engine. The object of the invention is to enable the engineer to ascertain, by observation, whether the lubricator is working regularly. This is accomplished by extending the end of the drip-tube so near the wall of the oil-cup, which at this point is made of glass, that the drops of water, as they escape from the tube, are delivered against the inner surface of the glass, and are thus plainly seen, even when the oil is almost opaque. The claims in controversy are as follows:
- "(5) In combination with the steam-condensing duct, and its horizontal extension, c, the lubricant cup, composed of metal, and provided in front of the duct extension, c, with an observation port, r, covered with a transparent plate, substantially as and for the purposes set forth.

"(6) In combination with the oil-cup of a lubricator, the port, r, covered by a glass plate, and the pipe or tube, c, having an inclined end or face, sub-

stantially as set forth."

In March, 1884, the patent was before the court upon a motion for a

preliminary injunction. Swift v. Jenks, 19 Fed. Rep. 641.

One of the defenses interposed is that the complainant has fully described the devices covered by the claims in question in a prior patent, and, having failed to claim them there, they must be regarded as abandoned to the public.

On the twenty-first of March, 1882, letters patent No. 255,353 were granted to the complainant for an improvement in lubricators. The lubricator described in that patent is similar, in all essential particulars, to the one in controversy, except that the cylinder of the oil-cup is made wholly of glass. It can hardly be disputed that if the metal cylinder of the present patent were substituted for the glass cylinder of the previous patent, the structure of March, 1882, would be almost identical with that of August, 1883. The difference, if any, would be unimportant, and entirely insufficient to support a patent. But the precise improvement covered by the latter patent is described in the former. The substitution referred to is there suggested. In the specification of March, 1882, the complainant says:

"As previously stated, my invention is applicable to most all lubricators operating upon this principle, and it is not essential that the cylinder should be wholly of glass, so long as that portion directly opposite the end of the tube or pipe, E, is transparent, to expose to view the end thereof, as hereinbefore described; and therefore, if desired, the cylinder, A, may be constructed of metal, with a window or 'sight' on a line opposite the tube or pipe."

It would be difficult to employ language which more aptly describes the important features of the present lubricator. The idea intended to be conveyed is more clearly expressed than in the patent in suit. That the complainant understood that he had previously disclosed the mechanism now claimed is clearly shown by the following quotation from the specification:

"A denotes the lubricant reservoir or cup, which, for greater strength and security against breakage, I construct with metal, and provide the side or front of its upper portion with an observation port, r, covered by a glass or other suitable transparent plate, as intimated in my prior patent of March 21, 1882, but reserved for special protection in my present application for letters patent."

The conclusion cannot be resisted that the claims in question are invalid, for the reason that the invention covered thereby was disclosed in a previous patent, and belonged to the public when the application was filed.

These claims, and the fifth claim of letters patent No. 257,326, granted to Ross J. Hoffman May 2, 1882, and now owned by the defendants, are for substantially the same invention. As between the complainant and Hoffman the former was the prior inventor. It follows, therefore, as a necessary result, that the fifth claim of the Hoffman patent is also void.

Let a decree be drawn in accordance with these views.

THE JOHN S. DARCY, etc.1

THE ISAAC L. FISHER, etc.

Conover v. The John S. Darcy, etc.

NEW YORK, L. E. & W. R. Co. v. THE ISAAC L. FISHER, etc.

(District Court, S. D. New York. January 5, 1887.)

1. COLLISION—FERRY-BOATS AND SLIPS—RULES OF NAVIGATION—DANGEROUS START A FAULT.

A tug, in navigating about the mouth of a ferry slip which a ferry-boat is approaching, is chargeable with notice of the ordinary course of the ferry-boat in making her slip, and the necessary turns and changes of heading, under the circumstances of the tide, in order to enable her to make her landing in the usual manner. The rules of navigation must be applied in reference to such known and necessary changes of the ferry-boat's course, and, when a boat cannot start from the dock without risk of collision, she is bound to wait.

2. Same—Tug and Tow—Rule 19—Rule 24—Delay in Reversing.

The ferry-boat J. S. D., of the Pavonia ferry, was coming up the North river; with a strong flood-tide, to make her landing at Twenty-third street. While she was still heading up river, a few streets below, and before she had made her usual turn to enter the slip in a diagonal direction, the steam-tug I.

L. F., having taken a tow along-side at the Twenty-fourth street dock, headed straight down river, close to the piers, so as to go down inside of the ferry-boat; each being, when the tug started, on the other's starboard hand. The J. S. D. pursued her usual course in rounding into her slip, and struck the tow of the I. L. F. a few feet from the outer end of the lower part of the slip. Held, that the J. S. D. was not bound to continue up river, starboard to starboard, but was entitled to make her usual turn, at the proper time, in order to effect her entrance into the slip in her usual manner; that the tug was chargeable with notice of the necessary change in her course, which change would make her, in effect, a crossing vessel, which the tug was bound by old rule 19 to avoid; and that the tug was therefore in fault for not going out into the river, as she might have done, to keep out of the ferry-boat's way; or, if that was not safe, she was bound not to start till all danger from the ferry-boat was past; that she was also in fault for running unnecessarily close to the piers, and across the ferry-boat's necessary course. The ferry-boat was also held in fault, because, seeing the course of the tug persisted in until the latter could no longer avoid a collision, the ferry-boat did not promptly stop, as she might have done, and thereby have averted any injury.

A few minutes after 7 o'clock in the evening of December 4, 1875, as the steam ferry-boat John S. Darcy, coming from the Pavonia ferry, Jersey City, with a strong flood-tide, was about entering her slip at Twenty-third street, North river, she came into collision with the tugboat I. L. Fisher, striking with her bows the starboard side of the tug, a little aft of the engines, doing both vessels some damage, for which the above cross-libels were filed. The entire slip from Twenty-second to Twenty-fourth street is about 536 feet wide by 650 feet deep. The two ferry landings at the head of the slip are a little below the middle of the slip, and occupy about 180 feet of its width. The ferry-boats also had

¹Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

the exclusive use of the clear water, about 108 feet in width, between the Twenty-second street pier and the lower ferry rack. northerly ferry rack and the southerly side of Twenty-fourth street pier there is clear water, about 230 feet wide. The Twenty-fourth street pier extends from the bulk-head about 650 feet into the river, being about 100 feet longer than the Twenty-second street pier, and over 300 feet longer than the racks forming the ferry slip proper. There was thus a large area of clear water within the slips besides the ferry landings. On the night in question the Fisher had gone into the slip to pick up a barge lying on the southerly side of Twenty-fourth street pier, for the purpose of towing her down the river. The tug approached the barge bow to bow, and, having fastened to the barge's stem, backed until the tug was about half way beyond the corner of the Twenty-fourth street pier, drawing the barge along at the same time. The stern of the tug being then allowed to swing up river with the tide till her head was turned nearly down, the tug moved ahead, and, fastening the barge upon her port side, very speedily headed directly down river, and proceeded straight down; being not further out, at most, than 50 feet from the line of the end of the Twenty-second street pier. Shortly before the collision she put her engines full speed ahead, hoping to pass the course of the ferry-boat, but was unsuccessful in the attempt. The ferry-boat, shortly before the collision, reversed full speed, and at the time of the collision was nearly, but not quite, stopped.

Wilcox, Adams & Macklin, for the Darcy.

E. D. McCarthy, for the Fisher.

Brown, J. Upon the evidence, I must find that the place of collision was less than 100 feet outside of the end of the Twenty-second street pier. nearly abreast of that pier, and in the usual track of the ferry-boats of that line in entering the Twenty-third street slip, in a strong flood-tide. I must further find that the pilot of each of these boats saw the other in ample time to avoid the collision, and understood perfectly the movements, course, and intention of the other. The pilot of the ferry-boat. when about opposite Seventeenth street, and one-third of the distance across the river, and being then nearly half a mile distant from the tug, saw the latter as she was backing out along the Twenty-fourth street pier, and knew from her lights that she had a tow in charge. He gave her a signal of one whistle, but got no answer. Soon after he saw her moving straight down river, across the mouth of his slip, and gave her another signal of one whistle, to which he received a reply of two blasts from the tug. He then sounded an alarm whistle, and reversed his engines full speed, but not in time to avoid collision.

It is clear from the evidence that the whistles above referred to, and the reversal of the engines, could not have been given so rapidly as might be inferred from the testimony of the ferry-boat's witnesses. The ferry-boat was moving more slowly than usual, and, with the flood-tide, could not have been going more than at the rate of eight knots by land; so that it must have been at least four minutes from the time of her first whistle

to the collision. The ferry-boat was seen from the tug at about the same time, or perhaps a little after, her first signal was given, although the tug's witnesses state that they did not then notice that she was a ferry-boat. If they did not notice this, it was their own fault, since the lights indicated it. But it was certainly known to be a ferry-boat bound for that slip when the second signal was given, and when the tug's contrary signal of two blasts was given in reply. If these opposite signals were not exchanged until within a distance of 300 or 500 feet from the Twenty-second street pier, there was clearly negligence on the part of both in not

giving or repeating the signals earlier.

1. The tug was familiar with the slip, and with the movements of the ferry-boats; and she is chargeable with knowledge of the usual course of such boats in approaching the slip in the flood-tide. the pilot of the tug first saw the Darcy, he says that her green light only was visible, and that she was one-third of a mile distant, i. e., much below him in the river. Shortly before the collision, as he says, she changed her heading so as to show her red light. The ferry-boat's witnesses deny any change of course, except a port wheel just before the collision, designed, it is said, to assist in avoiding the tug. The evidence shows that the ordinary course from Pavonia ferry, which is two statute miles below Twenty-third street, is to head nearly up river, after getting out into the stream, and then turn towards the New York shore, when about opposite Seventeenth street; with a still further turn towards the shore when near the Twenty-second street pier, so as to pass within from 10 to 20 feet of the upper corner of that pier, and at an angle of about four points with the line of the stream. Entering the slip in this manner, the flood-tide sweeps the stern upwards, as the boat passes in, so that the landing is thus most easily and safely made. The changes in the lights seen, as sworn to by the witnesses of the tug, correspond with the changes that navigation in the usual course would show; and I must find, therefore, that the course of the ferry-boat on this occasion was the usual course, and with the usual changes, notwithstanding the testimony, in general terms, that she kept a straight course from the Pavonia ferry to the Twenty-second street pier. And I am the more inclined to this from the fact that no straight heading for the Twentysecond street pier, with a strong flood-tide, could possibly have brought the Darcy there, but would have carried her far up the river, before she had reached the New York shore, unless her course by compass was kept constantly changing, so as to head for Twenty-second street pier, under a constant slightly port wheel; and that would cause the same changes of lights testified to by the tug, and thus amount to the same practical result.

It is claimed on the part of the tug that the ferry-boat, from the fact of showing her green light when half a mile distant, was bound to keep that relative position to the tug until the tug had passed her; and, the lights being green to green, the tug had a right to pass her starboard to starboard. This claim cannot be sustained in the special circumstances of this case. It would subject ferry-boats known to be approaching their

slips to precisely the same rule as vessels navigating the open sea. This is neither reasonable, nor in accordance with the decisions or the rules. The case of ferry-boats approaching their slips in a strong tide comes plainly within the exceptions provided for in the twenty-fourth rule, having reference to the special circumstances of the case. The "course" of a ferry-boat is that which she is obliged, from necessity, to hold in order to effect an entrance into her slip, with all the changes and turns which that course necessarily involves. The case is similar to the situation of a vessel navigating a winding stream, whose "course" is of necessity the channel of the river, with all its changes, not a straight course by compass. It is the same also with a vessel beating; another crossing her course must allow for her necessary change of course on running out her tack and coming about. The Velocity, L. R. 3 P. C. 44: The Ranger, L. R. 4 P. C. 519; The Wm. H. Beaman, 18 Fed. Rep. 334; The Isle of Pines, 24 Fed. Rep. 498.

No small skill is necessary to avoid accident in navigation under such circumstances. The necessities of the case, for the protection of human lives, long since led Judge Betts to declare in this court that it was "indispensable that the exit from and entrance into the ferry slips should not be checked or embarrassed by the presence of other vessels passing close to them." The Relief, Olcott, 104, 109. The duty of vessels to keep away, when they can, from the known path of ferry-boats, close to the slips, has since been repeatedly affirmed, and, so far as I am aware, has never been relaxed. Any voluntary disregard of this obligation has since been uniformly held to be a fault, such, even, as no usage can validate or justify. The Favorita, 8 Blatchf. 539, 541; The John Cooker, 10 Ben. 488; The Columbia, 8 Fed. Rep. 718; The Monticello, 15 Fed. Rep. 476; McFarland v. Selby, 17 Fed. Rep. 256.

In the case of *The Favorita*, supra, Woodruff, circuit judge, affirms this obligation of other boats towards ferry-boats upon reasons of ordinary prudence, and without reference to the state statutes applicable to the East river; and he there held the Favorita "bound to conform to the exigencies of that situation, and make her advance such as not to imperil other vessels pursuing their ordinary, accustomed, well-known business, with which those in the management of the Favorita must be taken to have been familiar." This seems to me precisely applicable to the tug in the present case. There was no obstruction to prevent the tug's going out into her proper place in the stream. In hugging the shore for the sake of the less head-tide, she voluntarily chose the risk of being held in fault, if accident arose.

If there had been anything, however, in the way that prevented the tug's going out into the river, it would have been her duty to wait till the Darcy had come into her slip, rather than to start across the Darcy's known course, at a moment when nothing short of immediate measures to avert collision could possibly avoid one. The tug was safe where she was. If she did not wish to go out into the river, and head the strong flood, she was bound to wait; because, the Darcy's course into the slip being known, the tug's starting across the Darcy's course was dangerous and

unjustifiable. The Belleville, Newb. Adm. 497, 500; The Nereus, 23 Fed. Rep. 448, 456. The ferry-boat had a right to follow her usual course in rounding into her slip, and the tug was bound to navigate in reference If the Darcy showed her green light at first, as I think she did, it was necessary for her to turn enough to show her red light, in order to make her slip. The pilot of the tug well knew this fact, and was bound to foresee the ferry-boat's necessary turn, and to act accordingly. tug had the Darcy on her own starboard hand, and the Darcy, being under the necessity of turning in order to make her slip, was, in effect, in the situation of a crossing vessel, although, when first seen, her heading was not crossing. By old rule 19, therefore, the tug was the one bound to keep out of the way, and not the ferry-boat; and in hooking up, instead of backing, when their courses were crossing, the tug took the risk of being held in fault, if her maneuver was not successful. The Khedive, 5 App. Cas. 876; The Frisia, 27 Fed. Rep. 480, 24 Fed. Rep. 495; The Galileo, 28 Fed. Rep. 469, 24 Fed. Rep. 391.

For these several reasons I must hold the tug to blame.

2. As respects the ferry-boat, the case of The Fanwood, 28 Fed. Rep. 373, 376, affirmed in the circuit, is so entirely analogous that little discussion is necessary. Here, as in that case, the position, the course, and the intent of the tug were perfectly apparent, and were understood by the ferry-boat, in ample time to have avoided her. If the ferry-boat had a right to expect that the tug would go out into the stream, the fact that the tug was taking the contrary course was apparent, and it was clear that she was persisting in this course when she could no longer avoid the ferry-boat by any change that she could make, while the ferry-boat could still, by stopping in time, avoid collision. The proof shows that the Darcy, at her moderate speed, would have stopped dead in the water in going a little over two lengths. The considerable time that elapsed after the Darcy's first whistle leaves no doubt in my mind that the Darcy might have stopped completely after immediate danger of collision was manifest. She was not justified in running upon the tug because the tug did not perform her duty; she should have stopped in time, under old rule 21.

The damages and costs must be divided.

Bradley v. Cargo of Lumber.1

(District Court, E. D. Pennsylvania, December 10, 1886.)

1. Ships and Shipping—Respondentia Bond—Master's Lien—Subrogation— RATE OF INTEREST.

The brig L., while on a voyage from Pensacola to Philadelphia, put into St. George's, Bermuda, in distress. The brig was subsequently condemned and sold, and the cargo was reshipped to Philadelphia. At St. George's the master incurred charges, which, with the freight, were liens on the cargo. To

Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

meet these charges the master borrowed money, and gave a respondentia bond, in which he agreed to hold the cargo until the bond was paid. The bond was for the amount advanced, plus a marine premium of 13½ per cent., the lender taking the risk of the cargo to Philadelphia. In a contest between the holder of the bond, the owners of the cargo, and the owners of the brig, held, that, although the validity of the respondentia bond was open to doubt, the libelant must be regarded as an equitable transferree of the master's liens on the cargo, and was entitled to the benefit of them as a means of reimbursement; but, in view of all the circumstances of the case, it was deemed just to confine him to the ordinary rate of 6 per cent.

2. SAME-PLACE OF ADJUSTMENT.

In this case it was proper to adjust the losses at Philadelphia.

In Admiralty.

Morton P. Henry, Henry R. Edmunds, and John A. Clark, for libelant.

Driver & Coulston, for respondents.

BUTLER, J., (orally.) The libel rests on two different sources of claim: (1) The respondentia bond, described; (2) an equitable transfer of the master's liens, for freight and charges incurred on account of cargo. The validity of the bond is open to doubt. While I incline to believe it valid. I am not fully satisfied that it is so. The other source of claim is, I think, free from doubt. The charges incurred were a lien on the cargo; and this lien, as well as that for freight, was vested in the The transaction between him and the libelant must be regarded as an equitable transfer of these liens, placing the latter in the master's The master expressly undertook to hold the cargo for the libelant's benefit until his advances were paid. The master cannot repudiate this contract, nor can his owners. The libelant is therefore entitled to the benefit of the liens as a means of reimbursement. No valid objection exists to the combination of these liens with the bond, in this suit. The respondent is not deprived of any advantage by doing so. Every source of defense is open to him that might have been made if the claims had been sued for separately. The attachment secured everything the libelant can justly claim; and the libel was properly amended so as to embrace the liens transferred. The ascertainment of the amount chargeable to the cargo by the adjustor, at Philadelphia, must be accepted as correct. Not only is there no evidence to the contrary, but the testimony of Mr. Gourlie, called by the respondent, affirmed its accuracy. It is true, Mr. Gourlie supposed the adjustment should have been made as if the cargo had been delivered to the consignee's or shippers, at Bermuda, and that, in such case, the rules of law applicable would be other than those applying here. On both these points, however, the court disagrees with him. Under the peculiar circumstances of this case the adjustment was properly made here. 2 Phil. Ins. § 1328; 2 Pars. Mar. Ins. 256, 257; Hobson v. Lord, 92 U. S. 397; Star of Hope, 9 Wall. 203; Barnard v. Adams, 10 How. 270; McLoon v. Cummings, 73 Pa. St. 98. Whether made here or at Bermuda, however, the rules of law applicable are the same. Lown. Av. 198; 1 Pars. Mar. Law. 327.

The balance of freight, and the charges referred to, are more than sufficient to pay the libelant's advances. Whether his claim be referred to the bond, or to the equitable transfer of the master's liens, involves only the rate of interest he should receive. In view of all the circumstances, it is deemed just to confine the libelant to the ordinary rate of 6 per cent. This will leave a small balance of freight, to which the owners of the vessel, who have intervened in the suit, are entitled.

As the adjustment was necessary, and properly ordered, the fee of the adjustor is rightly charged. A decree will be prepared accordingly, and

entered.

THE SAM BROWN.

THE JOSEPH A. STONE.

PHOENIX INS. Co. v. THE SAM Brown and another.

(District Court, W. D. Pennsylvania. January 6, 1887.)

COLLISION — STEAMERS—RULES OF NAVIGATION—Loss OF CARGO—DAMAGES.
 Where two steamers, approaching each other from opposite directions, both failed to comply with a rule of navigation, and in consequence a collision ensued, in a suit against the two boats, the damages resulting to the owner of a cargo in the charge of one of them will be equally divided between the boats.
 SAME—MEASURE OF DAMAGES.

Where a cargo is thus lost by a collision, in a suit against the wrong-doer, standing in no contract relation to the party injured, the prevailing rule is to allow only the actual damages sustained at the time and place of the loss,

with interest thereon.

8. SAME—SUIT AGAINST BOTH VESSELS.

And this latter rule applies where, for such loss, the injured party elects to bring a joint suit against two colliding boats, one of which stands in such contract relation to him, and the other not; the damages in such joint suit being assessable on the footing of the marine tort, for which both boats are answerable, and not on the basis of the contract, to which one of the boats is a stranger,

4. CARRIERS-OF GOODS-LOSS-DAMAGES.

In the case of carriers or others under contract to deliver goods, the measure of damages for their loss in transitu is their net market value at the place of destination, at the time when they should have arrived there.

In Admiralty.

Knox & Reed, for libelant.

Barton & Sons, for the Brown.

J. S. Ferguson, for the Stone.

Acheson, J. 1. It cannot be alleged seriously that the collision here was unavoidable. Beyond controversy, it was due to negligence. Indeed, each boat seeks exoneration by casting the blame upon the other. The night was calm, clear, and bright. The boats were distinctly visible to each other when at least a mile apart. The stage of water was not less than 12 feet, and the witnesses agree that there was ample room for the

boats to pass each other safely. Why, then, the collision? A careful consideration of the proofs has brought me to the conclusion that both boats were in fault. The first rule governing navigation, and covering the case of steamers approaching each other from opposite directions, after prescribing the signals touching choice of sides, and declaring that pilots shall not attempt to pass each other until there has been a thorough understanding as to the side each steamer shall take, proceeds thus: "The signals for passing must be made, answered, and understood before the steamers have arrived at a distance of eight hundred yards of each other." Had this rule been observed here, the collision would have been avoided. According to the weight of the evidence, direct and circumstantial, the boats were much less than 800 yards apart when the Stone gave the first signal for choice of sides. To that signal the Brown made no response. Nevertheless the boats continued to approach each other until they were within a distance of from 100 to 150 yards, and perhaps even less, when the pilot of the Brown, perceiving that a collision was imminent, gave the danger signals; but before the headway of either boat was stopped the collision occurred. I think neither boat observed due precautions to avoid the catastrophe, and both violated the provisions of the above-mentioned rule. Therefore both boats are responsible for the disaster, and the damages from the loss of the cargo of coke must be divided equally between them. The America, 92 U.S. 432.

2. In the case of carriers, or others under contract to deliver goods, the measure of damages for the loss thereof en route is their net market value at the place of destination, at the time when they should have arrived there; and such damages might have been recovered in a suit brought against the Brown alone, as that boat was under a towing contract to transport the coke to Louisville. But the libelant has elected to sue the two colliding boats together as jointly answerable, and it seems to me that in such joint suit no greater damages are allowable than could have been recovered against the Stone had that boat alone been In other words, the damages are to be assessed upon the footing of the marine tort, for which both boats are answerable, and not on the footing of a contract to which the Stone was a stranger. Now, where the cargo is lost in transitu by a collision, in a suit against the wrong-doer, standing in no contract relation to the party injured, the prevailing rule is to allow only the actual damages sustained at the time and place of the injury, with interest thereon. The Apollon, 9 Wheat. 362, 377; Smith v. Condry, 1 How. 28; 2 Sedg. Dam. (7th Ed.) 351, note a. Such, in my opinion, is the proper measure of damages here; and I am the more satisfied with this conclusion, because by that standard the insurance company (the libelant) and the owners of the coke settled the loss, the value at the time and place of the collision being \$1,070.41. In the libel, as originally filed, the insurance company only claimed damages on that basis. That, I think, is the true claim, and a decree therefor will, under all the proofs, do substantial justice to everybody concerned.

Let a decree be drawn in favor of the libelant for \$1,070.41, with in-

terest thereon from October 17, 1885, and costs.

THE KARO.1

THE KARO v. Two HUNDRED TONS OF SULPHUR.

(District Court, E. D. Pennsylvania, 1886.)

 CHARTER-PARTY — LIEN FOR FREIGHT AND CHARGES UNDER — FRAUDULENT BILLS OF LADING.

Where the charterer of a ship, under a charter-party giving the owners a lien on any part of the cargo for all freight and charges named therein, issues, fraudulently, a bill of lading for the goods of a third party, who had no knowledge of the charter-party, the goods so shipped are subject to the lien given by the charter-party, where the master acted in good faith.

2. SAME—EFFECT OF BILL OF LADING.

The acceptance of cargo, as by general ship, from one ignorant of the fact that the ship is chartered, or signing bills of lading inconsistent with the charter-party, would estop the enforcement, against that part of the cargo so received, of any claim for freight, except that specified in the bills of lading.

In Admiralty.

Morton P. Henry, for libelant.

Driver & Coulston, for respondent.

BUTLER, J. There is very little, if any, dispute between the parties respecting the facts. The libelant's statement is substantially correct, and is adopted by the court. It is as follows:

This was a libel filed against part of 600 tons of sulphur shipped by the charterers at Palermo, for Philadelphia, in which the libelants seek to enforce the lien for the balance due under a charter-party between Tagliavia & Co., of Palermo, and libelants, as follows:

Charter-party freight, - Fifth port of loading, Demurrage as per indorsement of Ta	aoliavia &	Co. on the	- char-	£1,224 50
ter-party at fifth port, - For proceeding from Boston to Philaphur attached, -	•		-	30 150
Less freight collected at Boston,		4	. 199 •	£1,454 960
Balance due the ship,			•	£494

The terms of the charter-party, material to this question, are as follows: The vessel was to load at Adriatic ports and Sicily, in rotation, four places only, as ordered, and to proceed to Baltimore, Philadelphia, New York, or Boston, one port only, as ordered, on signing bills of lading. Freight was a lump sum, £1,224. The freight to be paid on unloading and right delivery of the cargo, in cash, at current rate of exchange, for bankers' 60 days' sight bills on London, on the date of reporting at customs, less cash advanced. The charterers to have the option of ordering the vessel to a second northern port of discharge on payment of £150 additional. The captain to sign bills of lad-

¹Edited by C. Berkeley Taylor, Esq., of the Philadelphia bar.

ing as presented, without prejudice to this charter; owners having an absolute lien on the cargo for all freight, dead freight, or demurrage due to the steamer under this charter-party. Charterers to have the option of using one or two additional ports or places for loading in the Adriatic or Sicily. Steamer in no case to retrace her course,—paying £50 extra. The steamer to be consigned to charterers' agents at ports of loading and discharge. Demurrage

over and above lay days, £25 per day.

By agreement of second February, 1886, at Catania, in consideration of the transhipment of some cargo taken on board at Fiume and Trieste for New York, Tagliavia & Co. guarantied that the ship should be sent to Boston only, without prejudice of charter-party, and that the ship should not be liable for this transhipment. Tagliavia & Co., at Palermo, loaded the ship with fruit, macaroni, and sumac for Boston, for which the master signed one bill of lading to Tagliavia & Co., deliverable at Boston, with freight as per charter-party, and all other conditions, and authorized Tagliavia & Co. to sign partial bills of lading therefor as captain's agent. Tagliavia & Co. also shipped at Palermo the 600 tons of sulphur attached. The bill of lading for

the fruit was signed the day the vessel went to sea.

Tagliavia & Co. also presented, at the same time, a bill of lading to be signed by the master for the sulphur, making the same deliverable at Philadelphia. The master declined to sign such a bill of lading for the sulphur, as he had no authority to do so under the agreement at Catania, requiring the vessel only to proceed to Boston. Tagliavia & Co. assented to such refusal, and asked the master to sign a simple receipt, prepared by him, for the sulphur; and stated that he (Tagliavia) would tranship it in Boston. The receipt was: "Received on board the S. S. Karo, six hundred tons of sulphur." The transaction took place two hours before sailing from Palermo. The vessel arrived at Boston, addressed by the charterers to Messrs. Westervelt & Co., who refused to act as such for the charterer. The master then put the vessel in the hands of C. Furness & Co., of Boston, who collected the freight on the Boston cargo as called for; as set out in the partial bills of lading issued by Tagliavia & Co.

The existence of a bill of lading for the sulphur becoming known, and there being no person to receive the sulphur at Boston, the master, under the direction of his owners, proceeded to Philadelphia. Mr. Malcomson, the claimant, presented a bill of lading for the sulphur, signed by Tagliavia & Co., naming therein Fratelli Jung as shipper, and was deliverable to his order on payment of freight. It was signed, "For the Master, the Agents, Tagliavia & Co.," and was indorsed, "Deliver to the Canadian Bank of Commerce, New York, or order. F. Jung." This bill of lading was signed without any authority from the master. The master had no dealings with any one but the charterers in relation to this cargo. He had no knowledge, or means of knowledge, of the relation of F. Jung to the sulphur. The libelants claimed the balance due on the charter-party as a lien on this sulphur, which Mr. Malcomson declined

to pay, and this libel was filed against a part retained for freight.

Mr. Malcomson appeared as claimant of the sulphur, and subsequently to the filing of this libel, and the delivery of the sulphur to him as claimant, he paid the freight called for by the bill of lading of Tagliavia & Co. on 600 tons, amounting to \$586.80, with costs of suit up to that time, which was accepted

and paid without prejudice to either party.

It was the master's right, as between himself and the charterer, to collect the entire freight secured by the contract from any part of the cargo. He might apportion it ratably to every part, and thus collect it from the whole, or allow a part to escape, and collect the entire sum from the balance. There can be no doubt of this. That such a right

was intended to be vested in him appears from every expression in the contract relating to the subject. While he bound himself to sign bills of lading as presented by the charterer, he stipulated that this signing should be "without prejudice to the charter; the owners having an absolute lien on the cargo for all freight * * * due under the charter." It was important to the master that he should not be required to apportion the freight, which would be difficult and embarrassing, even if unattended with risk; but it was of no consequence to the charterer whether it be collected from the whole or a part. Notwithstanding, however, such was the master's right, under the charter, he might waive it, or estop the enforcement of it, as respects others. The acceptance of cargo, as by general ship, from one ignorant of the circumstances, or signing bills of lading inconsistent with the charter, would doubtless estop him, as respects that part of the cargo. For the fruit, sumac, and macaroni the master did sign such bills, or rather authorized them to be signed in his name; and these bills, being transferred to others, carried this part of the cargo, subject only to the freight specified therein. The purchasers were authorized to deal on the basis of the freight specified, and would, therefore, be defrauded if required to pay more. I say this with great confidence, notwithstanding some expressions found in Gracie v. Palmer, 8 Wheat. 605. While this case goes great lengths to sustain the ship's rights, under charter, it does not, I think, contain anything calculated to cast doubt on the truth of this proposition. The master's right, therefore, is lost, as respects all the cargo except the sulphur.

Why should he not be allowed to collect the freight due from this? He did nothing to restrict or qualify his right respecting it. lading held by the respondent is fraudulent, and affects no one but the charterer, who dishonestly signed it. It serves to transfer his rights in the sulphur, but has no other effect. That the master's name was used without authority is proved, and is no longer questioned. It is urged, however, that the master was remiss in receiving the sulphur, under the circumstances attending its shipment, and thus "rendered the fraud possible." But the fraud would have been possible, and equally probable, had the master done otherwise. No care on his part could have prevented the issuance of the fraudulent bill. Had the master signed the bill presented, with proper reference to the charter, the perpetration of the fraud would not have been rendered more difficult. He could not refuse to accept the merchandise. He was bound by the contract to carry it, and when the charterer consented to take his simple acknowledgment of its receipt, and undertook to tranship it at Boston, nothing further was necessary. The transaction was complete, as contemplated by the charter.

It is assumed that the sulphur was owned and shipped by Fratelli Jung; that the master knew it, and should therefore have informed him of the charter, and its terms. But neither assumption is supported by the evidence. Not only is it not shown that Mr. Jung was the owner, but it is shown that, if he was, the master did not know it. The master swears he did not; that he never heard of such person; and this testi-

mony is unanswered. The probabilities are against the assumption of such ownership. The circumstances tend to show that the sulphur, as well as all the balance of the cargo, belonged to the charterer. The fruit, sumac, and macaroni were shipped by him, and a bill of lading taken in his name. He dealt with the sulphur as his own, had it in possession, and assumed and exercised absolute control over it. The master knew no one else in the transaction. It now appears, however, that the name Fratelli Jung was inserted in the bill presented. The master, as he testifies, did not observe this, but rejected the bill because Philadelphia was named as the place of discharge. It is probable the charterer purchased the sulphur from Mr. Jung, and intended to use the bill as a means of payment; and, being disappointed by the master's refusal, he resorted to the fraud practiced.

As before remarked, the bills of lading contemplated by the charter were intended to be used as acknowledgments merely of the receipt of cargo. An ordinary acknowledgment would have answered as well; and, when the bill for sulphur was refused, the charterer prepared and took such an acknowledgment. Wherein, then, was the master remiss? The charterer having possession of the sulphur, exercising the rights of ownership, and shipping it under the charter, the master was bound to carry it. There was nothing to call for protest or inquiry, as urged by the respondent. The same might be said if it appeared that the sulphur belonged to Mr. Jung, and the master knew it. In such case the charterer must be regarded as his agent, binding him by what was done. The agent knowing all the circumstances, and shipping the merchandise under the charter, the principal would be bound as if he had shipped it personally. A charge of remissness could more readily be sustained against the respondent, and those who preceded him as transferrees of the bill. They knew that its validity depended on the charterer's authority to execute it, and that the burden of proof respecting this rested on them. Inquiry would have revealed the fraud, and avoided the loss which has followed.

What has been said disposes of the entire case. The respondent. standing in the charterer's shoes,—having his rights, and nothing more. —must submit to payment, not only of the balance of freight due under the charter, but also to all other charges which could be enforced against the charterer; that is to say, the charges for visiting a fifth port for loading, for detention there, and for carrying the sulphur to Philadelphia. About the latter charge, I had some doubt at first, but a more familiar knowledge of the circumstances has removed it. Both shipper and respondent intended to have the sulphur carried here. The latter purchased it with a view to delivery at this port, and it is improbable that he would have consented to its discharge at Boston. Although the charterer had promised to tranship it there, he did not intend doing so. and, when the ship reached Boston, the master was seriously embarrassed by the circumstance that he could not get rid of it there. He was not required to hunt the respondent up, but was fully justified in proceeding to Philadelphia, where, as he knew, the respondent expected it.

Support for the foregoing views may be found in Rodoconachi v. Milburn, 17 Q. B. Div. 320; Colvin v. Newberry, 1 Clark & F. 283; Pollard v. Vinton, 105 U. S. 7; Freeman v. Buckingham, 18 How. 182; Foster v. Colby, 3 Hurl. & N. 705; Gracie v. Palmer, 8 Wheat. 605; Peek v. Larsen, L. R. 12 Eq. 378; Carver, Carriage by Water, 680; Sandeman v. Scurr, L. R. 2 Q. B. 86; The St. Cloud, Br. & Lush, 4; Gledstanes v. Allen, 12 C. B. (74 E. C. L. 201) 202; Shand v. Sanderson, 4 Hurl. & N. 381; Small v. Moates, 9 Bing. 579; Faith v. East India Co., 4 Barn. & Ald. 630; Gilkison v. Middleton, 2 C. B. (N. S.) 134; Mitchell v. Scaife, 4 Campb. 295; Maclachlan, c. 5, p. 480; Perez v. Alsop, 3 Fost. & F. 188; Tate v. Meek, 8 Taunt. 280.

If the parties can agree upon the amount for which a decree should be entered, in pursuance of this opinion, the costs of a reference may be avoided; otherwise a commissioner must be appointed.

SHIP SHOWS IN SHOULD

11.1

THOMPSON v. McReynolds and others.

(District Court, W. D. Arkansas. January 20, 1887.)

- 1. COURTS—FEDERAL—JURISDICTION—CITIZENSHIP—ASSIGNMENT OF JUDGMENT.

 In a, suit to enjoin the assignment of a judgment in a federal court, the court has jurisdiction without regard to the citizenship of the parties to such suit.
- 2. Same—Original Suit.
 Such suit is not an original suit, but is auxiliary to, and dependent, upon, the original suit.
- 3. Same—Parties.

 Parties to the original suit, or persons who are not parties to such suit, and who are entitled to any relief in connection with or growing out of the original suit, may come into court, by bill in equity, and have a remedy regardless of citizenship.

 (Syllabus by the Court.)

In Equity.

D. H. Hammond, Ellis & McDaniel, and U. M. & G. B. Rose, for plaintiff.

John G. Chandler and Ben T. Du Val, for defendants.

PARKER, J. This is a suit in equity, brought to prevent defendant McReynolds from assigning a certain judgment recovered, as is alleged in the bill, in this court, March 4, 1874, in favor of defendants Whittaker and Mathews against the county of Carrol, in the state of Arkansas, and in this district, for the sum of \$13,988.96. It is alleged in the bill that said judgment was in truth the property of McReynolds, and that Mathews and Whittaker were only trustees for McReynolds. It is further alleged that McReynolds, being insolvent, executed to defendant Claypool a general assignment of his property for the benefit of creditors. said assignment is made part of the bill, and is void on its face; that plaintiff has recovered a judgment against McReynolds in the circuit court of the state, for Benton county, for the sum of \$1,252.25; that said McReynolds has no other property of any kind which can be subjected to the payment of the debt of plaintiff, save and except the judgment of this court; that, unless McReynolds is prevented, he will assign the judgment in this court for the fraudulent purpose of preventing an application of its proceeds to the payment of the judgment debt due to your orator. It is prayed in the bill that McReynolds may be enjoined from assigning said judgment of this court. This suit is against S. D. McReynolds, S. H. Claypool, Leonard Mathews, Edward Whittaker, and Carrol county. As a matter of fact, the plaintiff, and defendants McReynolds, Claypool, and Carrol county, are citizens of Arkansas, and Mathews and Whittaker are citizens of Missouri. This of this district. The defendants file a demurrer, and for cause thereof fact is conceded. they say "that, upon the facts stated in said bill, this court has no jurisdiction of the cause, because citizenship and residence of none of the parties, complainant or defendant, are averred in the bill, and, for all v.29f.no.14-42

that appears, none of them except Carrol county may be citizens or residents of any state."

The sole question raised by this demurrer is whether, in this kind of a case, it is necessary, in order to give jurisdiction, the bill should show that plaintiff and defendants are citizens of different states. If so, the demurrer must be sustained; if not, it must be overruled.

From an examination of the decisions of the supreme court of the United States upon a similar question to the one raised by the demurrer in this case, it is well settled, in my opinion, that the court has jurisdiction, not only in a case where the parties to the original judgment come into court by a bill in equity to restrain or regulate the original judgment, but also persons other than those who were parties to the original suit in which judgment was rendered, may invoke the equity side of the court to do what it has jurisdiction to do for the parties to the original judgment. The court has jurisdiction without regard to the residence of the parties. This is upon the principle that a suit to enjoin a judgment in the federal court is not an original suit, but that it is auxiliary to, and dependent upon, the original suit. Any party, regardless of his citizenship, who is entitled to any relief in connection with, or growing out of, the original suit, may come into court by bill in equity, and have a remedy, regardless of his citizenship. This right is based upon the principle that the court rendering a judgment has control over such judg-Its jurisdiction extends to regulating, enforcing, applying the proceeds of its judgments, restraining the same, and of seeing to it that they shall be entered as satisfied, if paid. It is but a healthy exercise of this jurisdiction for the court to see to it that its judgments shall not be used for a fraudulent purpose. These views are well sustained by Freeman v. Howe, 24 How. 460; Minnesota Co. v. St. Paul Co., 2 Wall. 609; Railroad Co. v. Chamberlain, 6 Wall. 748; Jones v. Andrews, 10 Wall. 327; Krippendorf v. Hyde, 110 U. S. 276; S. C. 4 Sup. Ct. Rep. 27; Pacific R. R. v. Missouri Pac. R. R., 111 U. S. 505; S. C. 4 Sup. Ct. Rep. 583. The demurrer is overruled.

PULLMAN'S PALACE CAR Co. v. Twombly, Treas., etc., and others.

(Circuit Court, S. D. Iowa. January 14, 1887.)

1. TAXATION—EXEMPTION—PROPERTY USED FOR PURPOSES OF INTERSTATE COM-MERCE.

Property is not exempted from liability to an equal and uniform property tax by the fact that it is used, either partially or exclusively, for interstate commerce.

Same—Vehicles of Transportation—Domicile. Vehicles of transportation, used constantly and continuously upon a single run, acquire a situs, for purposes of taxation, independent and irrespective of the domicile of the owner. 3. Same—Effect of Vehicle's Use in Different States.

Such situs is not destroyed by the fact that the owner, owning many vehicles of like character, and having lines in various parts of the United States, transfers from time to time such vehicles from one line to another, providing a constant and continuous use of such vehicles is preserved upon the single

4. Same—Conflict between Two States.

Where such vehicles are used upon a run extending through two states, there is a situs for taxation in each state to a fair proportion of the value of the property so used.

5. Same—Restraining Collection or Payment of a Tax.

Where a state tax is assessed and levied against a railroad company owning and operating a line of road within the state, based upon the rolling stock used by it in the operation of such road, a third party cannot enjoin the state from collecting, or the railroad company from paying, a portion of such tax, on the ground that a part of such rolling stock included in such assessment is the property of such third party, and exempt from taxation.

In Equity. Motion for injunction. Alfred Ennis, for complainant. A. J. Baker, Atty. Gen., for defendants.

Brewer, J. This is, in substance, a bill brought by the complainant to restrain the state of Iowa from collecting from certain railroad companies doing business in that state a portion of the taxes levied upon them, on the ground that the basis of the assessment upon which such portion of the taxes was levied was a number of sleeping, drawing-room, and parlor cars, belonging to complainant, and used only in interstate commerce. It appears that the complainant is a foreign corporation, created under the laws of the state of Illinois, and domiciled in Cook county, in that state. It is engaged in the business of manufacturing, using, and hiring to be used, sleeping, drawing-room, and parlor cars. It has certain contracts with the various railroads running through the state of Iowa, by which it furnishes to them such cars under contracts providing for their use and operation. In a general way, it may be said that the interior management of these cars remains with the complainant, the exterior with the railroad companies, who receive also the full pay for the mere transportation of passengers. These cars are all used in interstate commerce; that is, all of them run from points outside of the state of Iowa into or into and through the state of Iowa, or from points in the state of Iowa to points outside the state.

Complainant, therefore, insists that, being instrumentalities used exclusively for interstate commerce, and the domicile of the owner being outside of the state, they are exempt from taxation by the state; and, further, that, as the complainant itself cannot be taxed upon such cars, the state cannot do indirectly what it cannot do directly, and cannot, therefore, subject them to taxation by assessing them to the several railroad companies by whom they are in fact used and operated. Obviously, it becomes important to see exactly what the state of Iowa is attempting

to do.

The following are the statutes under which the assessment and levy complained of were made:

Sec. 1317. On the first Monday of March in each year the executive council shall assess all the property of each railway corporation in this state, excepting the lands, lots, and other real estate belonging thereto not used in the

operation of any railway.

Sec. 1318. The president, vice-president, or general superintendent, and such other officers as such council may designate, of any corporation operating any railway in this state, shall furnish said council, on or before the fifteenth day of February in each year, a statement, signed and sworn to by one of such officers, showing in detail, for the year ending on January the 1st preceding, (1) the whole number of miles owned, operated, or leased in the state by such corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind, and the value, located in each county in the state; (2) also a detailed statement of the number, and the value thereof, of engines, passenger, mail, express, baggage, freight, and other cars, or property used in operating or repairing such railway, in this state; and, on railways which are part of lines extending beyond the limits of this state, the returns shall show the actual amount of rolling stock in use on the corporation's line in the state during the year for which return is made. return shall show the amount of rolling stock, the gross earnings of the entire railway, and the gross earnings of the same in this state, and all property designated in the next section, and such other facts as such council may, in writing, require. If such officers fail to make such statement, said council shall proceed to assess the property of the corporation so failing, adding 30 per cent. to the assessable value thereof.

Sec. 1319. The said property shall be valued at its true cash value, and such assessment shall be made upon the entire railway within the state, and shall include the right of way, road-bed, bridges, culverts, rolling stock, depots, station grounds, shops, buildings, gravel beds, and all other property, real and personal, exclusively used in the operation of such railway. In assessing said railway, and its equipments, said council shall take into consideration the gross earnings per mile for the year ending January the 1st preceding, and any and all other matters necessary to enable said council on make a just and equitable assessment of said railway property. If a part of any railway is without this state, then, in estimating the value of its rolling stock and movable property, they shall take into consideration the proportion which the business of that part of the railway lying within the state bears to the business of the railway without the state. Such valuation shall be in

the same ratio as that of the property of individuals.

Sec. 1320. On or before the twenty-fifth day of March, in each year, said council shall transmit to the county auditor of each county through which any railway may run a statement showing the length of the main track of such railway within the county, and the assessed value per mile of the same, as fixed by a pro rata distribution per mile of the assessed value of the whole property named in the preceding section. Said statement shall be entered on

the proper record of the county.

Sec. 1321. At the first meeting of the board of supervisors held after said statement is received by the county auditor they shall make, and cause the same to be entered in the proper record, an order stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, or lesser taxing district in their county through which said railway runs, as fixed by the executive council, which shall constitute the taxable value of said property for taxable purposes; and the taxes on said property, when collected by the county treasurer, shall be paid over to the persons or corporations entitled thereto as other taxes, and the county auditor shall transmit a copy of said order to the city council, or trustees of such city, incorporated town, or township.

Sec. 1322. All such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes, as the property of individuals within such counties, cities, towns, townships,

and lesser taxing districts.

Sec. 1323. The provisions of this chapter in relation to transporting of passengers shall not apply to any railway in this state until the gross earnings of the preceding year, reckoning from the first day of January of each year, shall equal or exceed the sum of \$4,000 per mile average, for all the miles of road operated during the whole of that preceding year.

(Chapter 114, Laws 1878.)

An act to tax sleeping and dining cars, amending section 1318, c. 5, tit. 10, of the Code:

Section 1. Be it enacted by the general assembly of the state of Iowa, that, in addition to the matters required to be contained in the statement provided for in section 1318 of the Code, such statement shall show the number of sleeping and dining cars not owned by such corporation, but used by it in operating its railway in this state during each month of the year for which the return is made, and also the number of miles each month that said cars have been run or operated on such railway within the state, and the total number of miles that said cars have been run or operated each month within and without the state.

Sec. 2. The executive council shall, at the time of the assessment of other railway property for taxation, assess for taxation the average number of cars so used by such corporation each month, and the assessed value of said cars shall bear the same proportion to the entire value thereof that the monthly average number of miles that such cars have been run or operated within the state shall bear to the monthly average number of miles that such cars have

been used or operated within and without the state. Such valuation shall be in the same ratio as that of the property of individuals.

Sec. 3. The executive council shall, as provided by sections 1318 and 1319 of the Code, first assess the value of the property of the corporation using sleeping and dining cars not owned by such corporation, and shall then add to such valuation the amount of the assessed valuation of said sleeping and dining cars, made as hereinbefore provided, and such aggregate amount shall constitute and be considered the assessed value of the property of such corporation for the purposes of taxation.

Approved March 25, 1878.

From these statutes it is obvious—First, that no tax is assessed against the complainant, a non-resident corporation, but only against corporations created by, or doing business and domiciled in, the state; second, the tax is solely a property tax, with rate or assessment and levy the same as obtains in respect to other personal property. It will also be noticed that, in order to be perfectly fair and just, where any rolling stock is used partly in and partly out of the state, only that proportion of value based upon the amount of use within the state is considered as the basis of taxation. In other words, the state aims to tax that property which it protects, and only to the extent that it furnishes protection. If it cannot do this, it requires but a moment's reflection to see that the state will be shorn of much of what every candid man must feel to be honest revenue. Sleeping cars are not the only vehicles used in interstate commerce. A vast amount of rolling stock used on the various interstate railroads belongs to car trust companies, and is simply leased by the

railroad companies. Is it taxable only in the eastern cities in which the car trust companies are domiciled? More than that, how many interstate railroads, traversing often several states, are owned and operated by a corporation created by and domiciled in a single state? Has that state alone the power of taxation?

Now, as stated, the claim of complainant is that, because this property is used in interstate commerce, it is exempt from state taxation at any other place than the domicile of its owner. I deny the proposition, and affirm the law to be that personal property, continuously used in a state, acquires a situs in that state for purposes of taxation, and may, at the option of the state, be subjected to an equal property tax, and that notwithstanding it be used exclusively in interstate commerce. The state is sovereign, except as limited by the federal constitution. A sovereign may tax all property within its jurisdiction, and, unless there be found in the federal constitution some provision taking away this power, the state of Iowa may unquestionably tax this property used within its territorial limits. Lane Co. v. Oregon, 7 Wall. 77; Ward v. Maryland, 12 Wall. 427; Railroad Co. v. Peniston, 18 Wall. 5.

The restriction on the power of the state is claimed alone by virtue of clause 3 of section 8 of article 1 of the constitution of the United States, which grants to congress the power "to regulate commerce with foreign nations, and among the several states." I insist that an equal and uniform property tax is not a regulation of congress, although it reaches to and affects property used in interstate commerce. Such a tax is not similar to a license or occupation tax. They are conditions of, or restrictions upon, the doing of the business, while the former is simply a subjection of the property employed in the business to the common burden of state support. A citizen of Canada, with his only domicile there, may build in the city of Des Moines a sleeping car. It remains idle and unused. The duty of the state to protect that property for its owner is clear, and equally clear its correlative right to subject it to ordinary taxation. To provide protection costs money, and the tax is the owner's proper payment therefor. The car may be employed in commerce, and run continuously from Davenport to Council Bluffs. The duty of protection and the right of taxation confessedly remain unchanged. Next year it extends its run across the Mississippi river, to Rock Island. The duty of protection remains. Has the right of taxation gone? Must both Iowa and Illinois pay for furnishing this citizen of Canada protection to his property, and neither have a right to exact any compensation therefor? Does the regulation of interstate commerce compel such an absurdity and wrong? If the imposition of an equal and uniform property tax upon the vehicles used in interstate commerce be a regulation of commerce, the domicile of the owner and the situs of the property are immaterial questions. The use determines the exemption, and all such property is released from every burden of state taxa-If it be a regulation of commerce to impose such a tax in Iowa, where the property is found, it is equally so in Illinois, where the owner is domiciled. Surely, such a sweeping exemption was never within the

contemplation of the framers of the federal constitution in granting the power to congress to regulate interstate commerce.

If we turn to the decisions of the supreme court, we find an almost constant affirmation of the power of the state to levy a property tax upon the vehicles and instrumentalities of interstate commerce.

Thus, in The Passenger Cases, 7 How. 283, is this language:

"A state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens. A state may tax the stages in which the mail is transported, but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce; and yet, in both instances, the tax on the property in some degree affects its use."

In Morgan v. Parham, 16 Wall. 471, the court says:

"A steam-boat or a post-coach, engaged in a local business within a state, may be subject to local taxation, although it carry the mail of the United States. The commerce between the states may not be interfered with by taxation or otherwise, but its instruments and vehicles may be. It is not, therefore, upon this principle that we decide this case."

And in the late case of Gloucester Ferry Co. v. Pennsylvania, 5 Sup. Ct. Rep. 829, it is said:

"It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to state taxation, provided, always, it be within the jurisdiction of the state. As said by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 429: "All subjects over which the severeign power of a state extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."

And further, (page 832:)

"It is solely, therefore, for the business of the company in landing and receiving passengers at the wharf in Philadelphia that the tax is laid, and that business, as already said, is an essential part of the transportation between the states of New Jersey and Pennsylvania, which is itself interstate commerce. While it is conceded that the property in a state belonging to a foreign corporation, engaged in foreign or interstate commerce, may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, etc., is invalid,"-etc.

No case can be found in which the supreme court have declared a mere property tax void, on the ground that the property upon which it was imposed was employed in interstate commerce. Strong support of the views above expressed is found in the rulings of the supreme court upon state taxation of the agencies of the federal government.

In the case of McCulloch v. Maryland, 4 Wheat. 310, a state tax upon noves of the United States Bank was declared unconstitutional, and in Osborn v. Bank of U. S., 9 Wheat. 738, a similar tax upon the right of the bank to do business in the state of Ohio was also held illegal. These decisions were upon the ground that the taxes were an impediment upon the free operations of the agencies of the federal government.

In Railroad Co. v. Peniston, 18 Wall. 5, an attempt was made to carry the doctrine of these cases further, and to the extent of exempting the Union Pacific Railroad Company from liability for any state taxes upon its real and personal property. But the court refused to sanction this extension of the doctrine, and held that the railroad company, although a corporation created by an act of congress, the recipient of large bounty from the general government, and subject to the obligation of carrying its troops, mails, etc., was not exempt from state taxation on its real and personal property. The first syllabus in the case is as follows:

"The exemption of agencies of the federal government from taxation by the state is dependent, not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power. A tax upon their property merely, having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the states. A tax upon their operations, being a direct obstruction to the exercise of federal powers, may not be."

And in the course of the opinion the court uses this language to illustrate the distinction between this case and the prior ones, and to point out the extent to which those former cases went:

"McCulloch v. Maryland and Osborn v. Bank of U. S. are much relied upon by the appellants, but an examination of what was decided in those cases will reveal that they are in full harmony with the doctrine that the property of an agent of the general government may be subjected to state taxation. In the former of those cases the tax held unconstitutional was laid upon the notes of the bank. The institution was prohibited from issuing notes at all, except upon stamped paper furnished by the state, and to be paid for on delivery; the stamp upon each note being proportioned to its denomination. The tax, therefore, was not upon any property of the bank, but upon one of its opera-tions; in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation, performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank. No wonder, then, that it was held illegal. But even in that case the court carefully limited the effect of the decision. It does not extend, said the chief justice, to a tax paid by the real property of the bank, in common with the other real property in the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution, in common with the other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional. Here is a clear distinction made between a tax upon the property of a government agent and a tax upon the operations of the agent acting for the

"In Osborn v. Bank the tax held unconstitutional was a tax upon the existence of the bank,—upon its right to transact business within the state of Ohio. It was, as it was intended to be, a direct impediment in the way of those acts which congress, for national purposes, had authorized the bank to perform. For this reason the power of the state to direct it was denied, but, at the same time, it was declared by the court that the local property of the bank might be taxed; and, as in McCulloch v. Maryland, a difference was pointed out between

a tax upon its property and one upon its action. In noticing an alleged resemblance between the bank and a government contractor, Chief Justice Marshall said: 'Can a contractor for supplying a military post with provisions be restrained from making purchases within a state, or from transporting the provisions to the place at which the troops were stationed? Or could be be fined or taxed for doing so? We have not heard these questions answered in the affirmative. It is true the property of the contractor may be taxed, and so may the local property of the bank. But we do not admit that the act of purchasing. or of conveying the articles purchased, can be under state control. This distinction, so clearly drawn in the earlier decisions, between a tax on the property of a governmental agent and a tax upon the action of such agent, or upon his right to be, has ever since been recognized. All state taxation which does not impair the agent's efficiency in the discharge of his duties to the government has been sustained when challenged, and a tax upon his property generally has not been regarded as beyond the power of a state to impose."

It seems to me clear, from these considerations, that the mere use of property in interstate commerce does not exempt it from the burdens of an equal and uniform state property tax.

Neither does the domicile of the owner furnish, in the present case, any basis of exemption. It is true that the domicile of the owner (the complainant) is in the state of Illinois, and that for many purposes the situs of personal property is the domicile of the owner. Mobilia sequentur personam. But, for purposes of taxation, tangible property has a situs wherever it is found. Railroad Co. v. Pennsylvania, 15 Wall. 300. Now, these cars—tangible property—are found, and found continuously, in the state of Iowa. This is not the case of a car owned in another state making a single trip through the state of Iowa, and then returned to the state where it belongs. Such temporary transit, it may be conceded, would not change the situs of the property. It is also true, according to the allegations of the bill, that the complainant, being the owner of a thousand or more sleeping cars in use throughout the United States, frequently changes cars from one run to another, so that identically the same cars may not be continuously in use in the state of Iowa. But this interchange does not abridge the statement that there is a continuous and constant use in the state of Iowa of the sleeping cars belonging to the complainant, and, being thus continuously and constantly used in that state, they acquire a situs there for the purposes of taxation. As to other tangible property, it goes without saying that its continued presence in a state gives it a local situs for purposes of taxation. It is doubtless within the legislative power, by suitable enactment, to establish a situs for personal property elsewhere than at the place where it is found, and this fact interprets several decisions of the supreme court. place in which a vessel is registered is, by law, its home port. That is considered its situs.

In Hays v. Pacific Mail S. S. Co., 17 How. 596, the defendant, a corporation of New York, owned steam-vessels employed in the transportation of passengers and freight between New York and San Francisco, which were registered in New York. The court held that place of registry the situs of the property for taxation, and that the mere fact that

the vessels stopped temporarily in the ports of California to load and unload did not give the property a situs there for purposes of taxation.

The same proposition controlled the decision in *Morgan* v. *Parham*, 16 Wall. 471. That was an extreme case, for the vessel was engaged in the coasting trade between Mobile and New Orleans, and had been absent from New York city for years, yet in its opinion the court uses this language:

"The jurisdiction of this court over the present case, as in the case of Hays v. Pacific Mail S. S. Co., arises from the facts—First, that the property had not become blended with the business and commerce of Alabama, but remained legally of and as in New York; and, secondly, that the vessel was lawfully engaged in the interstate trade over the public waters. It is in law as if the vessel had never before been within the port of Mobile, but, touching there on a single occasion, when engaged in the interstate trade, had been subjected to a tax as personal property of that city. Within the authorities it is an interference with the commerce of the country not permitted to the states."

An attempt is made to place commerce by land in the same position as commerce by water, and to make in the former case the domicile of the owner equivalent to the port of registry in the latter. But until there has been some legislative declaration of equivalent import the obvious distinction between the two must be enforced, and the ordinary rule of the situs of tangible personal property for purposes of taxation be applied to vehicles used in commerce on land.

The distinction between the two modes of commerce is clearly recognized by the supreme court in *Railroad Co.* v. *Maryland*, 21 Wall., where, at page 470. Mr. Justice Bradley says:

"Commerce on land, between the different states, is so strikingly dissimilar in many respects from commerce on water that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and federal government. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislation, so that state interference by water is clearly marked and distinctly discernible. But it is different by land."

I have thus far assumed that the property in question was used exclusively for interstate commerce, but such is not the fact. It is alleged in the bill "that the same cars also transport passengers from points in Iowa to other points in said state, whenever they properly apply for such transportation, but the number of such passengers is very small, compared with the number of other passengers transported in such cars." It thus appears that these cars are used partly for commerce wholly within the state of Iowa. Can a vehicle, used partly for intrastate commerce, escape entire state taxation on the ground that it is also used partly for interstate commerce?

The case of Wabash, St. L. & Pac. R. Co. v. Illinois, 7 Sup. Ct. Rep. 4, (decided at the October, 1886, term of the United States supreme court.) while holding that the state might not regulate the tariff on freight transported interstate, conceded that it could so regulate the intrastate tariff. If the same car carried freight from a place within the state to one also within, and still other freight to a place without the state, would the two transportations in the same car destroy the state's power to regulate the tariff on either? I think this, however, is a minor matter. I have thus endeavored to show that, if this tax had been assessed and levied directly against the complainant upon its property continuously used in the state of Iowa, it would have to be sustained as a valid exercise of power on the part of the state; but the fact is that no tax has been attempted to be collected from complainant. As the bill discloses, the state has simply assessed and levied the ordinary property tax against certain railroad corporations, some its own creations, and all owning and operating lines of railroad within its territory, the basis of the assessment being only the property used by them in the operation of their lines within the state. May not the state enforce such a tax? Can a third party challenge the basis of that assessment? May it enjoin those corporations from payment on the ground that they have not a complete title to all the property they use? Suppose the tax be illegal, may not the railroad companies pay it, if they choose? They may prefer to pay, rather than forfeit the good-will of the people of Iowa, or provoke them to the imposition of severer burdens. A stockholder in those corporations would not be heard, unless he showed that he had used all reasonable efforts to compel the corporations themselves to act. Has a third party, with no interest in the corporations, a better right? If the tax is illegal, and the companies nevertheless pay it, they cannot recover it from the complainant. It would not be estopped by their action to challenge its validity.

Counsel for complainant say that while there may be no legal obligation on complainant's part to reimburse the railroad corporations this tax, yet it must keep on good terms with them, and will therefore feel obliged to reimburse them. It seems strange to me to ask a court of equity to enjoin a state from receiving a tax which the party against whom it is assessed is willing to pay, simply for the sake of keeping two corporations on good terms. I think it more important to permit the willing tax-payer to keep on good terms with the people of the state. Suppose the railroad corporations do not pay, and the tax is sought to be collected by warrant. That will run against the corporations, and not against the complainant. If any of its property is seized, replevin an action at law will furnish adequate relief, and there is no need of the interposition of a court of equity. So, for this reason also, I think the complainant must fail.

It now remains for me to notice the cases presented by counsel for complainant in support of their bill.

First, the case of *Crandall* v. *Nevada*, 6 Wall. 35, in which a capitation tax of one dollar, attempted to be levied by the state of Nevada for each passenger passing through the state by stage-coach or railroad, to be

paid by the carrier, was declared illegal, and beyond the power of the state. That was no property tax, but, in effect, a tax on the business of transportation. Yet even that decision was not placed on the ground of conflict with said section 8, but mainly rested on the proposition that such a tax tended to prevent the free passage of the citizen to and from the federal capital.

St. Louis v. Ferry Co., 11 Wall. 423. In this case it appeared that an Illinois corporation owned a ferry privilege across the Mississippi, at St. Louis. When not in use, its boats were laid up on the Illinois shore, and forbidden to remain at the wharf in St. Louis. It paid a ferry license and wharfage tax to the city of St. Louis. In addition, the city authorities assessed a tax on the company for the value of the boats as

property within the city.

Similar in its facts is the case of Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; S. C. 5 Sup. Ct. Rep. 826. In both cases the tax was held illegal. While called a tax on the property, the court regarded it as a tax on the business, because the boats, by simply touching the wharf for the purposes of loading and unloading, did not become a part of the property within the city. In the latter case, as we have already seen, the right to tax the instrumentalities of interstate commerce was expressly conceded.

Carlisle v. Pullman P. C. Co., 8 Colo. 320; S. C. 7 Pac. Rep. 164. In this case the only question was as to the mode of assessment and taxa-

tion. The power of the state was affirmed.

Tennessee v. Pullman S. Car Co., decided in the circuit by Mr. Justice MATTHEWS, 22 Fed. Rep. 276; opinion of the supreme court by Mr. Justice Blatchford, 117 U.S. 34; S.C. 6 Sup. Ct. Rep. 635. In that case it was decided that the levying of a privilege tax by the state of Tennessee was a regulation of commerce. The legislation of the state required the payment of \$50 per car for the privilege of running through the That this was an attempt to regulate the business is apparent, and, as such, was declared beyond the power of the state. It is true that in both opinions may be found some general expressions which, taken by themselves, and disconnected from the precise question before the courts, go very strongly to sustain the general claim of exemption asserted by complainant. But it has been well and often said that the true way to construe the language of an opinion is to take it as applied simply to the facts and the question under consideration. Especially is that true in a case like this, where, unless so limited, it contradicts the oft-repeated prior declarations of that court. The same comment may be made upon the opinion in the case of Wabash R. Co. v. Illinois, supra, in which the only question was as to the power of a state to prescribe the terms of interstate tariff.

These are the cases relied on by complainant, and in them I find nothing which I deem sufficient to overthrow the reasoning and authority heretofore presented.

My conclusion, therefore, is (1) that property is not exempted from liability to an equal and uniform property tax by the fact that it is used, either partially or exclusively, for interstate commerce; (2) that vehicles

of transportation, used constantly and continuously upon a single run. acquire a situs, for purposes of taxation, independent and irrespective of the domicile of the owner; (3) such situs is not destroyed by the fact that the owner, owning many vehicles of like character, and having lines in various parts of the United States, transfers from time to time such vehicles from one line to another, providing a constant and continuous use of such vehicles is preserved upon the single run; (4) where such vehicles are used upon a run extending through two states, there is a situs for taxation in each state to a fair proportion of the value of the property so used; (5) where a state tax is assessed and levied against a railroad company owning and operating a line of road within the state, based upon the rolling stock used by it in the operation of such road, a third party cannot enjoin the state from collecting, or the railroad company from paying, a portion of such tax, on the ground that a part of such rolling stock included in such assessment is the property of such third party, and exempt from taxation.

Entertaining these views, the restraining order heretofore granted will be set aside, and the application for a temporary injunction denied.

BLAND and others v. FLEEMAN and others.

(District Court, W. D. Arkansas. January 20, 1887.)

1. EQUITY—NECESSARY PARTIES.

All persons who are necessary parties to a suit must be made parties.

2. Same-Parties Interested in Result.

All parties whose interests are affected by the suit, or whose concurrence is necessary to a complete determination of the suit, or who have a substantial interest in the subject-matter of the suit, are necessary parties to it; and it cannot proceed without their being made parties.

8. Same—Plaintiffs—Defendants.

The law is that those whose interests are in harmony should be joined as plaintiffs or defendants, as the case may be.

4. Courts-Jurisdiction, how Conferred.

To give jurisdiction, how conferred.

To give jurisdiction, there must be subject-matter upon which the court has a right to pass, place over which it can exercise its powers, and all the proper and necessary parties. All of these requisites must exist; and in this suit the interests of all the heirs are in harmony, as against the defendant, and all of such heirs must be made parties plaintiff.

5. SAME—FEDERAL COURTS—PARTIES.

To give a federal court jurisdiction, on the ground of a dispute or controversy between citizens of different states, it must appear that all the necessary plaintiffs are citizens of states different from all the necessary defendants. If this state of facts does not exist, there is a failure of jurisdiction. They must exist, before the court, under the law, can exercise the power of hearing and defermining a controversy. Proportion and research power of hearing and defermining a controversy. and determining a controversy. Proper and necessary parties are as much an element of jurisdiction as any of the other elements of it. If there is a failure of either one of these elements, there is a failure of jurisdiction.

6. EQUITY—PARTIES—HEIRS.

All the heirs to an estate of a decedent, in a suit against an administrator of such estate charging him with having fraudulently converted the assets of the estate, are necessary parties to such suit.

7. Same—Pleading—Jurisdiction.

Under the law, and the rules of pleading as they existed in equity before the passage of the act of March 4, 1875, a plea to the jurisdiction in the nature of a plea in abatement, because of the joinder of parties who could not sue in the federal court, must have been filed before an answer to the merits, as an answer to the merits, without a plea previously filed, was a waiver of the objection. A plea filed simultaneously with an answer to the merits came too late. But this rule is abrogated by the act of 1875.

8. SAME-DISMISSAL.

Under this act it is made the duty of the court, at any time after suit has been brought, to see to it whether the suit really and substantially involves a dispute or controversy properly within its jurisdiction. If it does not do so, it is the duty of the court to dismiss the suit. This may be done when the question is raised by the pleadings, or it may be done by the court sua sponts.

9. COURTS—FEDERAL JURISDICTION—PARTIES.

Parties to a suit cannot artificially arrange themselves so as to create a fictitious ground of federal jurisdiction. The court will disregard all such arrangement of parties, and arrange them according to their interest in the suit. It will look to the real facts of the case, as shown by the pleadings.

10. SAME—CITIZENSHIP.

When a court has properly acquired jurisdiction of a cause by reason of the proper citizenship of the parties, some or any of such parties may, by cross-bill, assert a necessary defense, or set up a right or claim which puts such party in antagonism with his co-defendant. Such cross-bill is treated as ancillary to the main cause properly before the court. Even other persons who are not parties, if the court has first lawfully acquired jurisdiction of the cause, if necessary to protect their rights, may intervene in the suit, regardless of citizenship.

(Syllabus by the Court.)

In Equity.

U. M. & G. B. Rose, for plaintiffs.

J. M. Moon, John J. Walker, J. E. Cravens, and Clendening & Sandals. for defendants.

PARKER, J. This is a suit brought by those who are made plaintiffs on the record as a part of the heirs at law of Robert H. Adams, deceased. against Marion F. Fleeman and others. It is charged in the bill that Robert H. Adams died intestate, leaving a large estate, of which Marion F. Fleeman became administrator; that, as such administrator, he, with the aid and assistance of others who are made defendants, so managed the estate as to cause the greater portion of it to pass into his own hands. and the hands of some of those with whom he conspired, in fraud of the just, legal, and equitable rights of those who, as heirs of the said Robert H. Adams, were legally entitled to the same. All the plaintiffs are citizens of the states of Tennessee and Mississippi.

William W. Adams, Mary Adeline Waddell, Hattie Gray Waddell, and Kate M. Dickey are heirs at law of Robert H. Adams, deceased. William W. Adams is, and was at the time of the bringing of this suit, administrator de bonis non of the estate of Robert H. Adams. William W. Adams, Mary Adeline Waddell, Hattie Gray Waddell, and Kate M. Dickey are made defendants in this suit. They are citizens of the state of Arkansas, and residents of this district, the same state and district in which Marion F. Fleeman, and the other defendants who are charged to

have conspired with him, reside.

The prayer of the bill is that said defendants may be required to answer, but not under oath; that the settlements of Marion F. Fleeman, as administrator, may be set aside for fraud; that his accounts as such administrator may be reformed; that Fleeman be required to account for the rents and profits of the lands and ferry franchise, which belonged to the estate of Robert H. Adams, and for all profits made out of his fraudulent transactions in connection with the estate of Robert H. Adams, deceased, and that he be required to pay over the same to your orators, or to said administrator de bonis non; that the said Fleeman be compelled to surrender said lands to your orators, and the other heirs of said Robert H. Adams, deceased; and for such other and proper relief as may be deemed meet, and justice may require.

The defendant Marion F. Fleeman, on May 5, 1884, filed an answer, and at the same date filed a plea in abatement of the suit, because the court has no jurisdiction, for the reason "that W. W. Adams is one of the heirs at law of the said Robert H. Adams, deceased, and said action was instituted and is prosecuted at his instance, and for his benefit; that said W. W. Adams is, and was at the time of the institution of said action, a citizen of the state of Arkansas, and could not be joined as a plaintiff in the action, and for that reason he was collusively joined as a party defendant, for the purpose of creating a case cognizable in this

court."

The question presented here by this plea to the jurisdiction is whether this record presents a case where there "is a controversy between citizens of different states." There must be this to give the court jurisdiction. There is no controversy disclosed by these pleadings between those who are made plaintiffs by the bill and W. W. Adams, Mary Adeline Waddell, Hattie Gray Waddell, and Kate M. Dickey, who are made defendants by the bill. These last-named parties are heirs at law of the estate of Robert H. Adams, deceased, together with the plaintiffs. Their interest in the result of the suit is identical with the interest of the plaintiffs, and the only controversy disclosed by the pleadings is one between the plaintiffs and W. W. Adams, as heir and administrator, Mary Adeline Waddell, Hattie Gray Waddell, and Kate M. Dickey, on one side, and Fleeman, and those who are charged to have conspired with him to cheat and defraud all the heirs of Robert H. Adams, on the other.

This proposition is evidenced by the pleadings, as the answer of W. W. Adams and the other defendant heirs adopts the bill of the plaintiffs, declares it true in all its allegations, and they pray in such answer for the same relief as that asked for by the plaintiffs.

Then nothing is demanded by the plaintiffs against W. W. Adams, and the other defendant heirs. The record, therefore, shows that the interest of W. W. Adams and the other defendant heirs are in harmony with the interests of the plaintiffs. The rule is that those whose interests are in harmony shall be joined as plaintiffs or defendants, as the case may be. Bunce v. Gallagher, 5 Blatchf. 481; Parsons v. Lyman, 4 Blatchf. 432. W. W. Adams and the other defendant heirs are neces-

sary parties in this suit, because their interests are affected by it. Their concurrence is necessary to a complete determination of the suit. They have now an equitable interest in the subject-matter of the suit, which, if the same should be successful, would become a legal interest. Such interest is largely affected by the result of the suit. The suit, therefore, cannot proceed without them. Barney v. Baltimore City, 6 Wall. 280; Williams v. Bankhead 19 Wall. 571; Caldwell v. Taggart, 4 Pet. 190; Morgan v. Morgan, 2 Wheat. 298.

To give jurisdiction there must be subject-matter upon which the court has a right to pass, place over which it can exercise its powers, and all the proper and necessary parties. Each and all of these things must exist before the court, under the law, has a right to exercise the power of hearing and determining a controversy. Proper and necessary parties are as much an element of jurisdiction as any of the other elements of it. If either one of these elements which go to make it up fail, there is a failure of jurisdiction, and the suit is not properly before the court. It is, in my judgment, the duty of the court, under the law as it now stands, in passing on a question of jurisdiction in a suit originally brought in a federal court, to arrange the parties to the suit according to their interests in the controversy. All those whose interests are antagonistic to the defendants fall on the side of the plaintiffs.

This is a rule applicable, and which we are to apply in the first instance, to see if jurisdiction has attached. When jurisdiction attaches, parties may occupy such relations to each other in the controversy as a proper remedy for their rights may demand, regardless of citizenship. Applying the above rule in this case, W. W. Adams and the other defendant heirs would fall on the side of the other plaintiffs. Then we have a controversy between parties who are all necessary and material parties, and without joining whom jurisdiction would not attach; but it is a controversy not between citizens of different states from the state of the defendants, for the other parties who, under the law and rules of pleading, are necessary and material parties, and are properly plaintiffs, are citizens of the same state with the defendants, with whom they have a controversy precisely similar in all its parts with the controversy of the other plaintiffs against defendant Fleeman and his coadjutors. fore the passage of the law of March 4, 1875, citizenship of the parties was no part of the issue on the merits, but it must have been brought forward by a plea to the jurisdiction, in the nature of a plea in abatement, before answer filed to the merits. The objection could not be raised on the general issue. D' Wolf v. Robaud, 1 Pet. 476; Evans v. Gee 11 Pet. 80; Van Antwerp v. Hulburd, 7 Blatchf. 426; Evans v. Davenport, 4 McLean, 574; Wickliffe v. Owings, 17 How. 47; Dodge v. Perkins, 4 Mason, 435; Vose v. Reed, 1 Woods, 647; Smith v. Kernochen, 7 How. 198. The court said in Vose v. Reed: "The plea to the jurisdiction must be a separate plea. An answer is an appearance, and waives it."

Under the old rule the plea in abatement could not be filed simultaneously with an answer to the merits. The objection to the jurisdiction on the ground of a want of joinder of parties, or the joinder of improper

parties, was considered waived when the plea was so filed. The plea to the jurisdiction in this case was filed simultaneous with the answer, and, under the rule above laid down, it would come too late. But by the act of 1875 this rule has been abrogated, as the fifth section of that act provides "that if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may re-* * *" This section of the law permits the question of jurisdiction to be raised at any time while the suit is pending. Indeed, it becomes the duty of the court, at any time while it is pending, without any pleadings, even sua sponte, to dismiss or remand for want of jurisdiction.

The case of Schenk v. Peay, 1 Wool. 175, was much relied on in the argument on the question of jurisdiction in this case. But that was a case where jurisdiction had properly attached, as Schenke, a citizen of Ohio, had brought a suit against Bliss and Peay, both citizens of Arkan-Against Bliss the plaintiff prayed for a partition of property, and as against Peay that the title of plaintiff might be quieted. That brought the case properly before the court. Peay then filed a cross-bill, setting up an interest in the property antagonistic to both Schenke and Bliss. This he could do, as, when the court has properly acquired jurisdiction of a cause by reason of the citizenship of parties, some or any of these parties may, by cross-bill, assert a necessary defense, or set up a right or claim which puts such party in antagonism with his co-defendant. cross-bill is treated as ancillary to the main cause properly before the court. Even other persons who are not parties, if the court has first lawfully acquired jurisdiction of the case, if necessary to protect their rights, may intervene in the suit, regardless of citizenship. Phelps v. Oaks, 117 U.S. 236; S. C. 6 Sup. Ct. Rep. 714.

But it must be remembered that this case cannot get properly before the court until all parties who claim an interest in the property in suit, as against Fleeman, are made parties, and when they are made parties they must be made parties plaintiff, because their interests are all on that side of the controversy, and, when so placed as parties, they make a case where part of the necessary plaintiffs are residents of the same state with the defendants. Jurisdiction does not lawfully attach until all necessary and material parties are made parties. It is not in the discretion of the pleader to arrange parties in the suit so as to confer jurisdiction. They must be arranged according to their interests in the suit, and the court, when passing on the question of jurisdiction, will do this. It will look to the real facts of the case, as developed by the pleadings, and will

disregard the artificial arrangement of the parties by the pleader, and ascertain from the pleadings where the real controversy lies, and range the parties accordingly. Parties cannot, by arranging themselves as plaintiffs or defendants in a cause, create a fictitious ground of federal jurisdiction. This is denominated a collusive joinder of parties, to confer jurisdiction.

It is with some degree of regret that I feel compelled to hold that the court has no jurisdiction, as, from the examination of the facts of the case, I am led to the conclusion that the acts of Fleeman, as administrator of the estate of Robert H. Adams, bristle with fraud. But it is usurpation for a court to take jurisdiction where it does not have it under the law. With my view of the law regulating jurisdiction, and of the facts of this case, I feel compelled to order the dismissal of the case for want of jurisdiction.

WILSON and others v. Rockwell and others.

(Circuit Court, D. Colorado. December 15, 1886.)

Injunction-Trespass-Title.

A party showing an equitable title to realty will be protected against trespassers by injunction, though the location of the legal title has not been finally determined.

Motion for Injunction.

Hugh Butler, for complainants.

L. C. Rockwell, per se, for defendants.

Brewer, J. The facts stated in the bill give complainants a clear right to a preliminary injunction. It is immaterial whether the legal title be in complainants or the Woodmass of Alston Company. The dispute between them does not concern trespassers. Both parties are in court, the company being made defendant. The full equitable title ownership is with complainants, and a court of equity will protect the owners, as against trespassers, although the location of the legal title has not been finally determined. The allegations of the bill are met by affidavits and other testimony on the part of the defendants. The truth is in doubt. I shall not attempt to determine it now, nor comment, on the testimony, further than to say that Gwynn, the vendor to complainants, and Gwynn, the witness, do not speak in the same way. A little cross-examination may be helpful. The case made by the bill is shaken, but by testimony, some of which at least is open to strong suspicions.

A preliminary injunction will be granted as prayed for, upon the giving of a bond in the sum of \$10,000, with two sureties, to be approved by the clerk of this court, conditioned to pay all damages caused by this order, if the same shall finally be set aside. The complainants must also proceed, with all reasonable speed, to have the legal title determined.

CAHN and others v. MONROE.

(Circuit Court, W. D. Michigan, S. D. November 19, 1886.)

1. Costs-Depositions not Admitted in Evidence.

When plaintiff is nonsuited upon the statement of his case by his attorney, the defendant is not entitled, in the taxation of costs, to include a charge for depositions taken against him by plaintiff, as the depositions are not, in such case, admitted in evidence.

2. SAME-WITNESSES NOT SUMMONED.

Witness fees are taxable in the case of witnesses whose attendance is procured in good faith, although they are not subprensed.

Appeal from Clerk's Taxation of Costs.

On the trial of this cause the court directed a verdict for the defendant after the opening statement of plaintiffs' counsel to the jury and before the introduction of any testimony. No witnesses had been subpænaed by defendant, but a witness was by him in good faith procured to attend for the purpose of testifying, but had not been sworn. The clerk declined to tax an item of \$35 attorney fees on depositions taken by plaintiff, upon the taking of which defendant's attorney had attended for the purpose of cross-examination; and also declined to tax the fee for the witness, on the ground that he had not been served with a subpæna.

SEVERENS, J. Respecting the item of \$35 for depositions, I do not find it necessary to decide whether, in case the depositions are used by being admitted in evidence, the party against whom they are taken may, if successful, tax the statutory fee therefor,—a somewhat difficult question,—because I am of opinion that the depositions were not admitted in evidence, within the meaning of the statute. Stimpson v. Brooks, 8 Blatchf. 456. The court ruled, on the statement of the plaintiff's case by his attorney, that he could not recover. The clerk's action in this particular will therefore be confirmed.

Respecting the second item, which is that of a witness fee disallowed solely because the witness was not subpænaed, I am of opinion that the earlier and reported ruling of Judge Withey (Anderson v. Moe, 1 Abb. 299) in 1869 was sounder than the later ruling in this court (but not reported) by Judge Baxter. The fact that the earlier ruling is reported, and the later is traditional only, leaves me, in a measure, free to follow my own convictions upon the point, and they are entirely in accord with the opinion of Judges Gray and Colt, in the case of U. S. v. Sanborn, 28 Fed. Rep. 299. When a witness' attendance is procured in good faith, for the purpose of testifying in a cause, it appears to me there is nothing in the reason of the matter which should reject the allowance of the usual fees. Under such circumstances the witness attends "pursuant to law." It is a not unusual course in the actual practice of trials; and there is no reason that I am aware of which makes it necessary to put so technical a construction upon the statute as to exclude cases

when the attendance of the witness to testify is procured in this quite It must often happen that exigencies arise when a subcommon way. pæna may not be seasonably procured, and delay and inconvenience would result to the court and the parties in proceeding with the trial. The argument ab inconvenienti is of considerable weight in the construction of statutes, and especially in doubtful questions of practice arising It seems to me that the adoption of the opposite construction is a voluntary tying of its hands by the court where freedom is open. The general sense of equity on which costs are given by statute applies here in full force in favor of the successful party. No injury can happen, but in fact the costs are lessened, and there is certainly nothing of which the other party can complain. I think the statute is susceptible of a construction which is in harmony with reasonableness and convenience, and I shall therefore adopt it, and direct that the item in question be taxed.

WINEGAR v. CAHN and others.

(Circuit Court, W. D. Michigan, S. D. December, 1886.)

Depositions — Costs — Attorney's Fees — Depositions Taken for Another Case Used by Stipulation.

Attorney's fees for depositions taken in a former case, on behalf of plaintiff in the former suit, and, by stipulation of attorneys, read upon the trial of a later suit in which the former plaintiff is defendant at suit of another plaintiff, cannot be taxed as costs by plaintiff in the latter suit, he having incurred no liability in procuring said depositions. A deposition, when taken, is common property, and may be used by either party.

Motion for Retaxation of Costs. Fletcher & Wanty, for plaintiff. Turner & Carroll, for defendants.

Severens, J. A motion is made by the defendants in this cause for retaxation of costs. The question arising on the motion relates to the taxation by the clerk of 14 attorney's fees, of \$2.50 each, for depositions read and used upon the trial of the cause. It is claimed by counsel for the defendants that they should not have been allowed. The facts on which the point arises are these: In a former case in this court in which Cahn et al., the present defendants, were plaintiffs against Monroe, the former marshal of this district, as defendant, these depositions were taken on behalf of the then plaintiffs, their attorneys being the same as now, and the attorneys for the present plaintiff having been also attorneys for the defendant, Monroe. Ante, 675. On the trial of the former case these depositions were not in fact used, the court having disposed of the case upon the trial upon a point not involving the merits, on the opening statement of the attorney for the plaintiffs. On a motion for retaxation in that case before me, I sustained the action of the clerk in disallowing

the attorney's fees for these depositions, upon the ground that they had not been used upon the trial, and did not pass upon the question whether in any case attorney's fees could be taxed in favor of the party against whom the deposition was taken. By a verbal stipulation between the attorneys in this case these depositions were read upon the trial thereof, and now the attorneys for the plaintiff seek to tax the fees for the depositions.

As an original proposition, my opinion would be strongly against the allowance of these fees, upon the ground that the depositions were not taken in the case; but counsel for the plaintiff cites and relies upon a case in 12 Fed. Rep. 271, (Jerman v. Stewart,) which seems to militate against that conclusion. In that case the depositions had been taken in a cause depending in a state court, and were by stipulation "read and used" in the case in the federal court, and it was held that attorney's fees therefor were taxable.

It is an object much to be desired that uniformity of construction of the statutes should prevail in all the courts, and I am sorry I cannot see my way clear to follow the case cited. From the report of that case it does not appear that Jerman, the plaintiff, in whose favor the attorney's fees were taxed, was a party to the former suit. Hence the depositions were not taken in his behalf, nor was he subject to the expense of taking them either for direct or cross examination. It was laid down in that case, apparently as a principal basis for the ruling, that it was the use of the depositions upon the trial which determined the right to tax for them; and the case of Stimpson v. Brooks, 3 Blatchf. 456, was cited in confirmation of that view. But on looking at that case it will be seen that the court did not affirm that as the only prerequisite, but simply as completing the right to tax for the depositions; and the expression in the opinion relied upon was used as part of the argument leading to the conclusion which was arrived at upon the point actually decided, which was that affidavits (treated as the equivalent of depositions) used on a preliminary proceeding in the case, but not upon the final hearing, were not taxable under the statute. It was in this connection that the court said that it was the use upon the trial that determined the And in the present case it appears obvious that the expenses incurred in taking these depositions were incurred on the direct by Cahn et al., and on the cross by Monroe. If Monroe has not already settled his liability, that is a matter between him and his attorneys or others. Winegar incurred no liability on account of the taking them. then, should he be entitled to tax costs therefor? It would seem unquestionable that the intention of the statute was to compensate for the taking the depositions. It may be that the statute may be fairly construed to apply so as to give such costs to a successful party whose attorney has attended to the taking of depositions which have been taken at the instance of the other party, and used on the trial. A deposition. when taken, is common property, and may be used by either party.

The statutes in relation to costs in the federal courts ought certainly to receive a fair and reasonable interpretation, and, as I think, a liberal

one, in those directions in which they aim at cases and circumstances of moral justice and equity, not, however, transcending the bounds of settled principles of construction. The costs in question are not, in my opinion, either within the express terms of the statute, or within the limits covered by any possible interpretation of it. They must therefore be disallowed.

Moller and others v. Merritt.

(Circuit Court, S. D. New York. January 81, 1887.)

CUSTOMS DUTIES-REV. St. U. S. §§ 2931, 3011, 3012.

A suit against a collector of customs, to recover duties under section 2931, Rev. St. U.S., was brought in time as to two importations, but prematurely brought as to a third importation, in that 90 days since the appeal required by that section had not elapsed, and no decision of the secretary of the treasury made; and as to a fourth importation, in that no such decision, or an appeal or protest, also required by that section, had been made. Subsequently to the commencement of this suit such protest, appeal, and decisions were made. Thereafter plaintiffs' complaint and bill of particulars and defendant's answer were served. The collector refunded the duties sued for as to the first two importations, but refused to refund those sued for in case of the last two importations, solely on the ground that as to them suit was prematurely brought. Held, that a recovery in the suit upon the last two importations was authorized by sections 2981, 3011, 3012, Rev. St. U.S., when construed together.

This action was commenced June 30, 1881, to recover alleged excessive duties exacted of the plaintiffs by the defendant, as collector of customs, upon four importations of sugar made by them by the steamer Newport, March, 23, 1881; the Giles Loring, March 14, 1881; the Niagara, April 28, 1881; and the Venerata, May 31, 1881. The grades or Dutch standards in color of these sugars, according to which sugars were dutiable under the provisions therefor contained in Schedule G of section 2504 of the United States Revised Statutes, were determined by the collector as shown by chemical tests or by the polariscope, and the duties on the sugars accordingly exacted.

In the case of the Newport, liquidation of duties was made April 29, 1881; protest and appeal, April 30, 1881; and decision of the secretary, May 27, 1881. In the case of the Giles Loring, liquidation was made April 21, 1881; protest and appeal, April 25, 1881; and secretary's decision, May 27, 1881. In the case of the Niagara, liquidation was made May 24, 1881, payment in part, April 28, 1881, and in part, June 2, 1881; protest and appeal, May 27, 1881; and secretary's decision, July 18, 1881. In the case of the Venerata, liquidation was made July 2, 1881; payment, May 31, 1881; protest and appeal, July 8, 1881; and secretary's decision. July 23, 1881.

The plaintiffs' unverified complaint, (served August 19, 1881,) after alleging that defendant was collector of customs; that plaintiffs were

partners in trade under the firm name of Moller, Sierck & Co., and as such made the importations in question; and that the rate and amount of duty exacted was as therein set forth,—further alleges:

"(5) That plaintiffs filed with said defendant due and timely protests in writing, upon each entry of said goods, against," etc.; (6) that plaintiffs made due and timely appeals, in each case, to the secretary of the treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals when this action was commenced; (7) that the bill of particulars hereto annexed states, for each importation separately, the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the secretary of the treasury, and of his decision thereon, together with the other particulars required by law, and is made a part thereof; (8) that said sum so exacted as aforesaid has never been repaid," etc.

The defendant's answer, in its fourth and fifth paragraph, puts in issue plaintiffs' allegations as to protests, appeals, secretary's decisions, etc. Plaintiffs' bill of particulars was served August 19, 1881, setting forth

the particulars required by section 2931, Rev. St. U. S.

At its October term, 1881, the United States supreme court, in the case of Merritt v. Welsh, 104 U. S. 694, decided that the determination of the grade, or Dutch standard in color, of sugar, by the polariscope, was contrary to law. March 14, 1882, (see page 63, Synopsis Dec. 5154, Treas. Depart. 1882, herewith submitted,) the secretary of the treasury, after citing the Welsh decision, authorized a refund in similar cases upon entries not then liquidated, and upon entries not liquidated more than 10 days at the date mentioned, (March 14, 1882;) and also that, "in other cases, where the provisions of law necessary to protect the rights of the importers shall have been duly complied with, the entries will be adjusted upon the proper basis, and certified statements forwarded for a refund of the money overpaid, with interest and accrued costs, where suits have been instituted."

March 29, 1882, it was stipulated by the attorneys for the respective parties that this action be discontinued, and that the amount due the plaintiffs be ascertained and certified at the New York custom-house under the authority of the above-mentioned letter of the secretary of the treasury; and on the same day Judge Blatchford made an order in conformity therewith. Thereafter, and in 1882, such refund was made in case of plaintiffs' importations by the Newport and the Giles Loring; but refused in case of their importations by the Niagara and Venerata, on the ground that as to them suit had, according to the provisions of section 2931, Rev. St., been prematurely brought. Thereafter, and on June 11, 1883, upon plaintiffs' motion, Judge Wallace ordered that the stipulation in this case bearing date March 29, 1882, "be annulled, vacated, and set aside, so far as the last two items in said bill of particulars are concerned; and that, as to said two items in said bill, said cause be reinstated upon the docket of said court, and to have the same legal status, and the same legal force and effect, as if said stipulation had not been signed and made part of the record in said cause."

Upon the trial on December 8, 1886, of this case, as to the plaintiffs' importations by the Niagara and Venerata, the foregoing facts appeared at the close of the plaintiffs' case; and thereupon the defendant's counsel moved the court to direct a verdict for the defendant, on the ground (1) that plaintiffs had not proven facts sufficient to constitute a cause of action to entitle them to recover; (2) that they had not complied with the requirements of section 2931, Rev. St. U. S., in that this action was prematurely brought. This motion the court denied, and thereafter directed a verdict for the plaintiffs. The defendant subsequently moved for a new trial.

Stephen A. Walker, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., for the motion.

At common law an importer had a right of action to recover illegal duties paid by him. Elliott v. Swartwout, 10 Pet. 137; Bend v. Hoyt, 13 Pet. 263, 267. The importer's common-law right of action was taken away by the act of March 3, 1839. (5 U. S. St. at Large, 348, § 2.) Cary v. Curtis, 3 How. 236. A right of action to recover illegal duties paid by an importer was restored to him by the act of February 26, 1845, (5 U. S. St. at Large, 727.) Barney v. Watson, 92 U. S. 449-452; Arnson v. Murphy, 109 U. S. 238-241; S. C. 3 Sup. Ct. Rep. 184. The right of action restored by the act of 1845 was taken away by the act of June 30, 1864, (13 U. S. St. at Large, 214,) now section 2931, Rev. St. U. S.; and a statutory action given in place thereof by the latter act.

Under section 2931, Rev. St., 90 days not having elapsed since the plaintiffs' appeal as to their importation by the Niagara, and the secretary having made no decision on such appeal, and no protest or appeal or decision having been made as to their importation by the Venerata, no cause of action as to these importations had arisen to the plaintiffs at the date of the commencement of the case at bar. At that time suit as to them was prohibited, and the secretary having made his decisions on their appeals as to them within 90 days after such appeal, and no suit having been brought within 90 days after such decisions as prescribed by that section, suit is now barred, and the collector's ascertainment and liquidation of duties on these importations is final and conclusive against all persons interested therein. Arnson v. Murphy, supra;

and S. C. 115 U. S. 579, and 6 Sup. Ct. Rep. 185.

The prescription of a time before which suit shall not be brought, and of a time within which suit must be brought, is a condition on which alone the government consents to litigate the lawfulness of these duties. Cheatham v. U. S., 92 U. S. 85-89; Arnson v. Murphy, 115 U S. 579, 585, 586; S. C. 6 Sup. Ct. Rep, 185; Savings Inst. v. Blair, 116 U.S. 200, 205, 206; S. C. 6 Sup. Ct. Rep. 353. Such prescription is not a hard condition; for the plaintiffs in any event had only to wait as to these importations 90 days after their appeals, when they could have brought suit with or without the secretary's decisions. Plaintiffs cannot escape the conditions of section 2931 by the aid of section 3011. The latter section, by its terms, is coupled with section 2931, and to the right of action given by section 3011 are attached the conditions precedent prescribed by section 2931. Each of the entries in suit is the foundation of a single and entire cause of action, and the right of action as to them several and distinct. Bartels v. Schell, 16 Fed. Rep. 341-343. In general, the rights of parties to a legal action must be determined as they were at the commencement of the action. Wisner v. Ocumpaugh, 71 N. Y. 113. Cases of torts, and some cases growing out of contracts or agreements, are exceptions. Sedg. Dam. (7th Ed.) 147, 193, 196, 202, 204, note b; Lamb v. Walker, 3 Q. B. Div. 389; Curtis v. Rochester & S. R. Co., 18 N. Y. 534;

Sheehan v. Edgar, 58 N. Y. 631; Plate v. New York Cent. R. Co., 37 N. Y. 472; Fifth Nat. Bank v. New York E. Ry. Co., 28 Fed. Rep. 231; 1 Sedg. Dam. 196-202; Howard v. Daly, 61 N. Y. 362.

The case at bar falls within the general rule. It is true that section 542 of the New York Code permits an amended complaint, and in cases like Fincke v. Rourke, 20 Hun, 264; Prouty v. Lake Shore & M.S. R. Co., 85 N.Y. 272; Angell v. Lawton, 14 Hun, 70; Latham v. Richards, 15 Hun, 129,—section 564 of this Code allows a supplemental complaint; but where the performance or happening of some act is necessary to give plaintiffs a cause of action, and such action is not performed, or does not happen at all, until after the action was commenced, plaintiffs cannot,—not by amended or supplemental complaint,—incorporate such act into the case. McCullough v. Colby, 4 Bosw. 603; S. C. 5. Bosw. 477; Bostwick v. Menck, 4 Daly, 68. A premature suit cannot be made the subject of recovery. McCullough v. Colby, 5 Bosw. 477; Smith v. Aylesworth, 40 Barb. 104; Oothout v. Ballard, 41 Barb. 33; Muller v. Earl, 37 N. Y. Super. Court, 388.

Jerome F. Manning, in opposition.

WHEELER, J. The plaintiffs made four importations of sugar at the port of New York, while the defendant was collector there in 1881, on which he exacted duties which they paid, but against which they duly protested and appealed. Two of the appeals were decided against them May 27th; the last payment was made June 2d; the summons in this action was served June 30th; one of the remaining appeals was decided against them July 18th, and the other July 23d; the complaint in this action, with a bill of particulars in due form covering all the importations, was served August 19th, and issue was joined upon the answer to this complaint, without objection to the time or manner of the commencement of the action.

By the decision in Merritt v. Welsh, 104 U. S. 694, the exaction of these duties was shown to be illegal, and those as to which decision was made May 27th were refunded; and the case has been tried as to those concerning which decisions were made July 18th and 23d. On the trial no question was made but that the exaction of the duties was illegal, nor about any of the proceedings in any respect, except that a direction of a verdict for the defendant was requested on the ground that this suit was not commenced at a proper time. The court ruled against the defendant on this point, and, as there was no other question about the right of the plaintiffs to recover, directed a verdict for them. The defendant has moved for a new trial on account of alleged error in this ruling, and this motion has now been heard. The only question now is whether the plaintiffs are defeated of their right to recover by bringing their action too soon.

There are three sections of the Revised Statutes which appear to have some bearing upon this question,—sections 2931, 3011, and 3012. Section 2931 provides that the decision of the collector as to the rate and amount of duties shall be final and conclusive, unless protest be made within 10 days, and appeal to the secretary of the treasury be taken within 30 days; and that the decision of the secretary shall be final unless suit be brought within 90 days after; and that no suit shall be

maintained for the recovery of the duties until the decision of the secretary, unless it is delayed more than 90 days. Section 3011 gives an action to any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him to ascertain the validity of the demand, and to recover back any excess paid; but provides that no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section 2931. Section 3012 provides that no suit shall be maintained for the recovery of duties unless the plaintiff serves a bill of particulars within 30 days after

notice of the appearance of the defendant.

The restriction of recovery to cases in which a protest and appeal have been taken, in section 3011, was passed in 1877, and is the latest of these enactments. 19 St. at Large, 247. The action given appears to be an action for the recovery of the money, in which the principal question triable is the validity of the demand of the money made by the collector, about which the other provisions of these statutes appear to be regulations governing the action and conditions upon which it is given, compliance with which must be shown to entitle the plaintiff to recover, but which need not be alleged by the plaintiff in his pleading as a foundation for, or a part of, his cause of action, to give him a right to show compliance with them, and the want of which need not be set up by the defendant in his pleading, to give him the right to disprove such com-This is the effect given to statutes conferring a right of action, but limiting the right to maintain the action unless certain notices should be given. Kent v. Lincoln, 32 Vt. 592; Matthie v. Barton, 40 Vt. 286. Therefore, in states where the common-law method of pleading prevails, the common counts in indebitatus assumpsit would seem to be a sufficient declaration, and the general issue a sufficient plea. Elliott v. Swartwout, 10 Pet. 137. The money is what is recovered with the interest from the time of its illegal exaction, ordinarily. Erskine v. Van Aredale, 15 Wall. 75; Redfield v. Ystalyfera Iron Co., 110 U. S. 174; S. C. 3 Sup. Ct. Rep. 570.

According to the provisions of section 3011, the plaintiff might bring an appropriate action for the recovery of the money, and, on showing that the defendant took his money for duties by illegal exaction, and protest and appeal as prescribed in section 2931, have a recovery. There is nothing there about a decision by the secretary, and there is nothing about protest and appeal before the commencement of the suit. the recovery in the action, not its commencement, which is restrained by the want of these. Section 2931 does not provide that suit shall not be brought until decision by the secretary, but that it shall not be main-The same expression is used in section 3012, whereby it is provided that no suit shall be maintained unless a bill of particulars is filed, which is not to be done until after suit brought. This shows that prohibition of maintenance does not there prohibit commencement of suit. The impression made by the reading of these three sections, and considering them together, is that it was intended by them to give an action for the recovery of money illegally exacted for duties, but to restrain maintaining it to recovery of judgment, without protest, appeal, and adverse decision by the secretary. Of course, if there should be no protest and appeal in due time shown, the decision of the collector would be final and conclusive as to the legality of the exaction; and if these should be shown, and the suit should not be brought in time, the decision of the secretary would be likewise final and conclusive, and the plaintiff would have no ground for a recovery, whether the suit was otherwise well brought or not; but that does not show that a suit brought before decision would be premature. This suit was not delayed more than 90 days after the decision of the secretary, and, as there is no question about the rest of the plaintiffs' case, would seem to be well brought if the question is not foreclosed by the expressions of the supreme court in Arnson v. Murphy, 109 U. S. 238, 3 Sup. Ct. Rep. 184, and S. C. 115 U. S. 579, 6 Sup. Ct. Rep. The question in that suit about the time of bringing it was whether it was brought soon enough, not whether it was brought too soon; and what is said about the bringing of a suit being prohibited until after decision by the secretary appears to have been said with reference to the language of section 2931 in general, without reference to the language of that section in connection with that of sections 3011 and 3012 in partic-These expressions are so direct, however, that they may have been intended to indicate that this subject was considered in all its bearings, and decided, although not involved in this aspect. But whether so or not, those expressions are not considered to be decisive of this case against the plaintiffs.

The time when the complaint and bill of particulars in this action were served was after the decisions of the secretary upon the appeals, and long before the expiration of 90 days after. The answer of the defendant was served September 3d, and more than 40 days before the expiration of 90 days after the first of these decisions. This complaint was the first pleading under the provisions of the Code of Procedure of the state in which the suit was brought. Code Civil Proc. N. Y. § 478. Until the complaint was filed there does not appear to have been anything on which any judgment could be rendered. Id. §§ 419, 420.

This suit was well brought as to the other entries, in any view. There could be no advantage or benefit to the defendant or the government in having two suits instead of one. The answer of the defendant was filed by the district attorney of the government, who then knew from the bill of particulars, or is to be presumed to have known, that this suit was brought to recover these duties as well as the others. The objection that these causes of action are improperly united with the others could apparently have then been taken by the answer. Id. § 488. Had it then been so taken, the plaintiff could have brought a new suit within the required time. When it was taken this could not be done. The service of this complaint would seem to be sufficiently the commencement of this action, for these causes of action, for all the purposes for which a delay until the decision of the secretary can be required. Certainly it does not appear to be just to allow this objection to be taken and prevail now, unless the rules of law strictly so require. It is a mere technicality, which does

not at all touch the merits of the plaintiffs' claim, which is confessedly just; for it is for the recovery of money which was confessedly illegally exacted. It is true that the action is given only upon condition that it be brought within 90 days after decision of the secretary. This action was not so brought as to include the items in question until after that decision, and it was so brought as to include them within the 90 days after. What was done about it before the decision did not subject the defendant or the government to any additional costs, charges, or expense. If the suit is overthrown on this ground, money illegally exacted of the plaintiffs will be left in the hands of the government; if it is sustained, the plaintiffs will only recover that. The rules of law do not appear to stand in the way of doing justice by sustaining this recovery. Motion denied.

Mason and others v. Robertson, Collector.

(Circuit Court, S. D. New York. January 26, 27, 1887.)

CUSTOMS DUTIES—CHEMICAL COMPOUNDS AND SALTS—REV. ST. § 2499.

The term "chemical compounds and salts," in Schedule A of the tariff act of 1888, does not enumerate bichromate of soda, within the meaning of the statute. Bichromate of soda is a non-enumerated article, and in its similitude to bichromate of potash is provided for under Rev. St. § 2499, and dutiable at three cents per pound.

This action was brought by Mason, Chapin & Co. against William H. Robertson, collector of the port of New York, to recover an alleged excess of duties upon 30 casks of bichromate of soda, imported into the port of New York from Antwerp, by the steamer Westernland, on March 3, 1885. The collector assessed the duty thereon at three cents per pound, under the provision for bichromate of potash contained in Schedule A of the tariff act of March 3, 1883, (22 St. at Large, c. 121, p. 493,) and under section 2499, Rev. St., as follows:

Schedule A, 22 St. at Large, 493. Bichromate of potash, three cents per

pound.

Sec. 2499. There shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned, etc.

The plaintiffs protested as follows:

"New York, March 31, 1885.

"We protest against your decision as to the rate and amount of duties to be paid on the bichromate of soda entered by us for consumption, March 3, 1885, per Westernland, 26,214, from Antwerp, because it is a chemical compound and salt, not specially enumerated or provided for, dutiable at 25 per cent. as such, under tariff Schedule A. We pay the excess exacted under compulsion, solely to get the goods.

MASON, CHAPIN & Co.

"By Hartley & Coleman, Attys."
"To the Collector of Customs, New York City."

The clause of the tariff act in Schedule A, under which the plaintiffs protested, reads:

"All preparations known as essential oils, expressed oils, distilled oils, rendered oils, alkalies, alkaloids, and all combinations of any of the foregoing, and all chemical compounds and salts, by whatever name known, and not specially enumerated or provided for in this act, twenty-five per centum ad valorem."

Upon the trial, these facts were established by evidence:

(1) That bichromate of soda, as a commercial commodity, was not known in this country prior to or at the time of the passage of the tariff act of March 3, 1883. (2) That since March 3, 1883, it has been introduced and imported as a substitute for bichromate of potash, and it bears a substantial similitude to bichromate of potash in the uses to which it is applied. (3) That both are mordants, used in the manufacture of colors, for dying, for oxidizing purposes, in galvanic batteries, and in the formation of artificial alizarine. (4) That both are chemical compounds and salts. Chromic acid is the useful and effective ingredient in the uses to which they are applied. Soda is the base of bichromate of soda, and potash the base of bichromate of potash, but the soda and the potash are the mere vehicles for carrying and making the chromic acid available as an article of commerce, for the uses to which it is applied. Both articles are used interchangeably, and for the same purposes, with generally the same results.

At the close of the trial, the defendant moved for a direction for a verdict in favor of the defendant.

Stephen A. Walker, U. S. Dist. Atty., and Henry C. Platt, Asst. U. S. Dist. Atty., for defendant, quoted Stuart v. Maxwell, 16 How. 150; Arthur v. Fox, 108 U. S. 125; S. C. 2 Sup. Ct. Rep. 371; Cohen v. Phelps, 2 Sawy. 531; Cummins v. Robertson, 27 Fed. Rep. 654; Biddle v. Hartranft, 29 Fed. Rep. 90.

Hartley & Coleman, for plaintiffs, quoted U. S. v. U. S. Tel. Co., 2 Ben. 362; U. S. v. Clarke, 5 Mason, 30; Arthur v. Sussfield, 96 U. S.

128; Smith v. Field, 105 U. S. 53.

SHIPMAN, J. The only question in this case is whether bichromate of soda is an enumerated article. The only enumeration is that stated in the statute as a "chemical compound and salt." A chemical compound enumerates nothing, any more than the general term "manufacture." A chemical salt is, speaking generally, and not with scientific precision, the combination of an acid and a base. A base is the union of a metal and oxygen. It is a most general term. I cannot think that, within the meaning of the statute, the term "chemical compound and salt" enumerates the article of bichromate of soda. There is no question in my mind, from the testimony, that bichromate of soda has a similitude, in the uses to which it is applied, to bichromate of potash. It is not perhaps as valuable or beneficial in the manufacture of chrome yellow as the bichromate of potash, but the universal testimony of both plaintiffs' and defendant's witnesses is that the general uses to which the two articles are applied are substantially identical. The point of difference is that the plaintiffs' witnesses testify that bichromate of soda cannot be used to much advantage in the production of chrome yellow, and

of some other shades, or perhaps many other shades, of colors, giving to the testimony as much latitude as it will bear. But the general purposes for which it is used, the witnesses, starting with the testimony of Prof. Morton, agree, are substantially the same. In my opinion, there is no question of fact to go to the jury. There is only a question of law.

By direction of the court, the jury rendered a verdict in favor of the

defendant.

HANSEN v. ROBERTSON, Collector,

(Circuit Court, S. D. New York. January 21, 1887.)

Customs Duties—Fish Prepared—Schedule G, Tariff Act of March 8, 1883. Herrings preserved in a brine of vinegar, salt, and spices, with onions, carrots, peppers, or other vegetables, and ready for food in their imported state, found by the jury to be "fish prepared," and not merely "herrings, pickled or salted," within the meaning of the tariff act of 1888.

This was an action to recover alleged excessive duties, exacted by the collector of customs at the port of New York from Peter F. T. Hansen. the plaintiff, on his importation by the steamer Moravia, December 5. 1883, of certain fish, known in the trade as "Russian Sardines." The collector levied duty thereon at 25 per cent. ad valorem, under Schedule G. of the tariff act of March 3, 1883, (22 St. at Large, U. S. 504,) under the following clause: "Salmon, and all other fish, prepared or preserved, and prepared meats of all kinds, not specially enumerated or provided for in this act, twenty five per centum ad valorem." The plaintiff protested, and claimed the same to be dutiable under another clause of the same schedule, to-wit: "Herrings, pickled or salted, one-half of one cent per pound." The merchandise in suit was shown to be herrings imported in small wooden kegs or barrels, stamped "Pickled Herrings." but known in the trade as "Russian Sardines." They were pickled in salt and vinegar, and in addition thereto mixed with spices, onions, carrots, and red peppers, and prepared and ready to be eaten in their imported condition.

Chas. Currie and Stephen G. Clarke, for plaintiff.

Stephen A. Walker, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty., for defendant.

SHIPMAN, J., (charging jury.) The plaintiff takes the burden of proof, and must satisfy you by a fair preponderance of evidence that the goods should have been classified as "herrings, pickled or salted." They are herrings, and are pickled; that is to say, they have been preserved in a brine of vinegar, salt, and spices. But the government claims that they are more than that, and are "fish prepared;" that is to say, prepared with vegetables, and that they have passed beyond the stage of "herrings pickled." The plaintiff, on the other hand, says that a pickle

means prepared, either simply with brine or vinegar, or with vinegar and spices, or with vinegar, spices, and other articles, to give the compound an agreeable flavor, of which a great many pickles upon our tables are specimens. That is the whole question before you, whether the article is "herrings pickled," or whether it has passed beyond that stage, and is properly styled a herring or fish prepared, in addition to being pickled.

Verdict for defendant.

In re Petition of CAN-AH-COUQUA for Habeas Corpus.

(District Court, D. Alaska. 1887.)

1. Territories — Alaska — Organic Act — Whether Operates Retrospect-

The provision in the organic act of Alaska, (act of congress of May 17, 1884.) adopting the laws of Oregon, in part, as the law of Alaska, does not operate retrospectively, there being nothing in the act from which it can be inferred that it was so intended.

2. PARENT AND CHILD — CONTRACT RELEASING CUSTODY OF CHILD, WHETHER BINDING—HABEAS CORPUS.

A parent who has surrendered the custody of a child under a parol agreement is not entitled, after long acquiescence, to repudiate the agreement, and recover the child upon habeas corpus, as of course, without showing a breach of the agreement by the custodians, or a neglect of some duty in regard to the care, education, or moral training of the child; the controlling consideration in such case is, what is for the best interests of the child?

8. Same—Wishes of Child.

In such case the wishes of the child are to be considered, but are not con-

4. Same-Indian Child-Mission School-Alaska.

Held, accordingly, in the case of a male Indian child in Alaska, surrendered by its mother to the care of the officers of a Presbyterian mission school there, when the child was five years old, to remain five years, that the mother could not reclaim him, after three years, although the child wished to go back to his mother, it appearing that he was being well cared for and educated; but held, that the mother should be allowed to visit him at the mission.

Habeas corpus.
Clark & Berry, for petitioner.
M. D. Ball, for defendants.

Dawson, J. This is a proceeding by habeas corpus, brought by Canah-couqua, an Indian woman, the mother of Can-ca-dach, a male child eight years of age, against William A. Kelly, who is superintendent of the Presbyterian mission school at Sitka, and A. E. Austin, who is an ordained minister of the gospel of the Presbyterian Church denomination, and is now chaplain of said Presbyterian mission school. The petition alleges that Can-ca-dach is unlawfully restrained of his liberty by the defendants; that his restraint and detention is contrary to the will and wishes of the petitioner. The defendants, making return to the writ, admit the custody of Can-ca-dach, but deny the illegality of the restraint,

and assert that they are detaining him in the mission school pursuant to the assent and agreement of the petitioner made in May, 1883; that under said agreement said petitioner voluntarily surrendered the custody and care of her child (he being then only five years old) to the superintendent of the mission school for a period of five years, there to be instructed in the ordinary branches of an English education.

The facts are, as I have been able to gather them from the evidence, that some years ago the Board of Home Missions of the Presbyterian Church of the United States of America, an institution incorporated under the laws of the state of New York, established a number of mission schools in Alaska, and, among the number, one at Sitka. were equipped and supplied with teachers by liberal contributions from the Presbyterian Church denominations in various parts of the country, and especially in the city and state of New York. In May, 1883, the defendant Austin was the superintendent of, and in charge of, the mission school at Sitka. The petitioner, Can-ah-cougua, admits that at that time she surrendered the custody of her child to the superintendent for the purpose of having him educated. In March, 1885, the defendant Austin was superseded as superintendent of said mission school by one A. J. Davis, and he by the defendant Kelly, and Can-ca-dach has since that time remained in his custody. In July, 1884, congress appropriated \$15,000 for the support and education of Indian children of both sexes at industrial schools in Alaska, (23 U. S. St. at Large, 91;) and in March, 1885, a further appropriation of \$20,000 was made by congress for the same purpose, (Id. 381.) In December, 1885, the commissioner of Indian affairs, for and on behalf of the United States, entered into a contract in writing with the Board of Home Missions of the Presbyterian Church of the United States of America, of New York city, by the terms of which it was stipulated and agreed that, by a compliance with certain conditions therein set forth by the said Presbyterian Board of Home Missions, the United States would pay to said Board of Missions \$11.25 per month for each scholar taught in said school.

The question presented is by no means free from difficulty. The civil government of Alaska is anomalous. It has no parallel in the history of territorial governments. The school laws of the state of Oregon are inapplicable, and we are left to assimilate the adjudications of these questions as nearly as possible to the rules of the common law. congressional appropriations referred to, and the contract of December, 1885, it is quite evident that the policy of the government is to aid these mission schools in the great Christian enterprise of rescuing from lives of barbarism and savagery these Indian children, and conferring upon them the benefits of an educated civilization. But how shall this be done? There is no law compelling the Indians to send their children to school. Moral sussion is the only weapon in the hands of the missionaries. the parents bind their children in any manner except by indenture? The General Laws of Oregon, p. 559, forbid minors to be bound unless by indenture, but I am relieved from determining the applicability of that provision to Alaska, because the surrender of the custody of this child

took place one year prior to the adoption by congress of any part of the general laws of Oregon as the law of this territory, and, as a rule, laws can only operate prospectively. It will be observed that there is no provision in the organic act of May 17, 1884, from which it can be inferred that congress intended section 7 of said act to have any retroactive force. Laws cannot act retroactively unless the intent is manifest, clear, and undoubted.

Can a parent, then, at common law, surrender the custody of an infant by parol and acquiescence, so as to preclude the right to recover it on habeas corpus? The earlier decisions are to the effect that such contracts are not binding, but the later decisions are unquestionably against the repudiation of such agreements by the parent; and, unless a clear breach of the agreement is shown, or abuse of the child, or a failure to educate and provide for, and properly superintend its moral training, the courts will not assist in its recovery on habeas corpus. Church, Hab. Corp. 444; Com. v. Dougherty, 1 Pa. Eq. Gaz. 63; Pool v. Gott, 14 Law Rep. 269; Hurd, Hab. Corp. 545.

In this case the mother has, without objection, acquiesced in her agreement for nearly three years, has witnessed the progress of her child in his studies, and has expressed satisfaction at the treatment he has received. The evidence shows most clearly that Can-ca-dach has, during this time, been fed, clothed, sheltered, and cared for at the mission without expense to the petitioner, and that he is slowly but surely acquiring an education. The question now arises, what is for the best interest of the child? This is the paramount fact, and one that must have a controlling influence in determining this question. In re Bort, 25 Kan. 308. Will it be contended that his best interests require that he shall be released from the custody of the superintendent of the mission school, and permitted to go where the fascinations of camp life will soon obliterate and absorb the impressions of civilization his young mind has received?

It is the experience of those who have been engaged in these Indian schools that, to make them effectual as disseminators of civilization, Indian children should, at a tender and impressionable age, be entirely withdrawn from the camp, and placed under the control of the schools. It is quite obvious that to permit the parents of these children to place them in school under an agreement that they shall remain there for a determinate period, and then withdraw them at their own pleasure, would render all efforts of both the government and missions to civilize them abortive.

These Alaska Indians are dependent allies, under the protection of the laws, and subject to such restraints in their tribal relations as may be deemed necessary for their own welfare, promotion, and protection, and they must recognize the binding force of their obligations. Now, unless I should refuse to be influenced by considerations which influence the rest of mankind, I cannot escape the conclusion that the best interests of this child imperatively require that he should be remanded to the custody of the superintendent of the mission school. I am fully aware that

the jurisdiction asserted in equity to remove an infant from the custody of its parent, or to withhold that custody after it has been surrendered, and a desire is expressed to again assume it, is admitted to be of great delicacy, and attended with embarrassment and responsibility. But when sound morals, the good order and protection of civilized society, unmistakably demand it, the court has no alternative. There is no doubt as to the jurisdiction or duty in matters of this kind. 2 Kent, Comm. 205; In re Wollstonecroft, 4 Johns. Ch. 80; U. S. v. Green, 3 Mason, 482.

The education and moral training of the child should invariably be looked to by the court. Story, Eq. Jur. §§ 1327-1342, inclusive. The wishes of the child may be consulted, but they are not binding on the court. The court cannot substitute the wishes and caprice of the child for its own deliberate judgment. Consulting the wishes of the child is a mere rule, founded upon the duty of the court to exercise a wise and just discretion, and not upon any permanent and fixed right of the child to decide for himself and the court the question of custody. Rex v. Delaval, 3 Burr. 1436.

The habeas corpus proceeding would be a mockery if, after all, the child should be permitted to decide for himself where he will go, or under whose roof he will shelter. I can only look to the capacity, information, intelligence, and judgment of the child, and I am clearly of the opinion that Can-ca-dach has not yet reached that discretion which would enable him to choose wisely. Rude and untutored as the petitioner is shown to be, yet it is evident that the profligate and dissolute life she has lived has not entirely extinguished the natural affection and love of a mother's heart, and she asks to be permitted to visit her child.

The judgment of the court will be that Can-ca-dach be remanded to the custody of the superintendent of the mission school under the following order, which I have prepared: The superintendent, William A. Kelly, shall keep the child Can-ca-dach in the mission school, subject to the order of this court, and shall produce him in court when called upon by the court so to do. He shall maintain order, and refrain from inflicting corporal punishment upon Indian children, unless it should become absolutely necessary to the maintenance of discipline, and even then it must be done in moderation only; that he shall labor during school hours to advance the pupils in their studies, to create in their minds a desire for knowledge, principle, morality, politeness, cleanliness, and the preservation of physical health; that he shall impose on Can-ca-dach such manual labor only as will be consistent with his tender years. In the industrial department he and his subordinates must be equally vigilant in imparting to these Indian children a knowledge of mechanics and mechanical arts; and that Can-ah-couqua, the petitioner, shall, upon suitable occasions, when her presence will not interfere with recitations or study, be permitted to visit her child at the mission; that she must be received without injury or insult, and be permitted to remain with her child under surveillance of the superintendent or his subordinates a reasonable length of time, but shall not be permitted to take him away without the order of the court.

United States v. Haynes.

(District Court, D. Massachusetts. January 22, 1887.)

 CRIMINAL LAW—REMITTING CASE—REV. St. U. S. §§ 1037, 1038. Under Rev. St. U. S. §§ 1037, 1038, giving the circuit or district court authority to remit any indictment pending therein to the next session of the district court, if in the circuit court, and to the next session of the circuit court,

if in the district court, the order so remitting may be made at any time after the indictment has been presented until it has been finally disposed of.

2. SAME—DECISION.

When a case has been remitted from a United States district to a United States circuit court, or vice versa, and the only question open in the court so receiving it is one of law, it may be decided there; but, if a re-examination of the facts becomes necessary, the matter can be heard by the judge of the court from which the case was remitted, or it can be remanded back to that

8. Same—Procedure after Case has been Remitted.

When a case has been so remitted under the provisions of Rev. St. U S. §§ 1037, 1038, the practice is for the court receiving the case to proceed with it from the point it had reached in the court remitting it.

4. Same-Procedure When a Case has been Improperly Taken from One

COURT TO ANOTHER.

When a case has been taken from a lower court to the supreme court, or a circuit court of the United States, improperly, the court does not render a judgment that settles the rights of the parties finally, but remands it back to the court from whence it came, that further proceedings may be had there.

5. Constitutional Law — Powers of Congress — Jurisdiction of United

STATES COURTS.

Under the constitution of the United States, congress has no power to enlarge or restrict the original jurisdiction of the supreme court of the United States, but the jurisdiction of inferior courts is subject to the absolute control of congress, and may be changed or taken away, at its pleasure.

6. SAME-JURISDICTION TO RE-EXAMINE ON APPEAL FACTS TRIED BY A JURY. Under the seventh amendment to the constitution of the United States, the courts of the United States, as courts of appeal, have no jurisdiction to re-examine any facts tried by a jury in any other manner.

7. Same — Transfer of Cases from One United States Court to Another. The seventh amendment to the constitution of the United States does not prohibit congress from directing the transfer of cases, after verdict, from one federal court to another having co-ordinate jurisdiction, and not an appellate

8. Criminal Law—Judgment—Arrest—Bill of Exceptions—Remission of In-DICTMENT.

Under practice in the United States courts, a bill of exceptions is not necessary to bring before the court a question of law raised by a motion in arrest of judgment for defects in the indictment, but, with the concurrence of the court and the district attorney, the case can go up in the form of a remission of the indictment.

Ex parte.

Indictment under Rev. St. U. S. § 5480, for taking letters from the post-office in the execution of a scheme to defraud.

G. M. Stearns, Dist. Atty., for the United States.

NELSON, J. This case, originally two indictments, but tried together as one, was heard by the court upon the application of the district attorney of the United States for a warrant to issue for the arrest of the defendant. Its history, as gathered from the records and proceedings in this court and in the circuit court, is as follows:

The defendant, William Haynes, at the September term of this court for 1884, was indicted, tried, and found guilty by the jury of the offense of taking letters from the post-office in Boston, in the execution of a scheme to defraud, to be effected by opening correspondence with others by means of the post-office establishment of the United States, in violation of Rev. St. § 5480. It was proved at the trial that the defendant, under the name of the Lyons Silk Company, circulated through the postoffice an advertisement stating that, to close out remnants, he would send by mail, post-paid, pieces of silk, all of one color or assorted, suitable for making and repairing dresses and other garments, 6 pieces for 35 cents, 12 for 60 cents, and 24 for \$1, none less than seven-eighths of a yard in length; and that in answer to this advertisement he received through the mail letters inclosing money from persons who supposed they were to receive in return pieces of silk cloth, but the defendant sent them instead pieces of silk sewing thread. It appeared that, by this abominable cheat, he had succeeded in defrauding the public out of a large amount of money. Other transactions of a similar character were also proved against him. After the verdict, he filed a bill of exceptions to the rulings of the presiding judge at the trial, but this was never presented to the judge for allowance, and was in fact waived. He also filed in the district court a motion in arrest of judgment for alleged defects in the indictment.

At this stage of the case the indictment was remitted to the circuit court, on motion of the district attorney, under Rev. St. § 1037. In the circuit court the motion in arrest of judgment was heard before Judge Webb, in November, 1884, and overruled, and the case then stood for sentence. The defendant thereupon forfeited his bail, and left the country, and a default was entered on his bail-bond.

In February, 1885, he applied, through his counsel, to the circuit court, for leave to file a new motion in arrest of judgment, upon the ground, among others, that the district court had no jurisdiction "under section 1037" to remit the indictment after verdict. This application was granted, upon the condition that he should furnish new bail for his appearance in the circuit court, and this condition he complied with. The motion was heard before the circuit judge; and in March, 1886, an opinion was filed sustaining the motion, and holding that the action of the district judge in remitting the indictment after verdict was in violation of that clause of the seventh amendment to the constitution of the United States which declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." U.S. v. Haynes, 26 Fed. Rep. 857. The entry on the docket of the court was in this form: "The motion in arrest of judgment is sustained."

From the facts detailed above, it is impossible to come to any other conclusion than that a mistake, doubtless through inadvertence, occurred in this case in the circuit court. There was no question before that court

which required any re-examination of the facts tried by the jury. The defendant filed no motion to set aside the verdict as against the evidence, either in this court or in the circuit court. The only question left open when the case went to the circuit court was a pure question of law apparent on the record, raised by the motion in arrest of judgment. It is difficult to perceive how the constitution could be violated by deciding that question in the circuit court. If a question had arisen there requiring a re-examination of the facts, it could have been heard by the district judge who presided at the trial in the district court, or the case could have been remitted back to the district court. U. S. v. Murphy, 3 Wall. 649.

It would also seem that a mistake occurred, also doubtless by inadvertence, in ordering judgment to be arrested. Having decided that the case was not lawfully in the circuit court, the thing to do, according to the usual practice, was to remand it to the district court. When a case has been taken to the supreme court improperly, the court does not render a judgment that settles the rights of the parties finally, but remands it back to the court from whence it came, that further proceeding may be had there. The practice has been the same in the circuit court. That would seem to be what the circuit court should have done in this As it now stands, the defendant has been lawfully convicted on a good indictment; but judgment has been arrested by another court, which has decided, and had the right to decide, that it had no jurisdiction of the case. It is probable, if again put upon his trial on a new indictment, the defendant could invoke the protection of that clause of the fifth amendment to the constitution, which says, "nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb," as successfully as he has already invoked that of the seventh amendment. It would thus appear that, though lawfully convicted, he is to escape all punishment for his crime, his bail is to be discharged, and public justice completely thwarted. This must inevitably be the result if the arrest of judgment in the circuit court is to have the effect which usually follows such a judgment in a court having jurisdiction to render it.

A review of the legislation of congress, and the decisions of the courts, will show that, "according to the rules of the common law" as administered in the courts of the United States, the circuit court had ample jurisdiction to re-examine the facts tried by the jury, had there been occasion for such re-examination.

Rev. St. § 1037, enacts as follows:

"Whenever the district attorney deems it necessary, any circuit court may, by order entered on its minutes, remit any indictment pending therein to the next session of the district court of the same district, when the offense charged in the indictment is cognizable by the said district court; and in like manner any district court may remit to the next session of the circuit court of the same district any indictment pending in the said district court. And such remissions shall carry with it all recognizances, processes, and proceedings pending in the case in the court from which the remission is made; and the court to which such remission is made shall, after the order of remission

is filed therein, act in the case as if the indictment, and all other proceedings in the same, had been originated in said court."

Section 1038 is as follows:

"Any district court may, by order entered on its minutes, remit any indictment pending therein to the next session of the circuit court for the same district, when, in the opinion of such district court, difficult and important questions of law are involved in the case; and thereupon the proceedings in such case shall be the same in the circuit court as if such indictment had been originally found and presented therein."

These sections are reproduced from the procedure act of August 8, 1846, (9 St. 72;) section 1037 being taken from the second section, and section 1038 from the third section, of that act.

The object of this legislation was twofold: First, speedy trials for persons charged with crime, and dispatch of the public business; and, second, to furnish a method by which questions of law arising in criminal cases in the district court could be taken to the higher courts,—no provision for this having been made in the act of August 23, 1842, (5 St. 516,) which first gave to the district courts concurrent jurisdiction with the circuit courts of all crimes and offenses against the United States, not capital. Section 3. It gave to the district courts discretionary power, on motion of the district attorney, or on its own motion, if he did not apply, to remit cases involving points of law of difficulty and importance to the circuit court, from which it might go, by a certificate of division of opinion under the act of April 29, 1802, § 6, (2 St. 159; Rev. St. § 651,) to the supreme court. The act fixed no limits to the power, except that the indictment should be "pending," and in one case the motion of the district attorney should be made, and in the other the court should be of opinion that difficult and important questions The motion might be presented, or the question of law were involved. developed, after verdict as well as before; but, when these conditions did occur, the act was explicit and imperative that the order might be made. It could be done at any time while the case was pending; that is, from the time the indictment was presented till final judgment. The meaning is as plain as words can make it. An acquittal is undoubtedly a final judgment within the statute; but a conviction certainly is not. U.S. v. Morris, infra; Com. v. Lockwood, 109 Mass. 323.

It was decided by Mr. Justice Curts in *U. S.* v. *Morris*, 1 Curt. 23, that under this act, after the jury had been impaneled and witnesses examined, the district court had power to stop the trial, and discharge the jury, and order the indictment to be remitted to the circuit court. The records of this court show that the judge who made the order in the district court was Judge Sprague. That case was one of great public interest at the time, as it grew out of the rescue by a mob of the fugitive slave Shadrach from the custody of the United States marshal, and it consequently received from Judge Curts the most careful consideration. In an elaborate judgment, he held that indictments were "pending," within the meaning of the act, after they were presented, and their pendency continued till finally disposed of; and that "the natural meaning

of this clause is that the order to remit is to be made when the court has arrived at the opinion that difficult and important questions of law are involved in the case, and that the act prescribes no limit of time within which such opinion is to be formed." He further said, (page 33:)

"I am of opinion, therefore, that the natural meaning of the language of this third section empowers the district court to remit to this court an indictment pending therein, * * * after any proceedings have been had therein which do not amount to a bar to a future trial; that the subject-matter of the act does not call for a restricted interpretation of its language."

It will appear from another part of his opinion quoted subsequently that Judge Curus meant, by "a bar to a future trial," an acquittal in the lower court.

That case arose under section 3, the district court having certified that difficult and important questions of law were involved. But the language of section 2 is equally broad, and it is evident that the order may be made under one section at whatever stage it may be made under the other. The case of *U.S.* v. *Murphy*, cited *supra*, arose under section 2 of the act of 1846. It was said in that case, referring to orders of remission under the act, the opinion being by Mr. Justice Miller:

"The order can only be made on the motion of the district attorney, or whenever, in the opinion of the district court, difficult and important questions of law are involved in the case. There is therefore no danger of collision between the courts on account of such orders; and as they tend to the dispatch of business, and to sound decisions on legal propositions, there is no reason for limiting the rule further than the language of the statute requires."

There is not the least intimation in these cases that the act, when construed in the broadest manner, contravenes this clause of the seventh amendment.

Under these sections the practice has been for the circuit court to proceed with the case from the point it had reached in the district court. In *U. S.* v. *Murphy*, *supra*, issue was joined in the circuit court on a demurrer filed in the district court; and in *U. S.* v. *Richardson*, 28 Fed. Rep. 61, the case was heard in the circuit court, before Mr. Justice Gray, on a special plea filed in the district court.

It was decided in *Parsons* v. *Bedford*, 3 Pet. 433, that by force of this clause of the seventh amendment the supreme court, as a court of appeal, had no jurisdiction to re-examine facts tried by a jury in a circuit court of the United States. In *The Justices* v. *Murray*, 9 Wall. 274, it was held that under the same clause it could not re-examine facts tried by a jury in a state court. See, also, *Wetherbee* v. *Johnson*, 14 Mass. 412, 420; *Bryant* v. *Rich*, 106 Mass. 180, 193. The learned circuit judge cites, as authority for his conclusion, a passage from the opinion of Mr. Justice Story in *Parsons* v. *Bedford*, which is referred to with approval in *Justices* v. *Murray*. Judge Story, in commenting on this clause of the seventh amendment, says:

"This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the

court where the issue was tried, or to which the record was properly returnable, or the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings."

But it is evident that this language was used in both cases with reference to the question before the court, and was not intended to lay down the broad doctrine that congress was prohibited by this clause in the constitution from directing the transfer of cases, after verdict, from one federal court to another having co-ordinate jurisdiction, and not an appellate court.

The original jurisdiction of the supreme court of the United States is conferred by the constitution, and congress has no power to enlarge or restrict it. But the jurisdiction of inferior courts is derived from and is subject to the absolute control of congress, and may be changed or taken away at its pleasure. Existing courts may be abolished, and their jurisdiction, and all cases pending in them, whatever their condition, transferred to other existing courts, or to new courts. Repeated instances might be cited where congress has exercised this power. The celebrated act of April 29, 1802, (2 St. 156,) is one. It annulled the courts established by the act of February 13, 1801, (2 St. 89,) and ordered the transfer of all cases pending in them to the present circuit courts, which it created. The constitutional validity of the ninth section, which directed the remission of the cases, was upheld by the supreme court in Stuart v. Laird, 1 Cranch, 299; the court saying:

"Congress have constitutional authority to establish, from time to time, such inferior tribunals as they may think proper, and transfer a cause from one such tribunal to another. In this last particular there are no words in the constitution to prohibit or restrain the exercise of legislative power."

The act of March 3, 1863, (12 St. 762,) is another illustration in point. It abolished the circuit, district, and criminal courts of the District of Columbia, and transferred all their cases to the supreme court of the district. The various acts transferring cases pending in the territorial courts to the district and circuit courts of the United States, on the admission of new states, are also instances. In all such legislation the new courts are merely substitutes for the old courts, and, as regards their jurisdiction and capacity to dispose of cases remitted to them, are the same Power to re-examine facts tried by a jury goes with the cases as a matter of course. No one ever supposed that this legislation was prohibited by the seventh amendment. It has never been thought, at least before this case, that, in order to comply with this part of the constitution, it was necessary to keep the abolished court in existence solely for the purpose of re-examining facts tried by the jury, or that the judge who presides at a jury trial was the only judge constitutionally qualified to re-examine the fact found by the verdict. Such statutes have been assailed in the courts upon almost every conceivable ground, but never

¹For an historical sketch of the political controversies out of which sprung the act of February 13, 1801, and its repeal by the act of April 29, 1802, see an interesting article upon "The United States Courts," in the American Law Review, 1875-76, vol. 10, p. 398, by Mr. C. H. Hill, then assistant attorney general of the United States.

until this case as in contravention of this clause of the constitution. thority to enact them is derived from article 3, § 1, of the constitution, which declares that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." The doctrine of Parsons v. Bedford and The Justices v. Murray has no application to these provisions of the act of 1846. The case of Stuart v. Laird, though one of the famous constitutional judgments of the supreme court, is not cited as having any bearing on the question under consideration in either of those cases: and in neither of them is there a word to be found from which it can be inferred that the court intended to cast any doubt on that case, much Its authority, so far as I have been able to ascertain, less overrule it. has never been doubted. By force of these provisions of the act of 1846, the cases go from the district court to the circuit court as to a court of concurrent jurisdiction, and not as to a court of appeal. Construed as broadly as they were by Judge Curtis in U.S. v. Morris, and by the supreme court in U. S. v. Murphy, their constitutionality rests upon exactly the same ground that supports the acts of 1802 and 1863, and other similar statutes.

As above observed, the judge who presides at the trial in the district court is also a judge of the circuit court, and a question arising on the facts in the latter court can always be heard by him; or the case can be remitted back to the district court for the purpose of having such a question settled there. In addition to this, any possible injustice to the accused can always be prevented by granting him a new trial in the circuit court. In *U. S.* v. *Morris* (page 33) Judge Curtis said:

"It may well be that congress intended that a case remitted to the circuit court, because it involved questions of law so important and difficult that the interests of public justice and the rights of the immediate parties required that [district] court not to try and determine it, should be tried in the circuit court de novo from the beginning. This might be an advantage to the prisoner; for it gives him an opportunity to plead anew. But it is suggested that it may, in some cases, be injurious to him, because there may be something on the record below of which he could avail himself by motion; but, if the proceedings below do not come up, he must plead the matter specially, and thus, not only be put in jeopardy of failing upon some technical point, but subjected to a final judgment if he should fail. But, under the laws of the United States, I know of only one matter which must be pleaded specially; that is, a former acquittal or conviction for the same offense. Everything else may be given in evidence under the general issue. But if the defendant has been acquitted in the district court, the indictment is no longer pending there, and so cannot be remitted here; and if it were to be so remitted, the court would, upon motion and production of the record of the district court, dismiss it; the defendant would not be put to plead at all. The court has gone much further than this in U. S. v. Coolidge, 2 Gall. 364. And if the defendant were convicted in the district court, and the case were one in which a new trial can be had, the defendant can have no cause to complain that he gets one by having the case certified here."

See, also, The King v. Baker, Carth. 6; Warrain v. Smith, 2 Bulst. 146; The King v. Oxford, 13 East, 411; The King v. Nichols, Id. 412. The

case of *U. S.* v. *Cummins*, 3 Pittsb. Leg. J. 405, can hardly be called an authority. The case is very briefly reported, and all that appears is that one of the counsel stated that the judge of the circuit court had decided that after conviction a case could not be properly certified from one court to the other.

According to the decision of the circuit court in this case, prior to the act of March 3, 1879, (20 St. 354,) giving to circuit courts appellate jurisdiction in certain criminal cases, there was no way by which questions of law arising in such cases, after conviction, could be taken from the district to the higher courts; and in cases not within that act no way exists now. A bill of exceptions is not necessary to bring before the court a question of law raised by a motion in arrest of judgment for defects in the indictment. As a practical question, it would seem an unnecessary hardship to compel a defendant to resort to the complicated and costly remedy of a bill of exceptions and writ of error, when, with the concurrence of the court and the district attorney, the case can go up in the simple and inexpensive form of a remission of the indictment. Questions occurring on motions in arrest of judgment for the insufficiency of the indictment are among those that may be certified to the supreme court under Rev. St. § 651. U. S. v. Carll, 105 U. S. 611; U. S. v. Rauscher, 119 U. S. 407; S. C. 7 Sup. Ct. Rep. 234.

It is now claimed by the government that, as the circuit court has decided that the district court had no authority to remit the indictment, the case has never, in contemplation of law, been out of this court, and further proceedings can be taken here. That decision is undoubtedly the law of this case; and the proposition of the government is correct, unless the arrest of judgment in the circuit court has the effect to suspend judgment here as well as in that court. An extended record of the proceedings here was made before the case went up. Copies also of the indictments were retained here. The circuit court has recently ordered the return of the original indictments and other papers to this court. The record here has also been amended by striking out the order of re-The second motion in the circuit court set up other grounds mission. for arresting judgment than that passed upon by the court, but as they are the same in substance as those overruled by Judge Webb in the first motion, and as there is nothing on the record to indicate that leave to file the second motion was intended as granting a rehearing on the first motion, they may be regarded as merely surplusage. For the purposes of the motion now before the court, I am disposed to sustain the point taken by the government, and to hold that the judgment of the circuit court was, in effect, an arrest of judgment in that court only, for want of jurisdiction; that the case is still here, unaffected by the order of remission and the proceedings in the other court; and that this court has therefore authority to order a warrant to issue for the arrest of the defendant.

The case having been heard ex parts, this conclusion is, of course, subject to reconsideration, after the defendant has had an opportunity to be heard. Warrant to issue.

United States v. Laescki.

(District Court, N. D. Illinois. February 2, 1887.)

COUNTERFEITING — GOVERNMENT BOND—NATIONAL BANK NOTE—RECOVERY OF PENALTY—QUI TAM ACTION—INDICTMENT.

Under Rev. St. U. S. §§ 5188, 3708, the penalties provided for the making and uttering business cards in the likeness of a government bond or national banknote is only recoverable by a quitam action, brought by an informer, and cannot be recovered by indictment at the instance of the government.

Indictment for Counterfeiting.

Wm. G. Ewing, U. S. Dist. Atty., for the United States.

Jesse A. Baldwin, for defendant.

BLODGETT, J., (orally.) A motion is made to quash the indictment in this case, which is framed on sections 5188 and 3708 of the Revised It will be sufficient to read the first-named section, as the of-Statutes. fense is substantially the same in both:

"Sec. 5188. It shall not be lawful to design, engrave, print, or in any manner make or execute, or to utter, issue, distribute, circulate, or use, any business or professional card, notice, placard, circular, hand-bill or advertisement. in the likeness or similitude of any circulating note, or other obligation or security, of any banking association organized or acting under the laws of the United States, which has been or may be issued under this title, or any act of congress, or to write, print, or otherwise impress upon any such note, obligation, or security, any business or professional card, notice, or advertisement, or any notice or advertisement of any matter or thing whatever. Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable, one-half to the use of the informer."

The motion to quash is based upon the ground that an indictment will not lie to recover the penalties given by these statutes, but that the offender can only be punished by an action qui tam, in the name and for the use of an informer. It is claimed on the part of the prosecution that inasmuch as both these sections declare the act to be unlawful, therefore the government is not bound to await the prosecution by an informer, but, as a penalty of \$100 is provided for each offense, therefore an action of debt will lie to recover the penalty, or the offender may be proceeded against by information or indictment, while it is contended on the part of the defendant that the penalty can only be enforced by a suit brought by an informer.

It is well settled that when a statute makes it unlawful to do an act. and a penalty is given for doing such act, and no special mode of enforcing the penalty is provided, such penalty may be recovered in an action of debt, or by indictment or information; but when the statute creates the offense, prescribes the penalty, and the mode of enforcing it, it would seem that the penalty can only be enforced in the mode provided by the In U. S. v. Howard, 17 Fed. Rep. 638, it is said by Judge statute. DEADY:

"The rule is well settled that when a statute prohibits an act theretofore lawful, and imposes a penalty upon a party committing it, but prescribes no mode of proceeding to enforce it, such party may be prosecuted by indictment or information, and this mode of proceeding is not excluded by a subsequent statute prescribing another remedy. But if that portion of the statute containing the prohibition and penalty also prescribes a particular mode of proceeding to enforce the same, as a civil action to recover the penalty as a debt, such proceeding is the only one that can be maintained. 1 Russ. Crimes, 49; 1 Bish. Crim. Law, 277, 278; 1 Whart. Crim. Law, 24–26; Rex v. Wright, 1 Burr. 543."

In Pentlarge v. Kirby, 19 Fed. Rep. 501, Judge Brown, of the Southern district of New York, says:

"Where the offense is new, and the remedy prescribed, the general rule has long been that the remedy must be sought in the precise mode, and subject to the precise limitations, provided by the act which creates the offense. The rule is founded upon the presumed intent of the legislative authority in connecting the new offense with the particular remedy prescribed to exclude all other remedies."

In Millar v. Taylor, 4 Burr. 2323, Willes, J., says:

"If the offense, and consequently the right, which arises from the prohibition be new, no remedy or mode of prosecution can be pursued except what is directed by the act. * * * If the act has prescribed the remedy for the party grieved, and the mode of prosecution, all other remedies and modes are excluded. * * * If the same act which creates the right limits the time within which prosecutions for violations of it shall be commenced, that limitation cannot be dispensed with."

In Donalfson v. Beckett, 2 Brown, Parl. Cas. 129, it was held in such cases that there can be no remedy, except on the foundation of the statute, and on the terms and conditions prescribed thereby.

In the case of Dudley v. Mayhew, 3 N. Y. 9, Strong, J., says, (page 15:)

"It is very clear that when a party is confined to a statutory remedy, he must take it as it is conferred, and that where the enforcing tribunal is specified the designation forms a part of the remedy, and all others are excluded."

And the same principle is sustained in *U. S.* v. *Simms*, 1 Cranch. 252; 1 Brock. Marshall's Dec. 520; *U. S.* v. *Willetts*, 5 Ben. 220; and *Colburn* v. *Swett*, 1 Metc. 232.

So in Rex v. Wright, 1 Burr. 543, Lord Mansfield said:

"Where new-created offenses are only prohibited by the general prohibitory clause of an act of parliament, an indictment will lie; but where there is a prohibitory particular clause, specifying only particular remedies, there such particular remedy must be pursued."

And in the same case Mr. Justice Wilmor said it had been settled in Rex v. Mallard, 1 Barnard. 108, "that an indictment will not lie where an act of parliament makes a new offense, and prescribes a particular method of proceeding."

In Rex v. Robinson, 2 Burr. 800, it was said by Lord Mansfield:

"The true rule of distinction seems to be that, where the offense intended to be guarded against by a statute was punishable before the making of such statute prescribing a particular method of punishing it, there such particular remedy is cumulative, and does not take away the former remedy; but where

the statute only enacts 'that the doing any act not punishable before shall, for the future, be punishable in such and such a particular manner,' there it is necessary that such particular method, by such act prescribed, must be specifically pursued, and not the common-law method of an indictment."

The statutes now under consideration create the offense, declare the penalty, and make it recoverable, one-half to the use of the informer. No provision is made for proceeding by indictment, information, or action of debt in the name of the United States. An act which before the enactment of these statutes was entirely lawful, is made unlawful, and the penalty of \$100 is declared to be recoverable in a specific manner. It seems to me that the legislative intent deducible from the statute itself is that the remedy or mode of enforcement fixed by the statute is to be exclusive; that there is no room for the election of other remedies; and that it would be just as reasonable to say that another penalty can be enforced as that another mode of enforcing the penalty can be adopted. These statutes, in effect, say to all persons: "If you print or stamp upon a United States note or bond, or a national bank-note, any business card or advertisement, you are liable to a penalty of one hundred dollars, recoverable at the suit of an informer,"—and do not say that the offender can be indicted by a grand jury, and tried as a criminal.

The district attorney relies upon the case of U. S. v. Bougher, 6 Mc-Lain, 277. That was an action brought in the Southern district of Ohio to recover a penalty given by section 10 of the act of 1852, regulating the management of vessels, propelled in whole or in part by steam, for employing an unlicensed pilot. This statute prescribes a great many penalties for violations of its different provisions, and in many of the sections the mode of enforcing the penalties is specifically declared. Section 41 also provides that all penalties provided for in this act may be recovered in a qui tam action, one-half to the use of the informer; and the court held that the penalty against the owner of a steam-boat for employing an unlicensed pilot might be enforced by an action of debt in the name of the United States; it being contended on the part of the defendant that such penalty could only be enforced by a suit brought by an informer. But the obvious distinction between that statute and those now under consideration is that it was manifest, from the whole tenor of that statute, that congress intended that the right to sue by an informer was only a permissive, and not an exclusive remedy; while my construction of the statutes under which this indictment is found is that the remedy it gives is exclusive of all others.

The motion to quash is therefore sustained.

United States v. Wootten and others.

(District Court, E. D. South Carolina. January 18, 1887.)

1. Conspiracy—Definition.

Conspiracy is when two or more persons agree together to do an unlawful act, or to do some lawful act in an unlawful manner, and the crime is complete when such combination is formed, and an act is done to further it.

2. Post-Office-Using Mail to Defraud-Elements of Offense - Rev. St.

U. S. § 5480.

The elements in the offense of using the mail for the purpose of defrauding, created by Rev. St. U. S. § 5480, are (1) the devising, or intending to devise, a scheme or artifice to defraud; (2) the opening, or intending to open, correspondence or communication with some other person, or inciting such person to open correspondence, by means of the post-office department, with the condense and (2) in purpose of the scheme, putting a letter one devising the scheme; and, (8) in pursuance of the scheme, putting a letter or packet in the mail, or taking one out.

8. SAME—INTENT NOT TO PAY FOR GOODS.

In order to constitute the offense of using the mail for the purpose of defrauding, under Rev. St. U. S. § 5480, the intent not to pay for the goods must exist before credit sought,—must precede an order for goods;—and it is not fraudulent, within the meaning of the statute, if one, not in solvent circumstances, should seek credit or order goods without the present means of paying for them; nor would it come within the meaning of the statute if one had ordered goods, and afterwards devised a purpose of escaping from paying for

Indictment under Rev. St. § 5440.

L. F. Youmans, Dist. Atty., and C. M. Furman, Asst. Dist. Atty., for the United States.

Buist & Buist and W. E. Klein, for defendants.

Simonton, J., (charging jury.) The three defendants stand charged before you, in an indictment under section 5440 of the Revised Statutes, for conspiring to commit the offense against the United States forbidden in section 5480, Rev. St. Remember to keep this before you. question for you to decide is, are they guilty of having formed such a conspiracy? The thing to be punished is the unlawful conspiracy, not the particular acts alleged to have been done in consequence of it. Each of them—some of them—may have violated the provisions of section The evidence must satisfy you that two or more of them conspired together to commit the offense created in section 5480, Rev. St., and that so they have violated section 5440, which forbids two or more persons from forming a conspiracy to commit an offense against the United States. The statutes of the United States contain many prohibitions, define many offenses, against the United States. You have had before you, during this term, several of these cases, and have been instructed with regard to them. Any one convicted of violating any of these sections is guilty of a crime, and will receive the punishment specially provided therefor. If two or more persons conspire to commit any one or more of such offenses, and one or more of them act thereon, they are guilty of another and wholly distinct crime,—that of conspiracy.

Conspiracy is when two or more persons agree together to do an unlawful act, or to do some lawful act in an unlawful way, -when they combine to accomplish a criminal or unlawful purpose. It is complete when such combination is formed, and an act is done to further it. Such act must be done to carry out this agreement. U.S. v. Mitchell, 1 Hughes. You will therefore first inquire, did these defendants, or any two of them, form a conspiracy to do the thing charged in this indictment? Did they agree between themselves to do it, and, after having so agreed. combined, conspired, did they, or any of them, carry out such agreement by an act? If you find that they, or any two of them, did so conspire, and that such act was done, you will next inquire into the thing for which the conspiracy was formed, as charged in the indictment. They are charged with having conspired in devising, or intending to devise, a scheme or artifice to defraud, in this: that, representing themselves to be merchants, engaged in business, they should seek credit from parties abroad, and order goods of various descriptions and quantities to be shipped to them, they intending not to pay for any such goods so ordered, but to convert them to their own use; that the mail was to be used for this purpose in the opening correspondence with such merchants, or inciting correspondence to be opened with them; that, pursuing their plan, they each placed in the mail the letters set out in the indictment.

There are three elements in the offense created under section 5480: First. The devising, or intending to devise, a scheme or artifice to defraud. Second. An essential part of the scheme or artifice must be the opening, or intending to open, correspondence or communication with some other person, or inciting such person to open correspondence, by means of the post-office department, with the one devising the scheme. Third. And, in pursuance thereof, putting a letter or packet in the mail,

or taking one out.

It is not denied that these defendants corresponded with other parties. ordering goods, by mail, and that each of them received letters; so you can limit yourselves to the question, did they devise, or intend to devise, a scheme or artifice to defraud? A large number of letters, written by each of the defendants, have been read to you. They have been admitted in order that you may judge whether they lead to the conclusion charged. The first letters show that Wootten sought the position of commercial agent for Waidner & Co., of Chicago; that, upon receiving their authority, he at once sent on an order for goods for Buchheit, a co-defendant, recommending him; and that, about or at the same time, the other defendant wrote to the same firm, mentioning Wootten's name and recommendation, and ordering similar goods. None of the other letters, written separately by these defendants, makes reference so distinctly to one another of those charged with the conspiracy. They are letters of individual members of the alleged conspiracy. They all bear date about the same days, order the same class and kind of goods, in the same amounts, and in very much the same language, sometimes naming Wootten's purchases as a guide. Letters of each defendant were produced. These letters seem to have brought many replies. Sometimes goods were

shipped C. O. D. Sometimes with bills of lading attached to drafts. Sometimes they came without this precaution. In no case, when precaution was not used, were the goods paid for. In a few cases the goods

were obtained when precautions were used.

Waters and Buchheit have produced in evidence receipts showing that during the period of six months in which it is alleged that the scheme existed they had purchased goods from other persons than those to whom these letters were addressed, and have sometimes paid for them. ten has not produced any receipt of this character. You have not only seen their letters, you have had the testimony of witnesses living in the same town with the defendants as to the character of their business, and its volume, and as to their own character. They have no rating in the They are insolvent. There is no direct evidence intelligence offices. before you as to any conspiracy between these parties, or as to the intent with which the goods were ordered. You must decide, from all the testimony before you, whether or not a scheme or artifice was devised whereby merchants in various parts of the country were to be defrauded by orders for goods sent by mail, with an intent upon the part of the persons ordering them not to pay for the goods if they came. The testimony is circumstantial. The facts proved should all point to one con-They must exclude every other hypothesis than that of the clusion. guilt of these parties.

In coming to your conclusion, you must bear in mind that if one not in solvent circumstances should seek credit or order goods, without the present means of paying for them, this, by itself, is not fraudulent; nor would it come within the meaning of this section, if one had ordered goods and afterwards devised a purpose of escaping from paying for them. The intent not to pay for the goods must exist before credit sought,—must precede the order for the goods. This is the law of this case, and you are to apply it. In reaching your conclusion, perhaps it is best for you first to decide whether the correspondence of these defendants was the result of a scheme or artifice formed to defraud merchants by ordering goods for which it was intended that no payment should be made. If you come to the conclusion that such a scheme or artifice was formed, then you must satisfy yourselves whether these defendants, or any two of them, conspired together in the formation of such scheme or artifice.

One word more on the point. They must have conspired together in the scheme. If you conclude that one of them conceived the idea of the fraud, and ordered goods, without the connivance of the others, which were sent to him, and that the others, hearing of this, and struck with the new and easy mode of making money, imitated his example, each on his own account, this is not conspiracy. But if they combined together, formed the scheme together, and then they, or each of them, or any of them, carried it out, this would be conspiracy. If you are satisfied, beyond a reasonable doubt, that a conspiracy by two or more of them was formed to do the acts charged, and that these were the ordering of goods by mail, under the pretense of being in business as mer-

chants, from other merchants, with a formed intent of not paying for them, you will find the defendants or such two or more of them as were concerned in such scheme guilty. If you find that there was no precedent fraudulent intent, or that there was no conspiracy, you will find the defendants not guilty.

United States v. Hilbury.

(District Court, E. D. South Carolina, January 11, 1887)

1. POST-OFFICE - INTERCEPTING AND OPENING LETTERS-DELIVERY-"IN CARE

The words, "In care of F. Kressel," on a letter directed to A., indicate that it is to be delivered through Kressel; they mean that A., and not Kressel, is the person to whom the letter is to go.

2. Same—Rev. St. U. S. § 3892.

One who, with the purpose of obstructing a correspondence, or of prying into the secrets of the person to whom a letter is directed, takes the letter from the party in whose care it is sent through the mails, and opens it, is guilty of the offense defined in Rev. St. U. S. § 3892, and liable to the penalty therein denounced.

Indictment under Rev. St. U. S. § 3892, for intercepting and opening letters.

Asst. Dist. Atty. Furman, for the United States. W. M. Thomas, for defendant.

SIMONTON, J., (charging jury.) The evidence on the part of the government, not denied by defendant, shows that one Henry Merrick is keeper of the life-saving station on Morris island, Charleston harbor, defendant being one of his crew; that all letters, official and personal, for Merrick, come to the Charleston post-office, directed to the care of F. Kressel, who keeps a shop in that city. When any of Merrick's crew come to the city they call at Kressel's for Merrick's letters. The two letters in question were left by a letter carrier at Kressel's, directed to "Keeper Life-saving Station, Morris Island," care of F. Kressel. The defendant called for them, and at once opened and read them. It is charged that he had no authority to do this. Defendant denies this charge.

The attorney for defendant has requested the judge to charge the jury that, as the letters were directed to the care of Kressel, and were delivered to Kressel, the defendant cannot be convicted under this section, as the letters had passed out of the custody of the post-office department. Your inquiry is, to whom were these letters directed? Did the defendant open them before they were delivered to the person to whom they were directed? If, therefore, you find that these letters had been in the post-office, or in the custody of a letter carrier, and had been left at

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Kressel's, to be delivered to the keeper of the life-saving station, no one had a right to break the envelope but the person to whom, not to whose care, they were directed, or some one acting under his authority to do so. The words on the letters, "In care of F. Kressel," indicate that they were to be delivered through Kressel. They do not mean that he is the person to whom the letters were directed. The keeper of the life-saving station was the person to whom the letters were directed; and if the defendant opened them before they were delivered to him, and so opened them without authority, you can find him guilty under this section, (U.S. v. McCready, 11 Fed. Rep. 225,) if his purpose was to obstruct the correspondence, or pry out the business or secrets of the keeper.

United States v. Thompson.

(District Court, E. D. South Carolina. January 14, 1887.)

POST-OFFICE—EMBEZZLING REGISTERED LETTERS—Rev. St. U. S. § 5467.

The purpose of Rev. St. U. S. § 5467, is to prevent and punish any interference with the contents of a letter in the custody of the mail; and a postmaster who takes money out of a registered letter, and borrows it, with the hope and expectation of returning it, and does return it, is within the terms of the statute.

Indictment under Rev. St. U. S. § 5467, for secreting and embezzling a registered letter.

L. F. Youmans, Dist. Atty., for the Government.

T. H. Clark and E. H. Alley, for defendant.

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Simonton, J., (charging jury.) One of the counts of the indictment charges the defendant with violating the provisions of section 5467 of the Revised Statutes, by secreting and embezzling a registered letter intrusted to him as postmaster, which letter contained \$12 in United States currency, and that he did steal or take the contents thereof. The defendant has been examined before you, and admits that the letter was delivered to him to be registered, containing this sum of money, and that he gave a receipt for it; that he did not mail it for want of a post-office receipt for a registered package; that he put it in his pocket, and forgot it; that some days afterwards, when called upon by the person who handed him the letter, he produced it without its contents, but at once paid the value thereof to her. He denies that he stole, or intended to steal, this money. There is a conflict in the testimony upon the question whether the letter was sealed or not when handed to him for registration.

The counsel for the defendant has requested the court to charge the jury that they cannot convict the defendant unless they conclude from

¹See Jones v. U. S., 27 Fed. Rep. 447.

the testimony that he took the money with felonious intent; that the original taking must have been with intent to steal. Where words are used in a statute, a meaning must be given to each word, if possible. Words are not to be taken as synonymous, unless they are so necessarily. Congress, in using these two words,—"steal," "take,"—with the disjunctive, must have intended them to bear different meanings, else both would not have been used. If you find from the evidence that the defendant took the contents of this letter animo furandi, with intent to steal them, he comes within the prohibition of this section; if you find that he took the contents, borrowing them, hoping and expecting to return them, making temporary use of them, he also comes within the prohibition of the statute, and may be found guilty. The purpose of the section is to prevent and punish any interference with the contents of a letter in the custody of the mail.

GRIFFITH v. SEGAR and others.

(Circuit Court, N. D. New York. February 5, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT—SEVERAL PATENTS—PLEADING—MULTIPARIOUSNESS.

A bill in equity for infringement, founded upon five separate patents, containing in the aggregate sixteen claims, which does not contain an allegation that the inventions are capable of conjoint use, or that the structure manufactured and sold by defendants combines all of the patented features, is bad for multifariousness.

In Equity. On Demurrer to bill. Edwin H. Risley, for complainant. Thomas Richardson, for defendants.

Coxe, J. This is an equity action for infringement, founded upon five separate patents, containing in the aggregate sixteen claims, granted to the complainant for improvements in folding beds and cots. The defendants demur on the ground that the bill is multifarious, no reason appearing for uniting five distinct causes of action in one suit. is no allegation in the bill that the inventions are capable of conjoint use, or that the structure manufactured and sold by the defendants combines all of the patented features. The averments in that behalf would be sustained by proof that the defendants manufactured and sold five separate beds, each of which infringed one of the patents in question, but no one of which infringed all of them, or more than one of them. The authorities are quite uniform in declaring such a bill insufficient. Hayes v. Dayton, 8 Fed. Rep. 702; Nellis v. McLanahan, 6 Fish. 286; Nourse v. Allen, 4 Blatchf. 376; Horman Patent Manuf'g Co. v. Brooklyn City R. Co., 15 Blatchf. 444; Barney v. Peck, 16 Fed. Rep. 413; Lilliendahl v. Detwiller, 18 Fed. Rep. 176; Walk. Pat. § 417.

It would seem, from a casual examination of the patents in question, that it would hardly be possible to combine in one structure all the inventions therein claimed; but, if the defendants do so infringe, there should be an appropriate allegation to that effect.

The demurrer is allowed, the complainant to amend within 20 days.

THE MARTHA.

KINKEL v. THE MARTHA, etc.

(District Court, S. D. New York. January 17, 1887.)

1. PAYMENTS—APPLICATION OF—BOTTOMRY BOND—GENERAL ACCOUNT—SHIP'S AGENTS—NECESSARY ADVANCES—MASTER'S DRAFT DISCOUNTED.

Payments by the debtor will be applied according to the intent of the par-

ties, where that can be determined with reasonable certainty.

2. SAME—CASE STATED.

The steamer M., belonging to the Stettin-Lloyd line, having arrived in New York, subject to a bottomry bond, S., the owner of the line, being in embarrassed circumstances, engaged W. & Co. to act as resident agents of the line in New York, provided they-would arrange to take up and hold the bottomry bond, to which W. & Co. agreed; having first arranged that the master of the M. should draw upon S. for £1,700 in favor of W. & Co. payable in Germany, four days after the M.'s arrival there, which draft was to be discounted for W. & Co.'s benefit. A draft was drawn by W. & Co. also in order to procure the discount, and the next day W. & Co. took up the bottomry bond, advancing therefor about \$5,000, the excess over the moneys received upon the draft. The proceeds of the draft were put by W. & Co. to the credit of S. in their "general account." A different special account was kept, as respects the bottomry. W. & Co. soon after made large advances in fitting out the vessel, and accepted various accommodation drafts for S. in the current business. Held. upon the circumstances and conflicting evidence, that the draft was designed to aid W. & Co., both in taking the assignment of the bottomry bond and also in making their necessary advances in fitting out the ships of the line for their voyages from this port; that it was designed to be applied, first, against these necessary advances and liabilities incurred by W. & Co. in the current business, and the balance only, together with any balance of profits from the current husiness, was to be applied upon bottomry; that the proceeds of the draft were not a payment by S., nor his moneys, until the draft was actually paid by him; and at the date of such payment, W. & Co.'s advances and liabilities in the current business being equal to the proceeds of the draft, none of it was then applicable upon the bottomry lien; that, an account having been made up to the first of January following, upon which a balance was stated as due to W. & Co. upon "all the various accounts," the c

Edward H. Hobbs, for libelant.

See Magarity v. Shipman, (Va.) 1 S. E. Rep. 109.

Edward Salomon, for claimant.

Brown, J. In May, 1886, Schultz, the owner of the Stettin-Lloyd line of steamers, between New York and Stettin, having failed in business, the steamer Martha, then in this port, was libeled upon numerous claims, including the above suits, upon one of which she was sold, and her proceeds (\$50,000) deposited in the registry of the court. The libel first above named is to recover a balance of \$9,175.87, alleged to be due on a bottomry bond executed upon the steamer at Halifax, in February, 1885, in the principal sum of \$12,115.40. The second suit is upon the master's draft for £600, given to the libelants at New York, April 25, 1885, purporting to be drawn "for necessary repairs and supplies." The petitioners, a German bank, holding a mortgage upon the steamer, were allowed to intervene for the protection of their interests, in the determination of the amount due. They contend that, in the subsequent dealings between the libelant and the owner of the Martha, a larger sum than is credited should be applied in payment of the bottomry bond. second suit they claim that the draft was without authority, because the libelants had already funds in their hands sufficient for the supplies in question; and also that it has been paid.

I shall not attempt to indicate more than a few of the leading facts of this complicated case. On the arrival of the Martha in New York, subject to bottomry, the evidence leaves no doubt that Schultz was in pecuniary embarrassment; and that the arrangement made with Wright & Co. was for the double purpose of preventing the speedy sale of the ship for the payment of the bottomry bond, and also to enable Schultz to continue to carry on the business of his line. With this double end in view, he engaged the libelants' firm, Wright & Co., to act as the resident agents of the line in New York, upon their taking up the bottomry bond, and obtaining an assignment of it to themselves, with the agreement on his part that there was no defense against it, and that the lien thereof should not be prejudiced by any delay of Wright & Co. in enforcing it. part of the same arrangement, also, Wright & Co. were to negotiate a draft drawn by the master of the Martha upon Schultz, at Gothenberg, payable four days after arrival of the Martha, for £1,700. was accordingly drawn, but Wright & Co. were unable to raise the money upon it, except upon a collateral draft of their own, drawn by them upon Schultz for the same amount, which they gave; and upon both drafts together they obtained, on the second of March, 1885, the sum of \$8,117.50. On the following day they paid the holders of the bottomry \$13,152.55, the amount due upon it, took an assignment of the bond to themselves, and thereafter attended to the business of the line, until the failure of Schultz, in May, 1886.

When the bottomry bond was taken up by Wright & Co., it was expected that a considerable sum would be received to the credit of the ship on account of the bond, from the general average contributions due from the cargo. During the following year the sums received from this source amounted to \$6,410.97, which, with \$785.31 received from policies.

were applied by the libelants upon the bottomry account, reducing it to \$9,175.87, the amount here claimed, after the payment of considerable other sums for premiums and adjuster's charges, not here disputed.

The mortgagee contends that the amount raised upon the draft of £1,700 should be applied upon account of the bottomry bond. Schultz testifies that such was the intention, while the libelant testifies that it was intended to go to the credit of the line on general account, for the purpose of giving the line credit in New York, and to enable them to conduct its business as agents, without being always largely in advance; and also as security for four notes given by Schultz to them, payable in 30, 60, 90, and 120 days, for a previous debt of about \$1,700.

From the evidence it is plain that there was nothing in the negotiation itself, or in the express contract of the parties, that amounted to any specific appropriation of this draft, or its proceeds, to the one account rather than to the other. It was therefore applicable to either, or both,

as justice should require.

For the mortgagee, it is contended that it would necessarily be applied by law to a debt already due, rather than to a debt not due, and still more to the bottomry, as against a mere prospective or contingent liability; and that as the bottomry bond was due, and as there was no other obligation of Wright & Co. then actually existing, the whole amount is necessarily applicable upon the bottomry bond, from the start. Stone v. Seymour, 15 Wend. 19-23; 4 Kent, Comm. (11th Ed.) 468, note.

Without questioning at all the principle invoked, in a case presenting the simple alternative as regards the application of a payment to a debt due, or to a contingent or expected obligation, the principle cannot be justly applied here—First, because this is not a case of payment at that time by the debtor; and, second, because that would manifestly be contrary to the intention of the parties. This intention must in every case control, where it can be determined with reasonable certainty.

In the case of National Bank v. Mechanics' Bank, 94 U.S. 437, 439,

the supreme court say:

"The rule settled by this court, as to the application of payments, is that the debtor or party paying the money may, if he chooses to do so, direct its appropriation. If he fail, the right devolves upon the creditor. If he fail, the law will make the application according to its own notions of justice. Neither of the parties can make it, after a controversy upon the subject has arisen between them, and, afortiori, not at the trial."

Wright & Co., in this case, placed the proceeds of the drafts discounted to the credit of the general account. It is the first item in that account, while a separate and special account was opened in respect to the bottomry bond. Under the circumstances of this case, the fact of placing the draft on the general account I cannot regard as conclusive evidence of the intention of either party that no part of the proceeds of this draft, on payment, should in any event go to the credit of the bottomry account. It was expected, on the contrary, that the business of the line would prove profitable; and, in suspending the payment of the bottomry, there was the undoubted implication and expectation that the

net earnings of the line would go to relieve the ship from this charge. The contemporary letters show this expectation. This draft was, in effect, a draft upon the Martha's outward freights, i. e., upon the Martha's earnings. Like all the other drafts, it is applicable, first, as the accounts correctly show, to pay the current accruing liabilities of the business of the line, and any balance after that should be applied to the bottomry account. Such, I think, was the evident intention. But, until the draft was paid by Schultz, the moneys obtained on it were not his moneys, and the proceeds could not properly be put in any other ac-

count than the general account.

It is evident, however, that the negotiation of this draft was a condition of Wright & Co.'s undertaking the agency of the line, and of their taking up the bottomry bond. They certainly had the benefit at once of the moneys raised on it. They were intended to have that benefit, and were in consequence required to advance only about \$5,000, instead of \$13,000, at that time, since they did not take up the bond until the day after they had procured the money upon a discount of the draft. But as this draft had not been paid, and was secured by their own collateral, it is clear that it could not reasonably be applied at once to the discharge of the bottomry lien,—a lien, which, if once discharged pro tanto, could not be resuscitated if the draft were not paid. Co. could not be expected to part with a lien by bottomry, upon the mere discount of a draft for which they were themselves still responsible. Until payment by Schultz, the £1,700, as I have said, were not the moneys of Schultz; and, in truth, the draft was but a means of assisting Wright & Co., by a discount, to raise the money necessary to enable them to take up the bond at once, as well as to make the other advances needed in fitting out the ships for sea. It aided Wright & Co., but the proceeds could not be definitely applied until the draft was paid by Schultz; and this consideration is also a sufficient reason why, in the agreement given by Schultz at the time, specifying that there was no defense to the bond, nothing was said about the moneys raised upon the draft.

For the outfit of the Martha on her first subsequent voyage, Wright & Co., within a few weeks, advanced the sum of \$3,340.16, and other bills remained unpaid; making, in all, about \$5,500, all of which were entered as a debit in the general account. The precise date when the captain's draft of £1,700 was due does not appear, since the date of the Martha's arrival is not shown; but the draft bears an indorsement "Paid through bill on London, March 24, 1885." It must have been finally paid, and Wright & Co. informed thereof, not long after the first of April, 1885. At that time, the general account of Wright & Co. would show, if both the bottomry account and the discounted draft were excluded, that they were in advance to Schultz in the sum of about \$5,500. Crediting the draft in the general account, they would appear to be in funds, to Schultz's credit, about \$2,600; against which still stood the four notes above mentioned, amounting to \$1,700, none of which were yet paid, while the necessary disbursements for the Katie's twenty-first voyage were to be soon provided for.

There were also two obligations on which Wright & Co. were liable, as sureties for the vessels, to the amount of about \$3,700. But the contract shows that Wright & Co. had incurred these latter obligations as one of the conditions of receiving the agency of the line, and the contract evidently does not contemplate their holding the moneys received from the draft of £1,700 as security for these two contingent liabilities, neither of which has even yet been paid. I think they had no right to hold the moneys received from the draft of £1,700 upon account of those contingent obligations.

The letter written by Schultz on March 21st, from Havre, shows clearly that his understanding had been that this draft of £1,700, when paid, would go to offset Wright & Co.'s advances in current business, and that only the balance, after paying these advances, would go on the bottomry account. The language of that letter is incompatible with the supposition that the whole £1,700 would be at once applied upon the bottomry bond. He refers to the difficulty of meeting the £1,700 draft, and says: I may "have to draw on you for £1,000, at 60 days' * * * If you should not be in funds by the time the note falls due, you may draw back on me, 60 days, London, or take captain's draft," etc. Two days after, he accordingly drew on Wright & Co. for the two sums of \$2,500 and \$1,215.25, at 60 days from date, which were paid by Wright & Co. when due. Had the £1,700 not been designed in part to offset Wright & Co.'s advances in current business, there could have been no such uncertainty as this letter contemplates. A large debit, as we have seen, must have existed from the first. How much would remain of the proceeds of the £1,700 was the evident uncertainty contemplated, and it was against this excess that Schultz desired to draw. Wright & Co. were therefore authorized to retain this balance against all current advances, including the drafts thus drawn by Schultz upon them, instead of applying it upon the bottomry bond, as otherwise should have been done. That letter has the weight of a nearly contemporaneous act, and it in part sustains the libelant's contention. The two new drafts made by Schultz more than covered what remained of the £1,700 at the time when Wright & Co. could have known of its payment, and left nothing at that time applicable to the bottomry account.

From the general intent and expectation, to which I have above referred, that the net earnings of the Martha, or of the line, should go to reduce the lien upon bottomry, after first providing for all the current expenses and liabilities incurred by Wright & Co., it would follow that any such net credit balances as should subsequently appear at the time of rendering all their general and special accounts ought, in justice, to be deemed so applied. It would be most unreasonable to suppose, unless there were some very clear evidence of the fact, that the parties intended to preserve indefinitely a large credit balance, without any application of it to the outstanding lien by bottomry; and, as I have said, the early letters of Schultz indicate the contrary intention.

In October, 1885, Wright & Co. rendered to Schultz an account of all their various transactions, showing a considerable balance on general ac-

count, and a net indebtedness to them, "upon all the accounts, of \$5,710.46, with interest and commissions and expenses, in case of bottomry and average." But the items omitted are of so considerable importance as to make this statement of no use. To this account, which included the £1,700 in the general account, Schultz, though he made some other objections, never objected to the inclusion of the proceeds of the draft of £1.700. But as the final balance upon all the accounts was stated, except as to interest, commissions, etc., he had no interest in the question where the £1,700 was credited; and but little, if any, weight can therefore be given to the circumstance that he made no comment on it. In January following, Wright & Co. rendered a further account, made up to the first of January, 1886. In their letter, inclosing all these accounts, they show a balance to the credit of Schultz, on general account, of \$8,634.96, against which were three separate and special accounts, namely: The bottomry bond account, debit balance, \$9,753.39; steamer Katie, twenty-first voyage, debit, \$4,367.40; the Martha, on her third voyage, debit, \$3,107.96. They add "(6) A statement of balances." "This shows," they say, "an amount due January 1st of \$8,593.79, which covers all these various accounts inclosed."

The debit on account of the Martha, above referred to, is the same as that of the draft of £600 in suit. When the January statement was received at Stettin, Schultz had arrived in New York, and did not see the account till long afterwards; and, in their interviews here, neither party referred to it. There are some corrections to be made in it on both sides. When corrected, the credit on general account must be ap-

plied according to the rights of the parties as they then stood.

The two special accounts were merely protested drafts, drawn by the master upon Schultz, in favor of Wright & Co., in settlement of debit balances on two of the voyages of the Martha and the Katie, in the usual manner. They were a part of the current business of the line. Other items and balances of these and similar voyages were entered in the general account; and there was nothing shown to be peculiar in the nature of these protested drafts that authorizes any legal distinction to be made in respect to them from other items contained in the general account, so far as respects the application of the credit balance. These two "special accounts" of the Martha and the Katie must therefore be first discharged out of the credit balance standing on the general account, because belonging to current business. This would leave a balance of credit of \$1,159.60 remaining to be applied on the bottomry account. To this must be added the following items of debit in the general account, which, I think, are not chargeable against Schultz under Wright & Co.'s contract for the agency of the line, viz.: the items of \$85, \$100, and \$100, under date of March 4, 1885, amounting together to \$285. Wright & Co. are also to be credited with the error of \$180, referred to in their letter of January 1, 1886, making a difference in Schultz's favor in these items of \$105; which, added to \$1,159.60, makes \$1,264.60. This amount should be applied on the bottomry account, as the result of the accounts submitted up to January 1st; and the moneys subsequently re-

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ceived specifically on the bottomry account should also be credited. This reduces the amount due upon the bottomry account to \$7,911.29, with interest from April 28, 1886; and the draft of £600 must be held extinguished by the application of the credit balance, as stated in the account rendered to January 1, 1886.

The consolidation of all the accounts in striking a final balance up to January 1, 1886, indicates the understanding of Wright & Co. that such application of credit balances was to be thus made. They requested payment of this final balance. Payment of that balance, at that time, would manifestly have discharged the bottomry bond. The general credit balance of that date must be deemed, therefore, applied at that time, as above indicated. As early as the previous eleventh of July, Schultz had written his belief that, in less than three months, "all will be square," through the receipt of passage moneys; and in the same letter he had expressed the hope that Wright & Co. could "hold the old respectively outside accounts over until squared by receipts from passage moneys." The two drafts of £600 and £850 were not then due. Even if they were designed to be embraced in the terms "old outside accounts," which seems difficult to suppose, they were manifestly designed to be paid from the subsequent receipts. It was the subsequent receipts that made the credit balance on general account of January 1, 1886; and Wright & Co.'s offset of them in the statement of the final balance of "all the various accounts" was in accordance with this reauest.

I find nothing else in the evidence that should prevent the application of the balances as stated in the accounts of January 1, 1886. The supposed liability of Wright & Co. on the captain's draft for \$2,653.75 appears, at page 92 of the testimony, not to have been incurred until the ninth of January, after these accounts were made up. The draft was at once negotiated, and was apparently paid by Schultz at maturity, as it does not appear in the present account. All Wright & Co.'s liabilities in the current business, up to January 1, 1886, being thus provided for by their accounts rendered to that date, their subsequent dealings must be deemed incurred on the ordinary risks of the business they had assumed, and independent of the prior accounts.

Decrees may be entered in accordance with the result above indicated.

GALLO v. McAndrews.

District Court, S. D. New York. January 8, 1887.

CHARTER-PARTY—CHARTERER TO ENTER VESSEL—LIQUIDATED DAMAGES.
 Where the act for which damages are stipulated or estimated, by the contract, is one calculated to produce injury, and the damages are of a nature not susceptible of easy proof, the amount stipulated will be given, if not clearly unreasonable.

2. SAME—CASE STATED.

The bark I. G. was chartered to the respondents from Smyrna to New York, the charter providing that the vessel should be "entered at New York, by the respondent's agents, or, on default thereof, the owner should pay £20 estimated damages." On arrival at New York, the captain did not report to the charterer's agents at once, nor until the day after the vessel had been reported to other agents, and entered by them at the custom-house. Held, that the stipulation was a reasonable one, in view of the liability to injury to the charterers through delay in reporting the vessel at once, on arrival; and that the stipulated damages should be allowed without further proof of specific damage than the delay of one day.

In Admiralty.

Ullo, Ruebsamen & Hubbe, for libelant.

Wilcox, Adams & Macklin, for respondent.

Brown, J. The libel in this case was filed to recover the sum of \$133.54, part of the charter money due on the charter of the bark Idea G., from Smyrna to New York, by which the libelant stipulated that his vessel, on arrival at New York, "should be entered by the respondent's agents, or, in default thereof, that the libelant would pay £20 estimated damages." The respondent offered to pay the freight, but claimed to offset the £20 under the stipulation of the charter-party, because the master had not first reported his vessel to the respondent, as he was bound to do, in order that the respondent might enter the vessel, or direct her entry, at the custom-house according to the stipulation.

The term "estimated damages" is equivalent to the words "liquidated damages," more frequently found in contracts. Upon such a stipulation, where the act for which the damages are given is one that is calculated to produce injury to the plaintiff, and does so, and the damages are of a nature not susceptible of easy proof, the settled law is to enforce payment according to the contract, if not clearly unreasonable. Nielson v. Read. 12 Fed. Rep. 441. The object of the clause in this case was shown to be to prevent the delays and the losses to the charterer's business, and the claims for demurrage or damages which often arise from the failure to report the vessel promptly to the consignees or their agents on arrival. The agreement was in this case plainly violated. The master reported first to his own agents, and the vessel was already entered by them at the custom-house a day before any report of her was made to the respondent, as agreed; and, though the latter saw in the newspaper a report of her arrival, they had no knowledge where she was. This delay of at least one day is presumptive proof of damage, though no specific damage was proved, or evidence offered to show it. No further proof of damage was, in my judgment, necessary. The stipulation is a lawful one. The amount fixed upon by the charter as the estimated damage on default, viz., some \$97, is not unreasonable, and less than might often arise, and the agreement must therefore be enforced as it stands.

Decree for the amount of freight, deducting the £20, without costs.

THE COLUMBIA.

THE R. H. WILLIAMS, Jr.

Brown v. THE COLUMBIA and another.

CONTINENTAL INS. Co. v. SAME.

(District Court, S. D. New York. January 31, 1887.)

1. COLLISION—PROXIMATE AND REMOTE CAUSES—NAVIGATING NEAR PIERS AND SLIPS—STATE STATUTE.

Although navigating contrary to the statute does not necessarily charge the vessel with fault in a collision, where her position was perceived in time, and there was plenty of space and opportunity for each to avoid collision, yet it will be deemed a fault, and one of the proximate causes of the collision, when the violation of the statute has created embarrassment in the movements of either vessel.

2. SAME-RULE 19-ASSENTING SIGNALS.

A steamer having another crossing steamer upon her own starboard hand is not relieved of her duty to keep out of the other's way, under rule 19, merely from receiving first a signal of two whistles from the other, which are assented to, indicating that they will pass starboard to starboard. She remains, as before, bound to do all that she reasonably can to keep out of the way.

8. Same — Ferry-Boat — East River — Circling Course — Not Stopping and Backing.

The ferry-boat C., on leaving her slip in Brooklyn, bound for the Catharine-street slip, New York, observed the tug W. coming up with the flood-tide, close to her New York slip. The river is so narrow that on that tide a ferry-boat, under a hard a starboard helm, is sometimes scarcely able to make her necessary downward turn, circling around somewhat in the shape of the letter "S." The C. gave the W. a signal of two whistles, indicating that she should go outside of her, to which the W. replied with two. The W. properly sheered somewhat further towards the New York shore, and as near as was prudent with a tow along-side, and slowed, but did not back. The danger of collision was perceived when they were from 600 to 900 feet apart. The C. was all the time under a hard a starboard wheel, but did not turn fast enough to clear the W.'s tow, striking her with her starboard wheel or wheel-house, and sinking her immediately. Held, both were in fault,—the ferry-boat as being specially charged with knowledge of what she could do or not do in turning, and therefore bound to stop and back in time, when the danger was perceived; and the tug (1) for navigating unlawfully near the piers and slips, which created an embarrassment to the ferry-boat, and prevented her going to the westward of her, following her ordinary course, while she was not able, without stopping, to turn rapidly enough to go to the eastward; (2) for not back-

ing when the danger of collision was perceived; and (8) that it was immaterial that the two whistles were given first by the C., and that the tug was not thereby relieved from her duty to keep out of the way, having the other on her starboard hand, by the use of all reasonable means within her power.

In Admiralty.

Hyland & Zabriskie, for libelant.

B. D. Silliman, for the Columbia.

Charles Murray, for the Williams.

Carpenter & Mosher, for Insurance Co.

Brown, J. At about half past 1 in the afternoon of February 12, 1886, as the canal-boat Mary Brown, loaded with coal, was going up the East river, in tow of the steam-tug R. H. Williams, and lashed upon the tug's starboard side, she came into collision with the ferry-boat Columbia, not far from Pier 39, and within less than 300 feet of the shore. The ferry-boat was upon one of her regular trips from Main street, Brooklyn, to Catharine street, New York. At the time of the collision the tug and tow were headed nearly straight up river, probably a little towards the New York shore, and the ferry-boat nearly straight down, probably a little towards the Brooklyn shore. The after-corner of the starboard wheelhouse of the ferry-boat, or the paddle-wheel itself, struck the starboard side of the canal-boat a little forward of the after-cabin, causing the latter to sink immediately. The above libels are filed for the loss of the boat and cargo, respectively.

The river at the point of collision is only about 1,400 feet wide. Ferry-boats on the flood-tide, under a hard a-starboard wheel from the start, require nearly the whole width of the river to turn in, their course being like the letter "S," and varying somewhat with the wind and strength of the current. The pilot of the tug observed the ferry-boat when she left her slip. The tug, he says, was then about 300 feet from the New York shore, and opposite, or a little above, the Catharine ferry-slip. He testifies that the ferry-boat, soon after leaving her slip, on the Brooklyn side, gave him a signal of two whistles, indicating that she would pass outside of him, to which he replied with two, and immediately starboarded his wheel, and steered further in towards the New York shore; that when the ferry-boat was somewhat more than half way across the river, observing that she had turned down but little, if any, he was apprehensive of collision, and again gave a signal of two whistles, to which the ferry-boat immediately replied with two; that he kept in shore as near as it was possible, passing within some 10 or 20 feet of some barges that lay moored at the end of Pier 39; and that the collision occurred when he was just above that pier, after he had stopped his engine.

The witnesses for the ferry-boat deny that there was more than one exchange of signals, the time agreeing mostly with the second signals testified to by the tug's witnesses. It is more probable that there was also a prior exchange of signals, as testified to by the tug's witnesses, which were forgotten by the witnesses for the ferry-boat. That is, however, immaterial. I am satisfied that the last signals exchanged were in

abundant time for either boat to have avoided the collision by suitable precautions.

1. The chief point in defense of the ferry-boat is that the tug, after the exchange of whistles, did not sheer at all to port, as she might and should have done; that the Columbia had a right to count upon this; and, had the tug so sheered, the collision would not have occurred. Conceding that, under the circumstances, the tug was bound to sheer to port, in accordance with her signal, so far as was reasonable and prudent, the evidence on her part, sustained also by disinterested witnesses, proves that she did sheer considerably to port, and that this point in de-

fense of the ferry-boat is not sustained.

The present case, on both sides, illustrates forcibly the rule of evidence so frequently applied to the testimony of witnesses on the water, concerning the movements of other vessels, that such testimony must be received with great caution, when the vessels are changing their relative positions; and that, in general, the statements of a vessel's own witnesses in regard to her own movements are to be accepted, unless there be something improbable in their story, or they be in some other way discredited than by the mere appearance of her own motions to those on board of another moving vessel. The ferry-boat in this case was not only changing her position constantly, but was all the time upon the turn under a hard a-starboard wheel; though all testify, and no doubt were honestly of the opinion, that the tug did not sheer to the westward, but kept straight up the river. In like manner, the tug's witnesses also, for a considerable time, did not perceive the constant change of heading which the ferry-boat was making, and the tug's second and last signal was given because her change was not, and could not be, properly seen and appreciated.

However much of the river may have been needed for the ferry-boat's turn, her own pilot, knowing her accustomed motion, and familiar with her handling, was, in a much more special degree than the tug's pilot, bound to calculate upon her course in rounding, and was chargeable with knowledge of what he could do, and what he could not do, in turning, and to allow accordingly the proper margin for safety. 25 Fed. Rep. 457. Upon the circling course which the ferry-boat must pursue, the tug, on the contrary, could not calculate with any precision. If a reasonable margin of safety could not clearly and certainly be made by the ferry-boat in her turn under a hard a-starboard wheel, it was her pilot's plain duty to stop and back betimes, so as to get a different heading for his rounding course. He should have known what he could do. and should not have kept on. When the last signals were exchanged, the two boats were from 600 to 900 feet apart. The tug was going very slowly, for the latter part of the interval, under a slow bell, or stop-The ferry-boat could come to a dead stop in the water within 400 feet; so that, whatever the tug's fault, there was no need of the collision. The ferry-boat could have avoided it, and was bound to do so by back-The Fanwood, 28 Fed. Rep. 373. ing in time.

As the ferry-boat was under a hard a-starboard helm, she must have

swung, after the time when the last whistles were exchanged, several points before the collision; which shows that at the time of those whistles she could not have been heading, as her witnesses state, nearly down river, but, in my judgment, at least two to three points towards the New York shore, since all the witnesses say she was heading but little, if any, towards the Brooklyn shore at the time of the collision. The evident errors and inconsistencies of several of the ferry-boat's witnesses, in respect to her heading and slight change of course from the time of the last two whistles, detract much from the reliance to be placed upon the details of their testimony, though their general account is doubtless correct. It is sufficient, however, for the present case, to say that the ferryboat, having undertaken by her signal of two whistles to go outside of the tug, was bound not to crowd the tug too near to the New York shore; and that she was bound to stop and back in time, if she could not leave the tug a reasonable margin for safety in going along the shore with her tow along-side. I am satisfied that the tug, after the whistles, did at once sheer further towards the New York shore, and as much so as the ferry-boat, under the circumstances, had any right to count upon, and that the ferry-boat is therefore to blame for not stopping sooner, as she might have done, and was bound to do.

2. The tug was navigating in close proximity to the ferry slip and piers in violation of the state statutes, which required her to go "as near mid-river as may be." That circumstance alone, however, if it in no way interfered with the navigation of either vessel so as to tend to bring about the collision, has been in several cases held to be immaterial. Where there is ample time and space and opportunity for navigation, and for avoiding each other, such prior faults are regarded as remote and not proximate causes, and hence immaterial. The Dexter, 23 Wall. 69. 76: The Fanita, 8 Ben. 11; The F. M. Wilson, 7 Ben. 367; The Delaware, 6 Fed. Rep. 195; The Nereus, 23 Fed. Rep. 457; Cayzer v. Carron Co., 9 App. Cas. 873. In many other cases, where the position of the boat unlawfully navigating near the slips and piers has created embarrassment in the movements of either, so as to be in direct connection with the collision as one of its proximate causes, the violation of the statute has been uniformly treated as a legal fault. The Favorita, 8 Blatchf. 539; The Maryland, 19 Fed. Rep. 551; The Columbia, 8 Fed. Rep. 716; The Monticello, 15 Fed. Rep. 474; McFarland v. Selby, etc., Co., 17 Fed. Rep. 253: The Uncle Abe, 18 Fed. Rep. 270: The John S. Darcy, 29 Fed. Rep. 644.

In the present case, it cannot be doubted, I think, that the position of the tug opposite and near to the ferry-boat's slip in New York, when the ferry-boat left the Brooklyn side, was a plain embarrassment to her navigation. Her precise nearness to the shore could not then be determined by the ferry-boat. Each was bound by the inspectors' rules to give signals indicating on which side of the other she should go. The ferry-boat chose the signal of two whistles, undertaking to go outside of the tug. This signal was no doubt justifiable, as there was not room, considering the other boats between the tug and the New York

shore, to go inside of her; while if the ferry-boat's testimony is to be believed, that her wheel was all the time hard a-starboard, the result proved that she had not room to turn and go outside of the tug. the tug been in mid-river, where the law required her to be, there would have been no embarrassment of this kind; the ferry-boat could easily have crossed the tug's bows, and had abundant room to go between her and the New York shore, in following her ordinary course. The tug's unlawful place in the river was therefore one of the proximate causes of the collision.

Again, the tug had the ferry-boat on her own starboard hand as the latter was crossing the river. The burden was therefore imposed upon the tug to keep out of the ferry-boat's way. It was immaterial which vessel gave the signal of two whistles first. The ferry-boat admits they were first given by her. The assenting signals of two whistles, given by the tug, did not relieve the tug of her duty to keep out of the way, nor change the burden imposed by the rules of navigation. Doubtless the tug was not bound to go inshore beyond what was safe, but nothing prevented her backing in time. She did not reverse at all. The only excuse given is that doing so would have thrown the bow of the tow out into the river, and exposed her still more to the liability of collision. That would be doubtless true within the last quarter of a minute before the collision. It could not apply half a minute or a minute before the collision, since the backward movement of the tow would take her out of the ferry-boat's way much more than her swing to starboard would carry her in her way. Some time before the collision, as is evident from the pilot's statement, he was apprehensive of collision, because the ferry-boat appeared to be so slow in making her turn. When he first became apprehensive of collision, and when the ferry-boat was at some distance from him, though he knew the necessity of her turning, he took no sufficient steps to give her plenty of room to turn around. did not slow until within about 300 feet of her, nor stop his engines until somewhat nearer, nor back at all. This was not a compliance with reasonable prudence to avoid the danger the pilot had seen some time before, nor with the express requirement of the twenty-first rule of navigation, to stop and back, when collision is threatened. The tug must, therefore, on these several grounds, be held in fault.

But these faults do not absolve the ferry-boat from blame for similar neglect to reverse in time. Her engineer says that he got the bell to reverse only one-third or half a minute before the collision. The danger was evident some considerable time before that. The ferry-boat cannot be exempt either for delay in reversing, or miscalculation in the rapidity of her swing to port. The same a private light to the first

The libelant in each case is entitled to a decree against both vessels. whom it admired by the me there while the design of the

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WINBERG v. BERKELEY Co. Ry. & LUMBER Co.

(Circuit Court, S. D. New York. 1887)

REMOVAL OF CAUSE—TIME TO FILE PETITION—EXTENSION OF TIME TO ANSWER. In New York a case cannot be tried as a cause until there is an issue, and not then, unless the issue can be brought to trial by a notice; and although the defendant procured several extensions of time to answer, in consequence of which issue was not in time to bring the cause to trial at that term, which but for the extensions might have been done, a petition by the defendant for the removal of the cause under the removal act of 1875, § 3, is filed in time if filed at the next term before the trial.

Motion to Remand Cause. Smith & Bowman, for plaintiff. Stickney & Shepard, for defendant.

WALLACE, J. The decision upon this motion to remand was reserved to consider the point made by the plaintiff that the application for removal was not made at the first term of the state court at which the cause could have been tried. The plaintiff insists that the cause could have been tried, within the meaning of the third section of the removal act of 1875, at the October term of the state court, if the defendant had not procured several extensions of time to answer, in consequence of which issue was not joined in time to bring the case to trial at that term. It has never been decided in any case to which the attention of the court has been called that an application for removal is too late when made at the first term at which there was an issue in the cause in a condition to be tried, except in Gurnee v. County of Brunswick, 1 Hughes, 270. In that case, under the laws regulating the practice of the state court, the cause which was removed was triable without pleadings. The case is therefore an exceptional one. There are expressions in the opinions in Pullman Palace Car Co. v. Speck, 113 U. S. 84, S. C. 5 Sup. Ct. Rep. 374, and Murray v. Holden, 2 Fed. Rep. 740, which imply that the removing party is to be held to a stricter rule of diligence, and that the application is too late if made after a term at which the pleadings might have been in readiness for a trial of the cause. In both of these cases, however, the application was not made until a term subsequent to one at which there was an issue of fact or of law in condition for trial; and what was really decided was therefore in harmony with the adjudications generally. These are that the term at which the application must be made is the first term at which there is an issue, whether of fact or of law. which is capable of trial, and in a condition to be tried. Knowlton v. Congress & Empire Spring Co., 13 Blatchf. 170; Forrest v. Keeler, 17 Blatchf. 522; S. C. 1 Fed. Rep. 459; Cramer v. Mack, 20 Blatchf. 481; S. C. 12 Fed. Rep. 803.

In the language of Chief Justice Waite in Babbitt v Clark, 103 U. S. 612:

"The act of congress does not provide for the removal of a cause at the first term at which a trial can be had on the issues, as finally settled by leave v.29r.no.15—46

of the court or otherwise, but at the first term at which the cause, as a cause, could be tried."

The cause cannot be tried as a cause, by the practice in this state, until there is an issue, and not then, unless the issue can be brought to trial by a notice. Although the Code of Civil Procedure requires pleadings to be served within specified times, it also authorizes the courts to enlarge the time, upon proper cause shown, and the enlarged time is as much the statutory time as the original time of service. It has never been intimated that a delay by the removing party to form an issue for the whole period of time authorized by the procedure of the state court

for that purpose is to be deemed unreasonable.

If, however, the inquiry were to be made whether the defendant has been guilty of unreasonable delay in putting the cause at issue, it would not assist the plaintiff here. It is true that if the defendant had not procured extensions of his time to answer, by stipulation, from the plaintiff, and by the order of the court, he would have been required by the rules of practice to answer at a time which would have enabled the plaintiff to notice the cause for the October term, or he would have been in default for want of an answer. But the plaintiff cannot complain of delay as unreasonable to which he consented in advance by his own stipulation, nor is it obvious how this court can decently assume that the defendant was not justly entitled to the time granted him by the order of the judge, whose duty it was to refuse the application if there was not sufficient cause shown.

The motion to remand is denied.

Howth, Adm'r, and others v. Owens, Ex'r, and others.

(Circuit Court, S. D. Georgia, E. D. January 4, 1887.)

EXECUTORS AND ADMINISTRATORS—PARTIES TO BILL FOR ACCOUNTING.
 Where a bill in equity prays account against executors, and a general settlement of the trust, all the executors are necessary parties.

2. Same—Demurrer for Want of Parties.

A defendant may object to the bill for the want of proper parties; and, if such defect is not apparent on the face of the bill, the defendant may plead the matters necessary to show it.

Same—Plea for Want of Parties.
 A plea for the want of proper parties is a plea in bar, and goes to the whole bill.

(Syllabus by the Court.)

In Equity.

Charles Nephew West, for complainants.

J. R. Saussy, for defendants.

Speer, J. This was a bill filed originally by Isaac M. De Lyon and others against Thomas E. Lloyd, Julian Hartridge, and George S. Owens, as the executors of Levi S. De Lyon. The bill was filed May 26, 1873. Complainant Isaac M. De Lyon died. William E. Howth, his administrator, was made a party complainant. Thomas E. Lloyd died, and the complainants proceeded against George S. Owens, the executor, by bill of revivor. Julian Hartridge died testate, and Mary M. Hartridge qualified as his executrix. No bill of revivor was filed against Mrs. Hartridge as executrix, but, on the contrary, on June 3, 1879, the late Amos T. Akerman, then of counsel for complainant, took the following order:

"IN THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF GEORGIA.

"William E. Howth and others v. George S. Owens and others. (In Equity.)

"The complainants suggest that, since the last term of this court, Julian Hartridge, one of the defendants, has died; and on their motion it is ordered that his name be stricken from the cause, and that the cause proceed against the other defendants. It is further ordered that the time for taking testimony in said case be extended to the first day of the next term.

"JOSEPH P. BRADLEY, Circuit Justice.

"June 3, 1879."

The bill is framed for discovery, account, and general relief. The cause was set down for a hearing on the third inst., when the defendants filed the following plea:

"IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

"William E. Howth, Adm'r of Isaac De Lyon et al., Complts., and George S. Owens, Julian Hartridge, and George S. Owens, as the Executors of Thomas E. Lloyd, Deceased, Defendants.

"And these defendants, by leave of the court first had and obtained in this behalf, by protestation, not confessing or acknowledging the matters and things in and by the said bill and the amendments and bill of revivor set forth, alleged and set forth to be true in such manner and form as the same are therein and thereby set forth, for plea thereunto say Julian Hartridge, one of the defendants in said bill of complaint, departed this life on the eighth day of January, 1879, testate; that his last will and testament has been duly admitted to probate in the court of ordinary of the county of Chatham, in said Southern district of Georgia, and letters testamentary were duly issued to Mary M. Hartridge, as the executrix of said last will and testament, on the eleventh day of March, 1879, and the said Mary M. Hartridge was duly qualified as said executrix. These defendants further say that the said Julian Hartridge was a necessary party, and, since his death, his personal representative is a necessary party in his name and stead, as fully appears from the allegations of said bill of complaint, inasmuch as it is therein stated and charged that all of the said defendants to said bill of complaint, as executors, jointly wasted the assets and estate of their testator, and these defendants are entitled to contribution from the estate of the said deceased defendant for any and all sums of money that may, under the said allegations of complainants' said bill, be decreed to be paid by the said defendants; but yet the said complainants have not made the said Julian Hartridges' personal representative a party to said bill of complaint. All which matters and things these defendants aver to be true, and plead the same to the said bill of complaint, and pray the judgment of this honorable court in the premises.

"J. R. SAUSSY, Solicitor for Defts.

"Personally appeared George S. Owens, one of the defendants in the above cause, and on oath says that the foregoing plea is not interposed for delay, and is true in point of fact.

GEO. S. OWENS.

"Sworn to and subscribed before me this twenty-third day of November, 1886.

L. A. WAKEMAN, Not. Pub., C. C. Ga.

"The undersigned, solicitor for the above-named defendants, hereby certifies that, in his opinion, the foregoing plea is well founded in point of law.

"J. R. SAUSSY, Solicitor."

To this plea the complainants made a general demurrer.

The questions to be determined are: (1) Was the representative of Julian Hartridge, co-executor with the other respondents, a necessary party? (2) Does the action of the complainant, in striking the name

of Julian Hartridge from the record, bar the suit?

The question, who are necessary parties to a bill in equity? has not been defined with the exactitude which might have been expected with regard to a question of such frequent occurrence. It is said by Mr. Justice Story to be a subject of great practical importance, and of no inconsiderable difficulty, in a great variety of cases. Story, Eq. Pl. 72. "In view of the maxim that courts of equity delight to do justice, and not by halves, it is a general rule, subject to various exceptions, however, that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there will be a complete decree, which will bind them all." Id. Again, it has been said, in general, (subject to certain statutory exceptions,) all persons interested in the subject-matter of a suit, with respect to its object, are necessary parties to the suit. Sometimes, when there is a class of persons all having the same interest, and the class consists of so large a number of individuals that they could not all be made parties without extreme inconvenience, it is allowed to name one or more of the class to represent the rest, and this may be done whether these parties appear as plaintiffs or defendants. Hunter, Suits Eq. 15; Fonbl. Eq. 297. Numerous exceptions to this rule are cited. Story, Eq. Pl. 72 et seq.

The bill before the court is framed for a general account of trust funds in the hands of trustees. Here all the trustees should be made parties. Story, Eq. Pl. 214. Where two executors are bound to render an account, they should be made parties. Id. 218, and cases cited. It follows, therefore, that the action of the complainant in striking the co-executor, Julian Hartridge, from the bill, withdrew a necessary party. No doubt the distinguished counsel then representing the complainant was misled

by section 3444 of the Code of Georgia, which provides:

"In all cases which have been, or may be, commenced in any of the courts of this state, at law or in equity, against two or more defendants, one or more of whom have died, or may die pending said case or cases, it shall and may be lawful for the plaintiff or complainant to suggest said death of record,

and to proceed in the trial of said case or cases against the surviving defendant, to the extent of their respective liabilities."

This establishes a rule of practice in the courts of the state; but it can have no effect in the courts of the United States, where the doctrines of equity are administered under the general chancery practice. Mandeville v. Riggs, 2 Pet. 484. The want of parties is an ordinary equitable defense. Adams, Eq. 331. Though a plaintiff may be fully entitled to the relief he prays, and the defendant may have no claim to the protection of the court which ought to prevent its interference, yet the defendant may object to the bill for want of proper parties; and, if the defect is not apparent on the face of the bill, the defendant may plead the matter necessary to show it. Mitf. Eq. Pl. 325. This exception may be also insisted on in the answer, or at the pleading. Story, Eq. Pl. 541; 1 Daniell, Ch. Pr. 287.

A plea for want of proper parties is a plea in bar, and goes to the whole bill, as well to discovery as to the relief, where relief is prayed. Daniell, Ch. Pr. 290.

For these reasons the demurrer to the pleasis overruled.

OSBORNE and others v. BARGE and others.

(Circuit Court, N. D. Iowa, C. D. January Term, 1887.)

1. Partnership—Assignment for Benefit of Creditors.

B. and K., partners, agreed upon an assignment for the benefit of creditors, and directed an attorney to prepare the necessary papers, and draw up a schedule of assets, November 6, 1886. November 8th, at 8 A. M., the deed of assignment was executed in the firm name by B. November 8th, at 10 A. M., K., without the knowledge or consent of his partner, executed a chattel mortgage of the firm stock to secure a note given for indebtedness of the firm to the plaintiffs, and payable November 9, 1886. Held that, the assignment having been agreed to by the firm, each partner was authorized to execute the deed thereof, and the same was valid.

Same—Chattel Mortgage.
 Held, further, that, the chattel mortgage not being in furtherance of the
 business, neither partner had authority to execute the same without the consent of the firm, and therefore it was invalid.

In Equity. Bill to foreclose chattel mortgage. Exceptions to answer.

Martin & Wamback and Wright & Farrell, for complainants. Kamrar & Borye and W. J. Covil, for defendants.

Shiras, J. The bill filed in this cause sets forth that on the eighth day of November, 1886, the firm of Barge & King, being indebted to complainants in the sum of \$2,529.31 for goods sold, executed their certain promissory note, payable on or before November 9, 1886, for the sum named; and to secure the payment thereof also executed a chattel

mortgage upon the property of the firm, the same being signed "BARGE" & King, by W. T. King." To the bill filed herein, for the purpose of foreclosing this mortgage, Barge & King, B. F. Barge, W. T. King, and Robert Fullerton are made parties defendant; and B. F. Barge and Robert Fullerton answer the bill, setting forth that on the sixth day of November, 1886, the firm of Barge & King, composed of B. F. Barge and W. T. King, being wholly insolvent, the partners mutually agreed that a general assignment, for the benefit of their creditors, should be made by the firm to Robert Fullerton, as assignee; that the partners went to the office of an attorney, and directed him to prepare the necessary papers to complete such assignment; that the said W. T. King prepared and signed the schedule of assets and liabilities, intended to be attached to the deed of assignment when prepared; and that about 8 o'clock A. M. of November 8th the said assignment was completed, the firm name being signed to the deed by B. F. Barge. It is also averred that the mortgage to complainants was not executed until about 10 o'clock A. M. of November 8th, at which time the firm of Barge & King had ceased to exist; that said King had no authority to execute the mortgage in the firm name, the same being done without the knowledge or assent of said Barge; and that the mortgage is consequently invalid. Fullerton, the assignee in the deed of general assignment, sets forth the execution and delivery of the deed, his acceptance of the trust thereby created, and avers that, as against such assignment, the mortgage is of no effect. appears, therefore, that, the firm being insolvent, one partner executed a deed of general assignment, and the other a chattel mortgage to the complainants; and the exceptions to the answer present the question whether either one, and, if so, which, of these instruments, is valid, under the state of facts set forth in the answer.

As a general rule, it is held that each member of an ordinary partnership has authority, as the agent of the firm, to do such acts as are necessary or usual in the transaction of the business in the ordinary way; but that, as to acts not in the furtherance of the business of the partnership in the ordinary way, but which may put an end to the same, or the natural result of which is to take the control and management of the firm business and property from the partners, it is necessary, to sustain the validity of such acts, that it appear that the same were done with the assent of all the partners. As the effect of a general assignment for the benefit of creditors under the Iowa statutes is to convey all the property of the assignors, not exempt from execution, to the assignee, and to terminate the control of the assignors over such property, it follows that such an assignment, when lawfully made by a firm, practically terminates the business of the partnership; and such an act, therefore, cannot be deemed to be done in furtherance of the ordinary business of the firm, but, on the contrary, it terminates the business of the partnership, and, to give it validity, it must appear that the assignment was assented to by all the partners. There are cases wherein, by reason of the absence of some of the partners, or their inability to act, as by reason of insanity or the like, a general assignment, executed by one of the partners, has been sustained; but in these cases the assent of all has been inferred, and hence even these cases do not present an exception to the rule that, to make a general assignment valid, the same must have been executed with the assent of all the partners. Emerson v. Senter, 118 U. S. 3, 6 Sup. Ct. Rep. 981; Deming v. Colt, 3 Sandf. 284; Havens v. Hussey, 5 Paige, 30; Kirby v. Ingersoll, 1 Doug. 477; Dana v. Lull, 17 Vt. 390; Stein v. La Dow, 13 Minn. 413, (Gil. 381;) Brooks v. Sullivan, 32 Wis. 449; Loeb v. Pierpoint, 58 Iowa, 469, 12 N. W. Rep. 544.

In the latter case the supreme court of Iowa held that a partner has not the power to execute a general assignment, under the laws of Iowa, without the assent, express or implied, of his copartner, when the latter may be consulted, and is capable of expressing assent or dissent.

To sustain the general assignment set forth in the answer in this cause, it must therefore appear that it was executed with the assent of both partners. It is not necessary that the signature of both partners should be appended to the deed of assignment. The property affected by the assignment belonged to the firm, and the execution of the deed in the firm name is all that is needed to pass the title. The averments of the answer show that it was agreed between the partners that the assignment should be made, that the person to act as assignee was agreed upon, and that the partners jointly gave the instructions for the preparation of the deed of assignment, and both signed the schedule of property attached to the deed. From these facts, thus averred, no other conclusion can be fairly drawn than that both partners assented to the making of the assignment; and, it not appearing that this assent was withdrawn, it must be held that, when the deed of assignment was executed by B. F. Barge, he had authority so to do from his copartner, and the deed is therefore the act of the partners, so far as it appears from anything averred or shown upon the face of the record. According to the allegations of the answer, the deed of assignment was executed before the chattel mortgage If so, then the title of the property had passed before to complainants. the execution of the mortgage, and the latter would not affect the title conveyed to the assignee in trust for the creditors.

The answer also avers that the mortgage was executed by King alone, without the knowledge or assent of Barge, and that it is therefore invalid for want of authority. If a mortgage is given upon the stock in trade of a partnership, and under such circumstances that the giving thereof practically terminates the business of the firm, no reason is perceived why the assent of both partners is not as essential to give validity to such an instrument, as in the case of a general assignment. The mortgage executed to complainants covered practically all the stock of the firm, came due in 24 hours after its date, and gave the mortgagees full power to take immediate possession of the property, and to sell the same for the payment of the mortgage debt. The practical effect, therefore, of the instrument, if enforced, would be to terminate the business of the firm, and to hand over the control and right of disposition of the partnership property to a third party. The right to thus destroy the life and business of the firm is not possessed by one of the partners, and, to

be valid, it must appear that such an instrument was executed by the

authority of all the partners.

The position of counsel for complainants, that as complainants, when they received the mortgage, did not know of the dissolution of the firm, or of the execution of the assignment, they are protected, in that they dealt with the partner in ignorance of the dissolution of the firm, and without notice thereof, has no bearing upon the real point at issue. Even if the firm had not been dissolved, or if the assignment had not been executed, the right to execute the chattel mortgage in question was not possessed by the one partner; and the complainants were bound to know that the mortgage, being signed by one partner only, would not bind the firm unless all the partners assented thereto. If, then, it be true, as averred in the answer, that the mortgage was executed by King alone, without the knowledge or assent of his partner, Barge, and that the latter repudiated the same as soon as notified thereof, it follows that the mortgage cannot be deemed to be the act of the firm, and does not bind the firm property.

The exceptions to the answer are therefore overruled.

Union Pac. Ry. Co. v. Leavenworth, N. & S. Ry. Co. (In Equity.)

LEAVENWORTH, N. & S. Ry. Co. v. Union Pac. Ry. Co. (At Law.)

(Circuit Court, D. Kansas. February 4, 1887.)

1. RAILROAD COMPANIES—EMINENT DOMAIN—CROSSING OF RIGHT OF WAY—LAWS OF KANSAS—PACIFIC RAILWAY ACT U. S. 1862, § 15.

Section 15 of the Pacific Railway act of July 1, 1862, incorporating the Union Pacific Railway, and providing "that any other railroads now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon such just and equitable terms as the president of the United States may prescribe," does not place the right of way of the Union Pacific Railway beyond the reach of the power of eminent domain of the state of Kansas, nor exempt it from the operation of the laws of the state respecting the crossing and connecting of railroads, and the condemnation of property for these purposes; following Union Pac. Ry. Co. v. Burlington & M. R. R. Co., 1 McCrary, 452; S. C. 8 Fed. Rep. 106.

2. Same—Condemning Crossing over Another Railroad—Special Proceeding—Comp. Laws Kan. 1879, Ch. 23, § 47.

A proceeding instituted under section 47, Comp. Laws Kan. 1879, c. 23, in the district court, by one railroad company to condemn a crossing over the right of way of another railroad, is not a civil action, but a special proceeding, and, as such, the ordinary rules of pleading do not apply.

8. Same—Selection of Commissioners,
In a proceeding begun by one railroad company to have commissioners appointed to ascertain the compensation to be paid to another railroad company for crossing the latter's right of way, and the points and manner of such crossing, the defendant should be heard in the selection of such commissioners, although their action is not final, but subject to review by the court. 4. SAME-RAILROAD MEN.

The duties imposed upon such commissioners are beyond the mere valuation of property, and some, at least, of their number should be railroad men.

5. SAME—POINT OF CROSSING—DUTY OF COMMISSIONERS.

The demand by the petitioners for a crossing at a particular point is not conclusive, and does not limit the inquiry. It is the duty of the commissioners to determine the points and the manner of crossing, as well as the amount of compensation.

In Equity.

J. P. Usher, for Union Pac. Ry. Co.

E. Stillings and L. Baker, for Leavenworth, N. & S. Ry. Co.

Brewer, J. There are two cases pending between these parties. The first is a bill filed by the Union Pacific Railway Company to restrain the Leavenworth, Northern & Southern Railway Company from crossing its right of way. A preliminary injunction is asked. The question presented is whether the complainant's right of way is beyond the reach of the state's power of eminent domain; for that the defendant does not propose any forcible entrance upon the complainant's right of way, but seeks, by proceedings under the statute of the state, to acquire a legal right to cross, is clear.

The question presented can hardly be considered an open one in this court; for it was decided adversely to complainant by my predecessor in the case of *Union Pac. Ry. Co.* v. *Burlington & M. R. R. Co.*, 1 McCrary, 452; S. C. 3 Fed. Rep. 106. See, also, the case of *Northern Pac. R. Co.* v. St. Paul, M. & M. Ry. Co., 1 McCrary, 302, S. C. 3 Fed. Rep. 702, in which a similar decision was made by Judge Nelson in Minnesota; also the case of *U. S. v. Railroad Bridge Co.*, 6 McLean, 517.

A rule of property thus announced should not be set aside by the same court in after years, unless the ruling was clearly erroneous. It is true that the precise reason now advanced by counsel may not have been presented to or considered by Judge McCrary; at least, no reference is made to it in his opinion. It may have been presented, and deemed by him of not sufficient importance to require special mention. That reason is found in the fifteenth section of the Pacific Railroad act of July 1, 1862, which reads:

"And be it further enacted that any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places, and upon such just and equitable terms, as the president of the United States may prescribe."

The argument, briefly stated, is that one road cannot cross the track of another without connecting the two roads; that congress has legislated upon the subject of connection with complainant's road; and that, where congress has legislated on a matter within its jurisdiction, such legislation excludes and supersedes all state action. Even if it were conceded that congress had the power to enter the territory of a state, and, for any purpose, establish a line through its center over which the state had no right of crossing,—a sort of Chinese wall, dividing the state into two

portions, inaccessible to each other, a concession I should never be willing to make,—it is clear to my mind that no assertion of such a power was ever contemplated by congress in the Pacific Railroad legislation. The most that can be claimed under the section quoted is that congress intended that no road should be prevented by state legislation from making a connection with the Pacific Railroads, if, in the judgment of the president, the necessities of the general government required such connection. It would be a strained and unnatural construction to hold that retaining the right to establish a connection carried with it an implied denial of the power of the state to authorize a crossing. I think, therefore, that this reason is insufficient to sustain the claim of complainant, and I fully concur with my predecessor in the views expressed by him on the general question in the opinion heretofore referred to. The ap-

plication for a preliminary injunction will be denied.

The other case is one instituted by the Leavenworth, Northern & Southern Railway Company, under the statutes of the state, in the district court of Wyandotte county, to condemn a crossing over the right of way of the Union Pacific Railway Company. The case, thus commenced in the state, was by the latter company removed to this court. tion to remand was made by the former company, and last week overruled by Judge FOSTER. I shall not review this ruling, but accept it, for the purposes of this case, as correct. And yet I may be pardoned for adding, in view of what was said by counsel on the argument, that if this ruling is to be considered as an affirmation that the case at bar is within the limits of the stipulation of April 13, 1885, in the case of State v. Kansas Pac. Ry. Co., in this court, and that such stipulation is only binding upon the conscience, and may not be enforced in the courts, I am not prepared to assent to it. Two years ago this company proposed to the state, in settlement of pending litigation, to stipulate not to remove certain cases from the courts of the state to this court. That proposition was accepted, and the litigation termi-Now, while I am aware of the decision that a corporation having the right of removal to the federal court cannot be compelled to abandon that right as a condition of doing business in the state, yet there are many legal rights which a party may voluntarily surrender; and I am not prepared to hold that, when a party voluntarily and for good consideration enters into a solemn contract with a state that it will waive its right of removal of its causes from the courts of the state, a citizen of that state may not enforce such contract. There may be something more than a question of good faith and morals in this; there may be some matter of legal right. I do not pretend to decide the matter, but simply desire to give notice that, so far as I am concerned, that question is still open.

Passing now to the merits of the case: Defendant has filed a motion to set aside the appointment of commissioners, on the ground that such appointment was made without notice to it, and also for leave to file answer to the petition, and that time be given therefor in accordance with the Code of Civil Procedure, to-wit, 20 days. The proceeding was

instituted under the fifth paragraph of section 47, c. 23, Comp. Laws 1879, which, after authorizing the crossing by one road of the tracks of another, reads:

"And if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by three commissioners, to be appointed by the district court of the county in which such crossing or connection is proposed to be made."

Now, without discussing the various suggestions and arguments which have been made in respect to these motions, I will state briefly my conclusions:

- 1. The proceeding is not a civil action, as defined in the Code, but a special proceeding. As such, the ordinary rules of pleading do not ap-It is intended to be summary and speedy. In ordinary condemnation proceedings to take private property, there is a preliminary inquest by the county commissioners, or a specially appointed board, from which an appeal as to the amount of compensation may be taken to the district court. Even in such cases possession of the property may be taken by the railroad company pending the appeal. Here there is no such preliminary inquest. The proceedings are initiated in the district As the property over which the right of way is sought is already devoted to public use, the extra protection of a second inquiry is deemed unnecessary. But, although initiated in the district court, the proceeding is none the less a special one, and, as delay may work great injury, it should be as speedy as is consistent with full protection. It does not become one corporation, which has itself invoked the state's power of eminent domain, to be captious and technical in seeking to restrain another from the exercise of the same power.
- 2. Though a special it is a judicial proceeding, and a vital element of judicial proceedings is notice to the party against whom a right is asserted before a final determination of that right. While the action of the commissioners is undoubtedly not final, but subject to review by the court, yet their functions are so important that it is no more than fair that the defendant be heard upon the question of the proper persons to be appointed. I do not mean to affirm that a failure to notify the defendant prior to their appointment renders the whole proceeding null and void, providing due notice of the time and place of their meeting and action be given. Whether it does or not, justice requires that defendant be given an opportunity of being heard in their selection, as in the selection of jurors in an ordinary action at law.
- 3. The duties imposed upon such commissioners are beyond the mere valuation of property, and therefore some, at least, of their number should have experience as railroad men.

4. The notice served upon the plaintiff was sufficient to justify the commencement of this proceeding.

5. Although the petitioner may demand a crossing at a particular point, such demand is not conclusive, and does not limit the inquiry, but it is the duty of the commissioners to determine the point and

manner of crossing, as well as the amount of compensation, having due regard to the interests of both roads, as well as those of the public.

As in its bill in equity the complainant avers the legal existence of the defendant corporation, such legal existence will be assumed, unless

proof to the contrary is offered.

The motion, therefore, of defendant, for leave to answer in 20 days, will be overruled, without prejudice to its right to present any defenses to this proceeding at the time named for the appointment of commissioners. The motion to set aside the appointment of commissioners heretofore made will be sustained, and on Wednesday next, February 9th, at 2 o'clock, at my chambers in Leavenworth, I will proceed to appoint new commissioners, at which time and place I will hear such suggestions as either party may have to offer in respect to the proper parties to be appointed.

MERCANTILE TRUST Co. v. PITTSBURGH & W. R. Co.

(Circuit Court, W. D. Pennsylvania. February 14, 1887.)

1. RAILROAD COMPANIES-MORTGAGE-RECEIVER-INTERVENTION.

The appointment of receivers of a railroad company, pending statutory proceedings in another court against the company for the assessment of construction damages, does not interfere with the prosecution thereof, nor is the plaintiff therein bound to bring in the receivers. It is their business to intervene, and make defense, if they wish to do so.

2. Same—Jurisdiction—Collateral Attack.

The jurisdiction of such court cannot be called in question collaterally, on the ground of a supposed mistake in holding the plaintiff's case to be within the statutory remedy.

8. Same—Priorite of Claims—Damages to Lot-Owners.

The claim of a lot-owner for damages, resulting from the construction and maintenance on the street in front of his lot of a railroad mounted on trestlework, is paramount to the claims of the railroad company's mortgage creditors.

4. SAME-WAIVER-CONSTRUCTION OF ROAD IN STREET.

The lot-owner does not waive his paramount right by allowing the railroad company to construct its railroad on the street without first making compensation or giving security according to the constitutional requirement.

In Equity.

Sur exceptions to master's report on petition of John A. Verner for an order on receivers of Pittsburgh & Western Railroad Company to pay judgment for damages from construction of railroad, obtained by him in the court of common pleas of Allegheny county, Pennsylvania.

John S. Ferguson and James T. Buchanan, for exceptions ex parte pe-

titioner.

Johns McCleave, for exceptions ex parte receivers.

ACHESON, J. 1. The appointment by this court of the receivers did not oust the jurisdiction which the court of common pleas had previously acquired of the proceedings against the railroad company instituted by

the petitioner for the ascertainment of his damages, nor did it operate as a stay thereof. Neither was the petitioner bound to bring in the receivers as defendants, as he was seeking no relief against them. It was their business to intervene, and take defense, if they wished to do so. High, Rec. §§ 258-260; Tracy v. First Nat. Bank, 37 N. Y. 523. The master was therefore correct in his determination that the petitioner's rights as a judgment creditor are not to be denied recognition simply because he proceeded in the prosecution of his suit without making the receivers parties, or notice to them, and without leave of this court.

2. We concur with the master that it is not open to the receivers, or to the mortgage creditors, in a collateral way, to question the jurisdiction of the court of common pleas on the ground that the trestle-work built on the street in front of the petitioner's property, and by reason of the construction of which his damages arose, was not an "embankment," within the meaning of section 10 of the act of February 19, 1849, (Purd. 1423, pl. 47,) and therefore that the proceedings in the court of common pleas were unauthorized by that act. It was for the court of common pleas to determine whether the trestle-work was such an embankment. The conclusion of that court upon that question presumably was right; but, whether so or not, it is not impeachable collaterally. It may be added that, if the petitioner's case was not embraced by the act of 1849, then, under the ruling in Pennsylvania R. Co. v. Duncan, 111 Pa. St. 352, 5 Atl. Rep. 742, his damages were recoverable in a common-law action. The subject-matter of the claim being thus within the general jurisdiction of the court, it follows that, if any mistake was made, it was, at most, in the mere form of procedure. any view, however, the tribunal for the rectification of the supposed error is the supreme court of Pennsylvania. Standing in full force, the judgment must be treated here as conclusive.

3. This brings us to the consideration of the question whether the petitioner's claim is of such a kind or nature as to be entitled to payment out of the funds in the hands of the receivers in preference to the claims of the mortgage creditors. The learned master held that it was From this conclusion we are constrained to dissent. It is true that no part of the petitioner's lot of ground was appropriated by the railroad company, and, in view of the decision in Allegheny City v. Moorehead, 80 Pa. St. 138, it may even be conceded that the petitioner had no title in the soil of Bank Lane, the street upon which the railroad was built. But the rule which absolved a corporation, acting under the right of eminent domain, from liability for consequential damages to private property, never had any foundation in natural justice, and has been abrogated by the fundamental law of Pennsylvania, which enjoins compensation to be made alike for the taking, injury, or destruction of private property. Const. 1874, § 8, art. 16; Pusey v. Allegheny City, 98 Pa. St. 522. If, then, the petitioner had no proprietary title in the soil of Bank Lane, he had an easement therein appurtenant to his abutting lot of ground, and, his property having been injured by the construction and maintenance of the trestle-work on the street, his case undoubtedly is within all the provisions of the above-cited section of the constitution, which, after prescribing compensation, declares: "Which compensation shall be paid or secured before such taking, injury, or destruction." Thus, damages resulting from the injury or destruction of private property are put upon the same footing as damages

sustained by a direct appropriation. This is as it should be.

Now, in Western Pennsylvania R. Co. v. Johnston, 59 Pa. St. 290, it was held that a land-owner's claim for damages, arising from the taking of property, is paramount to a mortgage given by the railroad company before the damages were assessed and paid, or secured to be paid; and in Lycoming Gas & Water Co. v. Moyer, 99 Pa. St. 615, this principle was applied to a case of consequential damages, it being there decided that a mill-owner's claim for damages, resulting from a decrease in the flow of water in his mill-race, which the company caused by interfering with the run which supplied his mill, was a continuing lien on the corporate property, extinguishable only by payment, or security for payment. In the former of these cases it was distinctly ruled, also, that the claimant's paramount right was not lost or waived by allowing the corporation to construct its railroad without first making payment or giving security.

What superior equities have the mortgage bondholders here? We perceive none. It cannot be pretended that the petitioner, by word or act, misled them. Moreover, inquiry whether the railroad company had discharged the claims for construction damages was a matter of common prudence. If these creditors made no investigation, they have only themselves to blame. In fine, the mortgagees, having no other or better title than that of the railroad company itself, can with no more justice maintain a railroad, mounted on trestle-work on the street in front of the petitioner's property, to his permanent injury, without making him

compensation, than the corporation could.

The petitioner's exceptions to the master's conclusions of law must be sustained, and all other exceptions overruled.

Let a decree be drawn in accordance with this opinion.

WYMAN v. CITIZENS' NAT. BANK OF FARIBAULT.

(Circuit Court, D. Minnesota. February, 1887.)

NATIONAL BANKS—LENDING MONEY UNLAWFULLY—PENALTY.

Rev. St. U. S. § 5200, providing that the amount for which any one individual or firm shall be indebted to a national bank shall not exceed a certain sum, when such a bank violates the provision by lending to one person an amount in excess of the limit, such person cannot set up the violation of the statute as a defense to his liability on the note. If a penalty is to be enforced against the bank, it can be done only at the instance of the government. A contract entered into by the bank in violation of this section is not void.

A bill of complaint is filed by the complainant asking that a promissory note signed by him as a joint maker be declared void, and that the defendant be required to deliver up the note for cancellation. The bill charges, in substance, that on the twelfth day of January, 1886, the firm of Jesse Ames' Sons borrowed of defendant \$5,000, for which a promissory note was given, payable in four months, and that plaintiff, not a member of the firm, signed said note as a maker thereof; that the firm procured and induced him to sign the note for the sole purpose of evading the provisions of the banking law, (section 5200, Rev. St. U. S.;) and that the facts were well known to the defendant. It also appears in the bill that the bank has obtained a judgment, in which the amount of this note is included, against Jesse Ames' Sons, but the complainant was not made a party to the suit, and no judgment was obtained against him. A demurrer is interposed.

D. A. Secombe, for complainant.

Cole, Bramhall & Morris, for defendants.

NEISON, J. It is well settled that the federal courts no longer have jurisdiction upon the ground that the defendant is a national bank; but it is insisted that jurisdiction obtains under section 1 of the act of March 3, 1875; for the amount involved is over \$500, and the suit arises, as plaintiff claims, under a law of the United States. I think the decisions of the United States supreme court heretofore made warrant the conclusion that objections of the character presented to a breach of the banking law by a national bank can only be urged by the government, and the substance of complainant's bill of complaint is virtually an objection to the breach. In this case the other makers of the note, who received the consideration, could not escape payment although the money was loaned in violation of the act. This is conceded. The contract is not void as to them, and I see no equity in releasing the complainant, and applying a different rule to him. He knew the obligations assumed when he signed the note to aid the plaintiff in making the loan, and he was equally liable with the other makers. The true rule is that, if the bank is to be punished for a violation of law, the government must enforce the penalty, and not an individual. The banking law, when fully examined, does not make the contract entered into inviolation of section 5200, Rev. St., void, and the stockholders are not to suffer when such a claim is made, under the circumstances suggested in the record. If it is desirable to punish a bank for a violation of law, I have no doubt the proper officer of the government would, on sufficient proofs, commence proceedings.

Demurrer sustained, and bill dismissed.

Kelley and another v. Morrell.

(Circuit Court, D. Minnesota. February, 1887.)

1. GUARDIAN AND WARD—GUARDIAN'S SALE—RECORD OF GUARDIAN'S APPOINT-MENT—PRESUMPTION AS TO NOTICE.

The record of a probate court of the territory of Minnesota, in the matter of the appointment of a guardian, (1) recited that "on this third day of December, 1856," came A., petitioning for his appointment as guardian of his non-resident minor children, they having real estate in the county; (2) ordered a bond to be filed by him; (3) ordered his appointment, (reciting the filing of the petition and bond;) and (4) set out a copy of the bond, dated December 6th. It did not affirmatively appear from the record that the notice required to be given to all persons interested was given. Held that, the court being a court of record, and not strictly one of special and limited jurisdiction, and the manner of notice to interested parties required by the statute being left to its discretion, it must be presumed, as bearing upon the validity of a subsequent guardian's sale, that proper notice was given.

2. Same—Form of Bond—Whether Defect Jurisdictional.

If a guardian's bond is given to the wards instead of to the probate court, the approval of it is merely an error in a matter of procedure, and a subsequent sale of the ward's real estate is not thereby invalidated.

Suit for Partition.

Pierce & George, for complainants.

Chas. D. Kerr, for defendant.

Nelson, J. This is a bill in form for a partition of real property. The complainants claim an undivided one-third of the real estate described, and allege that the defendant owns the remaining two-thirds. The defendant in his answer claims he is the owner of the entire property. His title to the one-third rests on a sale by the guardian of non-resident minors ordered by the probate court of Morrison county, Minnesota, and made pursuant to such license on January 17, 1857, and confirmed February 2d following. A deed was executed and delivered to the purchaser, February 17th. The complainants' title is traced through Dorothy J. Sturgis, the mother of Sarah J. Kelley, and through her sister and a brother. To sustain the complainants' title, an attack is made upon the proceedings of the probate court appointing the guardian, and subsequent proceedings resulting in the sale of the minors' interest in the property.

The evidence introduced to show the appointment of a guardian is the following record:

"IN THE MATTER OF THE GUARDIANSHIP OF JENETTE A., SARAH JANE, AND JOHN K. STURGIS.

"December Term, A. D. 1856, of the Probate Court of Morrison County, Minnesota Territory, held at Little Falls by Chessman Gould, Probate Judge. "Now, on this third day of December, A. D. 1856, comes William Sturgis, of said county and territory, by his petition, and says that he is father of Jenette A., Sarah Jane, and John K. Sturgis, minors; that Jenette A. was twelve years of age on the twenty-fourth day of November, A. D. 1856; that Sarah Jane was ten years of age on the twentieth of October, A. D. 1856; that both

are residents of St. Joseph county, state of Michigan; that John K. Sturgis was six years of age on the twenty-third day of March, A. D. 1856, and is a resident of Johnson county, state of Iowa; that said minors are seized of certain real estate; and that, to protect and preserve the legal rights of the said minors, it is necessary that some proper person be appointed guardian of their said estate, and that the said William Sturgis asks that he be appointed such guardian. It is therefore ordered by the court that the said William Sturgis: be, and he is hereby, required to file in this office his bond in the penal sum of one thousand dollars, with sureties to be approved by the court. On reading and filing the petition of William Sturgis, asking to be appointed guardian of the estate of Jenette A., Sarah Jane, and John K. Sturgis, minors under the age of fourteen years, and on reading, filing, and approving the bond executed in due form of law to the said minors by the said William Sturgis, with sufficient security, it is ordered that letters of guardianship of the estate of the said minors issue to the said William Sturgis, and that he be appointed such guardian aforesaid, according to the prayer of said petition."

Copy of the bond filed in the probate court by William Sturgis, guardian of the estate of Jenette A., Sarah Jane, and John K. Sturgis:

"Know all men by these presents that we, William Sturgis, N. Richardson, and T. M. Smith, are held and firmly bound unto Jenette A. Sturgis, Sarah Jane Sturgis, and John K. Sturgis, minors under the age of fourteen years, in the penal sum of one thousand dollars lawful money of the United States, to be paid to the said minors, their executors and administrators or assigns, to which payment well and truly to be made we bind ourselves firmly by these presents.

"Sealed with our seals and dated this sixth day of December, 1856.

"The condition of this obligation is such that if the above-bounden William Sturgis shall and will in all things discharge the duties of a guardian of the estate of the said minors according to law, and render a true and just account of all moneys and properties received by him, and of the application thereof, and of his guardianship in all respects, to any court having cognizance thereof when thereby required, then this obligation to be void; else to remain in full force and virtue.

WILLIAM STURGIS. [Seal.]

"N. RICHARDSON. Seal."
"T. M. SMITH. Seal."

"Sealed and delivered in presence of James Hall and Chessman Gould.

"Territory of Minnesota, County of Morrison—ss.: On this sixth day of December, 1856, appeared before me William Sturgis, N. Richardson, and T. M. Smith, severally known to me to be the persons described in and who executed the foregoing bond, and respectively acknowledged that they execute the same.

CHESSMAN GOULD, Judge of Probate."

Also a record is introduced, dated December 24, 1856, of a petition of the guardian to sell the real estate, and the appointment of appraisers, and an order for the sale.

It is urged that in the record it does not affirmatively appear that notice required by law was given to all persons interested that an application for the appointment of a guardian would be made, and for that reason the subsequent proceedings are void, including the sale. The probate court of the territory of Minnesota had original jurisdiction of the appointment of a guardian, and could direct a guardian's sale. It was not a court of special and limited jurisdiction, strictly speaking. It was a court in which records are required to be kept of all proceedings. It was

a court of superior jurisdiction, and full faith and credit are due to its official acts, when regular on the face of them, as much so as are due to the official acts of other courts of record; and, while in this case the record is silent upon the matter of notice of the application for the appointment of a guardian, it does show that the minors were non-residents, and it appears in the petition for the sale that they had real estate in Morrison county; and every fair intendment must be made that the court gave such notice as the law contemplated before it assumed to act. The court had jurisdiction of the subject-matter, and the manner of notice of the appointment of guardian was left to its discretion. The notice is presumed to have been given, as the court passed upon the question when the appointment was made.

I think the case of Grignon v. Astor, 2 How. 319, is in point. ercise of jurisdiction in appointing a guardian warrants the presumption that everything necessary was done before the court acted. In every other respect there is a substantial compliance with the statutes relating The bond which the statto the sale of the property by the guardian. ute required to be given to the probate court was given to the children; but this is a matter of procedure, and, at most, it was an error of judgment in the court to approve and accept it, and does not render void the

subsequent sale.

It is unnecessary to consider the other questions raised. Decree for defendant; and it is so ordered.

Tuck v. Olds and another.

(Circuit Court, W. D. Michigan, S. D. December, 1886.)

 WATERS AND WATER-COURSES—DOCK ON LAKE SHORE.
 The owner of the adjacent land has a qualified proprietary interest in the soil under the edge of the shore of a lake, so as to give him the right to con struct and maintain a dock along the shore, and extending the necessary distance under the water; and, when thus erected, the dock is an appurtenance of the real estate.

2. CHATTEL MORTGAGE—NOT FILED—MORTGAGE ON DOCK—EXECUTION LEVIED UPON LAND—How. St. Mich. § 6198.

A chattel mortgage upon a dock of which the mortgagor is left in possession, no interest in the land upon which the dock is situated being transferred to the mortgagee, is void as against an execution levied upon the land by a judgment creditor of the mortgagor, the mortgage not being filed till after the levy of the execution. How. St. Mich. § 6193.

8. EQUITY—CREDITORS' BILL—LEVY OF EXECUTION—FILING MORTGAGE AFTER

The filing of a chattel mortgage on a dock situated upon land belonging to the mortgagor, after an execution has been levied upon the land, puts such an obstruction in the way of the judgment creditor realizing his just satisfaction out of the property of the defendant in execution as is calculated to inspire doubt and apprehension in the minds of purchasers, and prevent their bidding upon the property; and the judgment creditor may maintain a creditors bill to have such mortgage declared fraudulent and void, and to have it set aside.

In Equity. Bill in aid of execution.

Taggart, Wolcott & Ganson, for complainant.

Dart & Call and G. A. Wolf, for defendants.

Severens, J. The complainant in this cause obtained a decree in this court for the sum of \$1,145.67, which, with the accruing interest and costs, remains wholly unpaid. He obtained and issued an execution for the collection of his decree, and it was levied upon the right, title, and interest of Olds in fractional section 7, in a township in Charlevoix county. The land in this fraction is only a small portion of a full section, and lies in the north-east corner of what would be the entire section, were not the rest of it covered, as it is, by Pine lake, a considerable sheet of water, into which at one end flows the River Boyne, and out of which, at the other end, flows a current, through a short channel and a small intermediate lake, into Lake Michigan. The fraction has an eastern line rather longer than the northern, and on its extreme southern point is a dock, built, so far as appears, in the ordinary The eastern line of the fraction terminates at the south, according to the government survey, at a stake on the shore of the lake, after running a certain number of chains from the north-east corner of the fraction. The shore of the lake has since receded, and the stake cannot be found. If the fraction extended southwardly to the old shore of the lake, as claimed by the complainant, the dock would be nearly all of it on the front of this description. If, on the other hand, it stopped at the south end of the distance of the measured line of the survey, which ends at some distance north of the lake shore, nearly all of the dock would be on the adjoining land.

The complainant now files this bill in aid of his execution, and the gravamen of his complaint is that Olds, in whom is the legal title to the land, executed a chattel mortgage to Aylesworth upon the dock, as security for an amount therein named, which mortgage, although dated some two months prior to the levy of execution, was not, it is alleged, executed until after such levy. The mortgage was not filed until several days after the levy, and the complainant's allegation is that it was a fraudulent device, in which the defendants co-operated, contrived to embarrass the complainant in the sale of the property on execution; and he prays that it may be declared fraudulent and void, and that it may be set aside. It is alleged that the defendants insist that this dock is personal property, and this is, indeed, implied by the giving and taking the chattel mortgage; whereas, the complainant claims that it was real estate, that it was therefore covered by his levy, and that the defendants' pretenses and action upon the theory that it was personal property obstruct his execution. The defendants, admitting the decree, the execution, and the levy thereof on section 7, and the giving of the chattel mortgage on the dock, nevertheless insist that the mortgage was given bona fide at its date, but admit its filing was after the levy. They also allege that the dock is only in very small part on section 7, this allegation resting on the theory that the eastern line thereof terminated at

the southern limit of the distance given for it in the survey. They also claim that it is personal property, and say the mortgage is valid. They claim also that Olds had the right to mortgage the dock, and thereby impress upon it the character of personal property as between himself and his mortgagee; that he had a right to mortgage independently of the levy; and that the question whether the mortgage is defeated by the levy, or to what extent it is subordinated to it, cannot be determined here, but will be matter for future settlement, if it ever becomes necessary.

In such a proceeding as this, and with only these parties before the court, no adjudication can be made by its decree, upon the question of boundaries, which can conclude any one except the parties to this suit. But, for the purposes of the present case, it may be rightfully assumed that the old shore is the southern extremity of the eastern boundary of the section. The general rule unquestionably is that metes and bounds control distances, and this would sustain the complainant's contention that the dock fronts the land levied on. But assuming this, and the facts relative to the chattel mortgage, and the pretenses set up by the defendants as to the nature of the property in this dock to be as alleged in the bill, but without now deciding what is too important to be decided without necessity and without full discussion, that, as claimed by the complainant, the ownership of the land along the shore would extend by lines perpendicular to the shore to the middle of the lake, subject to the public right of navigation, I think there is satisfactory ground of equitable jurisdiction upon which the bill can be sustained. It would seem safe to hold that the owner of the adjacent land has, at least, a qualified proprietary interest in the soil under the edge of the water at the shore, so as to give to him the right to construct and maintain a dock along the shore, and extending the necessary distance into the water, (Yates v. Milwaukee, 10 Wall. 497; Railroad Co. v. Schurmeir, 7 Wall. 272; Fletcher v. Thunder Bay River Boom Co., 51 Mich. 277; S. C. 16 N. W. Rep. 645;) and that, when thus erected, it would be an appurtenance of the real estate.

The facts of the case, as disclosed by the pleadings and proofs, are such as to induce me to apply a remedy, if they also point to one the court is accustomed to give.

It is strongly urged by counsel for complainant that, in consequence of the defendants' claim that the dock is personal property, the complainant is confused as to the method of proceeding to sell; for personal property is sold on execution in Michigan by an entirely different proceeding from that prescribed for the sale of real estate, and there is no redemption, as in the case of sale of real estate. But, even if the defendants' pretenses were more plausible than they are shown by the bill to be, the case in this respect would only present as matter for decision the question whether the property levied on is real or personal property, to the end that a party who has made a levy on property of doubtful character in this respect may be guided by the opinion of the court in his determination of the proper method to take in making sale. The

court would have its hands too full if it assumed to act as a mentor in every such dilemma, and could hardly excuse itself from giving its advice in other equally troublesome perplexities to its suitors.

But while I do not think the bill could be sustained on this ground, still I think it may be, as one filed to remove an obstruction to the ex-If I assume that this dock is a part of the real estate,—and I do not see how else, upon the allegations of the bill, it can possibly be regarded,—the suit comes to this: upon the facts, it must be found that this chattel mortgage, though dated two months before the levy, was either not in fact executed until after such levy, but antedated to give a false appearance, or else, being executed previously to the levy, it was withheld from filing until after the levy, on purpose. It is not made to appear that possession of the dock was delivered to the mortgagee, and the presumption is to the contrary, because—First, it is not customary in Michigan to transfer possession with the mortgage, the legal title remaining, under the present doctrine of its courts, in the mortgagor; and, second, there is nothing to show that any interest in the land, without which possession of the dock would be useless, was transferred to or was ever in the mortgagee. Under such circumstances, the statute (How. St. § 6193) declares the mortgage to be void as against creditors. As already pointed out, the complainant was such creditor, and he has brought his execution and levied it on this property. Fearey v. Cummings, 41 Mich. 383; S. C. 1 N. W. Rep. 946; Cooper v. Brock, 41 Mich. 488; S. C. 2 N. W. Rep. 660; Putnam v Reynolds, 44 Mich. 114; S. C. 6 N. W. Rep. 198; Wallen v. Rossman, 45 Mich. 333; S. C. 7 N. W. Rep. 901.

Upon the question of the validity of the mortgage as one of chattels, and independently of the infirmity declared by statute, it must be admitted that the evidence, other than the external indications, to establish the fraudulent character of the mortgage, is not very strong, but is, I think, sufficient with them to cast upon the defendants the burden of proving that the mortgage was given bona fide for a valuable consideration, and this is not attempted. The principle on which this class of creditors' bills rests is that the defendant, by some inequitable proceeding, has put an obstruction in the way of the complainant's realizing his just satisfaction out of the property of the defendant levied on. The obstruction must be one calculated to inspire doubt and apprehension in the minds of purchasers, and thus prevent them from bidding upon the property, whereby the process is paralyzed. In such a case the complainant has no adequate remedy at law. Beck v. Burdett, 1 Paige, 305; Jones v. Green, 1 Wall. 330; Thayer v. Swift, Har. Ch. (Mich.) 430, 433.

Referring to the statement of the defendants' position in respect to this chattel mortgage, and considering the facts to be as found, it would seem clear that the case is one appropriate for the interposition of the court. It is difficult to see how otherwise the complainant can get any adequate relief. The decree must therefore be entered for the complainant substantially as prayed.

DEVEREAUX v. CITY OF BROWNSVILLE.

LOAGUE, Adm'r, v. TAXING DIST. OF BROWNSVILLE.

(Circuit Court, W. D. Tennessee. January 25, 1887.)

1. Constitutional Law—Obligation of Contract—Municipal Corporations -REPEAL OF CHARTERS-TAXATION TO PAY DEBTS OF EXTINCT MUNICIPAL-

If a municipal charter be repealed, and the same inhabitants and territory be reorganized into another corporation, the latter is the successor of the former, both in the corporate obligation to pay the existing debts, and those corporate powers of taxation conferred as a part of the remedy of the creditors; and any statutory prohibition of its exercise is void, under the inhibition of the federal constitution against impairing the obligation of contracts.

2. Same Subject—Mandamus against the Successor of Extinct Municipal-ities—Judgments against Municipal Corporations. Those agencies, existing for the local government of a municipality, are

bound to perform such duties as are necessary to enforce the taxing power, although not especially designated for that purpose, if there be a general grant of the power of taxation to the municipality itself. This duty is implied from the general grant, whether it be conferred directly by statute upon the particular municipality, or devolved upon it as the successor in corporate obligation through a grant to its predecessor. Therefore a mandamus will lie to enforce, by taxation, the payment of judgments against the original corporation, to be directed to the governmental agencies of the new corporation, they to proceed according to the general laws of the state governing the exercise of the taxing power by municipalities possessing the authority.

8. Same Subject—Taxing Districts of Tennessee—Case in Judgment.

Under the legislation of Tennessee, repealing municipal charters and reorganizing the inhabitants into taxing districts, contrived to compel creditors to accept a compromise of their debts at reduced amounts, the prohibitions of the exercise of the taxing power by the new local governments are void, so far as relates to those grants of that power to the old corporations, which enter into contracts as a part of the remedy of creditors; and the "taxing districts" may be compelled to exercise the power given by these original grants, by proceeding, according to the general tax laws of the state, to certify to the county court clerk the necessary rate to pay the judgment, to be extended upon the tax-books, and collected as other taxes are collected. It is not necessary that the particular officials to perform this duty shall be designated in the statute, but the general grant to the corporation implies that the officials governing the municipality shall perform it, and it will be enforced by mandamus against the new commissioners who take the place of the former mayor and aldermen.

4. Same Subject — Special Sessions of Legislature—Subjects of Legislation—Governor's Call as a Restriction of Legislative Power—Constitution of Tennessee of 1870, Art. 3, § 9.

It was not the intention of the constitution of Tennessee to require the governor to define, in his call for an extra session of the legislature, the details of the subjects of the legislation desired, but only, in a general way, to confine the business to particular subjects. Therefore a call for legislation "to enable taxing districts to compromise their old debta" does not exclude legislation repealing former grants of taxing power to the taxing districts to pay those debts.

5. Scire Facias — Revivor of Judgments against Extinct Corporations —

SUGGESTION OF RECORD ONLY NECESSARY.

Revivor of a judgment against the successor of an extinct municipal corporation is accomplished by a mere suggestion of record. A scire facias is not necessary before a mandamus can issue against the new corporation organized in place of the old. The practice examined and stated in relation to the effect of the legislation of Tennessee creating "taxing districts" in place of municipal corporations whose charters have been repealed.

6. STATUTE OF LIMITATIONS—IMPLIED SUSPENSION—REPEAL OF MUNICIPAL CHAR-TER-STATUTORY OBSTRUCTION OF SUIT BY THE STATE-EQUITABLE DEFENSE

TO MANDAMUS.

If the state, with the deliberate purpose of obstructing the creditor, repeal a municipal charter, whereby there is no organization to be sued, and the creditor be disabled from proceeding, the time of such obstruction will be excluded from the limitation of the statute, the legislative intention to suspend it being implied, as in case of war. Moreover, it may be set up as an equitable defense in proceedings by mandamus.

7. MANDAMUS—TO ENFORCE JUDGMENT—INADEQUATE LEVY.
Although the court will not compel, by alias writ of mandamus, any further levy of taxation until there has been an exhaustion of former levies, by pursuing all legal remedies against delinquent tax-payers, this rule does not apply if the state and the corporation abandon the former levies, and obstruct their operation by legislation and other acts intended to prevent the creditor from realizing them.

8. Same Subject—Nugatory Mandamus—Statutory Receiver to Collect Taxes—Appointment not Compelled.

If the governor of the state refuse to appoint a receiver authorized by statute to collect the taxes already levied by a municipal corporation whose charter has been repealed, the court will not undertake to compel an appointment by mandamus, because the writ will not be issued where it is likely to be nugatory, and cannot be enforced.

9. TAXATION—PERMANENT LEVIES.

Nothing less than an explicit declaration of the statute that a tax levy is intended to be continuing and permanent will effectuate that result. It will not be implied or established by construction of ambiguous language.

10. CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACTS—POWER OF LEGISLATURE TO REPEAL TAX LEVIES FOR MUNICIPAL PURPOSES.

Any taxes levied by the legislature for municipal purposes, or grants of power to a municipality to make such levies, may be repealed, if they be subsequent to the contract involved, as there is no protection under the federal constitution except for such powers of taxation as enter into and become a part of the contract itself, and belong as a remedy to the creditor.

11. Same Subject—Taxing District of Brownsville, Tennessee.

The legislation of Tennessee, in relation to the "town" and "city" and "taxing district" of Brownsville, examined; and held, that all special methods of taxation granted to that municipality have been repealed, that the corporation has been placed under the general tax laws of the state, and that it is to those laws the creditors must resort for the enforcement of their judgments, by mandamus, where they are entitled to that writ against the taxing district as the successor of the old corporation.

At Law. Petitions for mandamus. Myers & Sneed and Craft & Cooper, for petitioners. Bond & Rutledge and Smith & Collier, for defendants. Before Jackson and Hammond, JJ.

Hammond, J. Following a public policy, reviewed in its application to the city of Memphis in Meriwether v. Garrett, 102 U. S. 472, the legislature of Tennessee, in 1879, inaugurated a plan of relief for insolvent municipal corporations, whereby it was expected they could escape the payment of their debts, unless the creditors would accept the "settlements" tendered them under the provisions of the legislation. eral plan was to repeal the charters, so that there should be no officials or agencies liable to judicial compulsion by mandamus; then to supply other agencies of local government, invested with all the powers of the old municipalities, except the taxing power, which was not only withheld, but conspicuously prohibited, to those new organizations, called "taxing districts." The taxes for carrying on the new contrivances were to be levied directly by the legislature itself upon the taxables within their boundaries, and, that body not being amenable to any judicial coercion by mandamus, it was believed that the creditors were wholly without remedy. The legislature then provided for a settlement with creditors upon the general basis of refunding the old indebtedness at the half, the amount at which the state "settles" or "compromises" its own indebtedness. The taxes to pay the interest and principal of the new bonds, like other taxes for municipal purposes, were to be levied directly by the legislature; but provision is made that, in default of such levy, the "taxing districts" may themselves levy the necessary tax. Acts 1883, c. 170, p. 224. This act applies to all "taxing districts," of whatever class, and by its twentieth section "repeals all laws, or parts of laws, in conflict herewith."

Under this legislation the supreme court of Tennessee has held that, by operation of the constitution of the United States, forbidding a state to pass laws impairing the obligation of contracts, these new "taxing districts" are simply the successors of the old corporations, so far as relates to the obligation to pay the indebtedness existing at the time of the repeal of the charters, and that creditors may proceed against them, as such successors, the obligation resting upon the inhabitants of the particular territory. O'Connor v. Memphis, 6 Lea, 730, 738, 739; Luchrman v. Taxing Dist., 2 Lea, 425. The same doctrine is affirmed by the supreme court of the United States in Mobile v. Watson, 116 U. S. 289;

S. C. 6 Sup. Ct. Rep. 398.

We have just held in Loudon v. Taxing Dist., (no opinion,) the circuit and district judges on the bench, upon considerations entirely satisfactory to us, that it is the logical result of that principle, if it be not distinctly decided in the last-cited case, that any power of taxation, provided as a means of paying their debts, heretofore granted to the original municipalities, devolves as readily as the obligation to pay them, and by like operation of the federal constitution, upon those successors, notwithstanding the attempted statutory prohibition. That power was a grant to the inhabitants of the particular municipal territory, and not to the designated officials through whose agency it was exercised; and those inhabitants may, and must, exercise the power, so far as the old creditors are concerned, through any new agencies existing by law, and adapted to the work of levying and collecting taxes. As evidence of that adaptation, it may be remarked that the "taxing districts" are especially authorized to exercise all the essential powers of taxation to pay the new bonds, if the legislature neglects that duty; and it is particularly worthy of notice, in view of the argument made at the bar that a given agency of the municipal government must be designated and especially clothed by statute with the power to levy and collect taxes, before the general power, devolved as above mentioned, can be exercised, that by the twelfth section of this very act of 1883 the power is not so conferred upon any designated agency of the new municipal government, but only upon "every municipal cor-

poration or taxing district which compromises its debts," etc. The whole argument of the defendant was that no given agency of the new governments could exercise the taxing power, unless appointed by law to do so; vet this new legislation does not appoint any agency, but confers it in the most general terms, as did the old legislation, upon the municipality itself: that is, upon the inhabitants of that locality. This would seem to be a sufficient answer to the argument, for it can hardly be imagined that any further legislation is necessary to enforce this power in favor of the holders of the new bonds, if occasion should require it; and the mandamus would necessarily run against the legislative and administrative officers of the taxing districts, just as we are here asked to order it. is to say, it is a necessary implication from the general grant of the taxing power that the officials of the municipality exercising other legislative duties would be required to perform this. We do not imply the grant of taxing power as a product of the federal constitution, nor create it by judicial judgment,—not at all; but we hold that the grant heretofore made to the inhabitants of the given territory has never been taken away; and that while the agencies have been changed, and the methods of taxation altered, other agencies and other methods have been provided upon which the law devolves the duty embodied in the general grant, just as it would devolve it upon these self-same agencies were the courts required to act upon the general grant of taxing power under this twelfth section of the act of 1883.

Nor is there any practical difficulty in the way. The former method of having the municipalities make separate assessments, and providing independent agencies for the collection of municipal taxes, has been long since abolished by general law. Now the state officials make, through the agency of the county courts, one general assessment, upon which all taxes are levied and collected. This is placed in the hands of the county clerk, and it is required "that cities and incorporated towns shall certify the rate of taxation levied by them to the clerk of the county court," and he extends them upon one tax-book, in appropriately designated columns, etc. Acts 1868, c. 102, § 2, p. 247; Acts 1875, c. 92, § 63, p. 159; Acts 1877, c. 73, § 6, p. 96; Id. § 8, p. 97; Acts 1881, c. 171, § 42, p. 255; Acts 1883, c. 105, § 42, p. 115.

Here, then, is adequate and complete machinery, provided by general law, for all municipal corporations possessing the general power of taxation, whereby they may effectually exercise it; and, given the general grant to a certain body of people, it is a mistake to suppose that they need to have a statutory appointment of named officials to exercise it. Those appointed for the general purposes of the local government of that body of inhabitants may exercise the power, as they do all governmental

powers of that local character.

It is only necessary, then, that we require the officials of the new government to certify to the county court clerk that rate which the judgment itself shows is needed to satisfy it, upon the basis of an assessment already at hand; that the county court clerk extend that rate upon the tax-books; and that the other officials collect the tax so ascertained to be due from each tax-payer. It is a very simple process, and is the inevi-

table outcome of the decisions of the state and federal supreme courts already cited. Once grant the taxing power to a body of people incorporated for local government, as a part of the remedy given to holders of its bonds authorized by law, and it remains with them until the debt is paid, and may be exercised as long as any machinery of local government is provided for them. The entire destruction of the machinery in all its parts, and the relegation of the inhabitants to the general mass, might accomplish the intended purpose of this legislation; but, at the very moment that new agencies of incorporation and government are substituted for the old, the inexorable rule of justice comes into play under our constitution, and the existing obligations must be paid. vociferous statutory prohibitions of this legislation are void, both as to the new corporations and their new agencies, so far as concerns the old indebtedness. The new machinery succeeds to and takes the place of the old, finding its powers of action in the old grants of the taxing power in precisely the same way that it finds the other elements of the contract obligation that cannot be impaired. Our general tax laws applicable to the whole state furnish conveniently the instrumentalities for the work of taxation, and there is no necessity to decide how this principle would operate if they were wanting,—whether we would compel an assessment, levy, and collection by the taxing district officials, and which of them would be selected by the court to perform the duty, etc. As it is, we have the assessment, we have an official to separately extend each levy on the collection book, and other officials to collect the tax. The judgment itself shows the aggregate amount required, and a simple calculation and the making of a certificate of the rate is all that the municipal authorities need do to accomplish the work. Their duty to make the certificate comes from the original grant of the taxing power, coupled with the general tax laws of 1881 and 1883, authorizing the certificate to be made, not by any specifically appointed officials, but by "cities and incorporated towns," implying, obviously, that the officials charged with the municipal government shall do this.

But certain special defenses are made in these causes that now require The legislature repealed the defendant's charter in 1879, our attention. the judgments here involved being at that time unsatisfied in this court. Acts 1879, c. 27, p. 41. In 1881 the formation of "taxing districts of the second class" was authorized, and under that act such a "taxing district" was organized for Brownsville, in 1883. Acts 1881, c. 127, p. By these two acts "commissioners" were substituted for the formerly existing "mayor and aldermen," with all the usual authority, legislative, executive, and judicial, except the power to levy taxes, which was prohibited. But the act of 1879 especially enacted that nothing contained in it should impair the obligation of then existing contracts, and the act of 1881 "hereby levied" a tax of one dollar per hundred, onehalf of which was to be applied to the current expenses, and the other to the old debts. Specific power was also given to one of the "commissioners," called the "secretary and financial agent," to assess and collect this tax. The general act of 1883, already noticed, relating to all taxing districts, had been passed, but by an act of 1885 the act of 1881, relating to "taxing districts of the second class," was amended, and section 2 gives the commissioners the most ample power to levy taxes, and appropriate money to provide for the payment of "all the debts and current expenses of the districts." Acts 1885, c. 82, p. 162. It is apparent that, notwithstanding the general act of 1883, and its broad repealing clause, the legislature (or, rather, the authors of this legislation relating to Brownsville) considered the act of 1881 as wholly unaffected by it. But by a subsequent act of 1885, at the extra session, the full powers given under the former act of that year were taken away, or, rather, limited to the payment of the "compromise" bonds only; the evident object of the last act being to correct this careless blunder of a departure from the general plan of relief already fully commented upon. Acts Extra Sess. 1885, c. 10, p. 75.

A question was made at the bar whether this last act of the extra session could be made to fall within the terms of the governor's call for an extra session, as otherwise it would be unconstitutional. Const. Tenn. 1870, art. 3, § 9. We think it does. It was not the intention to require the governor to define with precision, as to details, the subjects of legislation, but only in a general way, by his call, to confine the business to particular subjects. Mitchell v. Turnpike Co., 3 Humph. 455. Too great latitude of construction might, undoubtedly, abrogate the restriction of the constitution, but, on the other hand, a too rigid requirement in this regard would disastrously embarrass the executive and the legislature; since the former could never, with accuracy, foretell what the legislative mind would adopt as pertinent to the general subject, and therefore could not specifically define the provisions, or even the special character, of the forthcoming legislation, while the latter could not always, if ever, determine with accuracy what might or might not be of too remote affinity with the call. Besides, it would be conferring on the governor legislative powers never contemplated by the constitution, to permit him to restrict the legislature as to the details or character of its enactments. We think, therefore, notwithstanding the discrepancy between the call for legislation "to enable taxing districts to compromise their old debts," and legislation repealing former grants of power to levy taxes to pay them, that the act is not, in this regard, unconstitutional. The legislature and the governor might properly consider this repeal as a necessary means of reaching a "compromise." Acts Extra Sess. 1885. p. 7, where the call is printed; Id. c. 10, p. 75, where the act is printed.

The next question arises upon the defendant's objection that these judgments have not been revived by scire facias against the new corporation. We do not think this necessary. By section 15 of the act of 1881 the "taxing districts established under this act shall be known by the name of the town or city at the time the corporation became extinct." So there was no change at all, even of the corporate name, except from "town" or "city" to "taxing district" of Brownsville; and that section further provides that "all suits by or against said district shall be brought by or against the board of commissioners of the taxing district of

Brownsville." These judgments were obtained against, and stand in the name of, the "board of mayor and aldermen of the city of Brownsville."

It is conceded at the bar that a mandamus against designated officials operates, without scire facias or other revivor, against their successors in office, and that a change of personnel is immaterial; but it is urged that here there has been an extinction of the corporate defendant to the judgment, and that it is as if an individual defendant should die, when there must be a revivor against his administrator or other successor. court has general power to issue the writ of scire facias, when applicable to its procedure, and the acts of congress provide against the abatement of pending suits by the death of parties; but we are not aware of any federal statute regulating the revivor of judgments, unless the process acts, giving the same remedies of execution as are known to the state laws, may be said to require us to follow the state practice in that regard. Rev. St. §§ 716, 916, 955, 956. But we do not find that the state statutes contain any special provisions different from the usual common-law procedure on this subject. General provision is made for the use of the scire facias to revive judgments upon the death of parties, (Thomp. & S. Code Tenn. §§ 2987, 2988; M. & V. Code Tenn. 3701-3704;) and against the abatement of all actions, which may be revived by scire facias or upon mere motion, according to circumstances, (Thomp. & S. Code Tenn. §§ 2845-2859; M. & V. Code Tenn. 3559-3570.) Among these provisions is one that, if the "decedent" has parted with his interest pending the suit, it may be revived against "his successor in interest," instead of the representative or heir.

For the obvious reason that a corporation is supposed to be substantially immortal, and that a mere change in the personnel of its management does not require any notice in legal proceedings against it, none of these statutes, state or federal, make any provision for the revivor of suits against "extinct" corporations, except that where the state proceeds to dissolve the corporation, a decree of dissolution shall not extinguish its debts, but the court appoints a receiver of its property to pay the debts; and, if dissolved for any cause, they shall continue to exist for five years for the purpose of prosecuting and defending suits against them. Thomp. & S. Code Tenn. §§ 1493, 3426; M. & V. Code Tenn. 1720, 4163. These provisions of the Code relate to private corporations, and are not applicable, perhaps, except as analogies, to public municipal corporations; but this court had occasion to consider them in relation to an extinct railroad corporation in Kelley v. Mississippi Cent. R. Co., 1 Fed. Rep. 564, S. C. 2 Flip. 581, and there the somewhat false and misleading analogy to the death of individual suitors is suggested. applies with greater force here, and comes of pressing too far the doctrine that a corporation, either private or municipal, has an existence independent of the persons who compose it. The "law provides heirs, executors, or administrators for dead persons; but an extinct corporation must be represented by the individuals who originally composed it." Id.

Now, here the population of the town of Brownsville, and all its accretions of individuals, from whatever source, constituted the munici-

pality known as the "town" or "city" or "board of mayor and aldermen" of Brownsville, and these same persons now compose the municipality known as the "taxing district" or "board of commissioners" of Brownsville. So, at most, we have only a change of name, and scarcely that, in relation to the persons sued, whatever may be said as to their corporate rights, powers, or liabilities. Indeed, the legislature itself, as above shown, enacts that the new corporation shall be known by the same name; and the change of designation, for the suable style, from "Board of Mayor and Aldermen of the City of Brownsville" to that of "Board of Commissioners of the Taxing District of Brownsville," is in itself not worthy of much consideration, even as a change of name. But a mere change of name for substantially the same party does not require a scire facias; and a suggestion of the fact upon the record is sufficient to meet the technical requirement that the execution and judgment must be consistent with each other, so that the record shall not stand with a judgment against A. and an execution against B., which is the only reason for any notice of the fact at all. Harwood v. Law, 7 Mees. & W. 206; Penoyer v. Brace, 1 Ld. Raym. 245; Fost. Sci. Fa. 99 et seq. The court said in Bosanguet v. Ransford, 11 Adol. & E. 520, that whether we proceed by scire facias or suggestion on the record depends on this point: "Whether new parties are to be introduced upon the record. The uniform course, if new parties are introduced, is by scire facius. Suggestion is applicable only to collateral facts, affecting the same parties; as, for example, change of name, etc., and similar matters." S. C. 2 Q. B. 972, and 39 E. C. L. 285. Mr. Foster sums up the cases by saying: "In accordance with the above decisions, where there has been a mere nominal change of parties, as in the public officer of a joint-stock company, the real party being the company, a suggestion on the record of such a change of the public officer has been held sufficient without scire facias." Fost. Sci. Fa. 103. It was so ruled in Webb v. Taylor, 1 Dowl. & L. 676; Fost. Sci. Fa. 104, 106, et seq.

Hence we see that a revivor by scire facias is only required where new parties are to be charged with a liability. The reasoning of the above cases, there applied to such corporations as banks, etc., is more applicable to a mere change of municipal authority. It is true, no doubt, that these commissioners should be entitled to show any defense they might have to the judgments that could be pleaded to a scire facias; but because defenses may arise which might be available on a scire facias does not entitle a party to that writ. He may find it necessary to make the defense otherwise, for he is not entitled to a scire facias, except when the conditions of the case require that writ to issue, according to the prac-But a suggestion, as shown by the practice books, is traversable, and, if the facts upon which it is made be not true, it cannot be entered of record. Moreover, owing to the peculiar nature of a mandamus, it affords in itself ample opportunity to these commissioners to make any defense, by a return to the alternative writ or rule to show cause, that they can make to the scire facias. The court will not issue the writ per-emptorily, if there be any reason, sufficient in fact or in law, against it, and the pleading is of that character which affords the widest scope for any defense available in any way. More entirely, therefore, here, than in any other cases, as where the fieri facias or some like writ of execution issues, is the rule requiring a scire facias, upon change of parties, based upon the purely technical demand that the writ and the record shall consistently conform to each other. We do not find the precise point of practice determined, but we doubt if this reason of the rule requiring a scire facias, or a suggestion of record for that purpose before a fieri facias can issue, applies at all when the writ of execution takes the form of a mandamus, because of the essential difference in the forms of the two writs.

This is not, however, very important, as we hold that a bare suggestion, which may be now made of record, is all that is required. suggestion need only state that, by subsequent legislation, the suable style of the defendant corporation has been changed from that which appears in the face of the judgment to that required by the new legislation. this be done, the record is entirely consistent with any writ that may issue on the judgment, whether fieri facias or mandamus, and this is all that the practice seeks to accomplish in such cases. It is the same party, by a different name, sought to be charged, namely, the inhabitants of Brownsville, in their corporate capacity; not any new party. Hence no scire facias is necessary. And, since a mandamus may issue against individuals who may not be parties to the judgment, conformity to the judgment in names is not always either possible or necessary. Manifestly, we get those parties from the preliminary petition or affidavit upon which the mandamus is to be founded, and they may be the names of any persons whatever who are charged with the duty sought to be enforced. When they answer as individuals, they can set up any defense, either in their own right or as the representatives of the defendant corporation.

Although there was a scire facias in O'Connor v. Memphis, supra, the court clearly recognizes that a suggestion on the record of the change of

name may be the proper form of proceeding. 6 Lea, 731.

If Greeley v. Smith, 3 Story, 657; Mumma v. Potomac Co., 8 Pet. 281; The Sapphire, 11 Wall. 164; and Thompson v. U. S., 103 U. S. 480,—have any application, they support, and do not conflict with, the ruling we make.

Whether the inhabitants of the "city" of Brownsville, who in their corporate capacity contracted these debts, with a power conferred of paying them by local taxation, and whom the law still compels to pay them by the exercise of that power, were a different corporation from that same body of inhabitants who are now incorporated as the "taxing district" of Brownsville, or whether the old corporation be "dead," and a new one "arisen" as its "successor," or whether both be the same, under different names, are questions pertaining more to the metaphysical doctrine of "psychopannychism," if that can be adapted to corporations, which are said "to have no soul," than to the practical science of legal procedure. The next defense set up is that one of the judgments is barred by the

statute of limitations, it having been more than 10 years from the date of the judgment to the suing out of this mandamus, although other like writs have issued in the mean time. If the time elapsed between the repeal of the charter and the reorganization into a "taxing district," during which there was no organization to be sued, be excluded, the 10 years have not expired, and the bar has not attached. We have no hesitation in holding that it should be excluded, precisely as the time occupied by our late war was excluded, and for precisely the same reason. If a state, with the deliberate and confessed purpose of doing that, repeals the charter of a municipal corporation to enable it to evade or avoid the writ of mandamus to enforce judgments against it, thereby disable the plaintiff from proceeding in the case, the time of disability should not be computed in the period of the statute of limitations. We are aware of the stringency of the rule that courts will not ingraft upon the statute exceptions growing out of mere equitable considerations of hardship or injustice, and the only doubt we have is whether the plaintiffs here are not put to a bill in equity to perpetually enjoin the defendant corporation from pleading the statute, as one might be for relief against any fraudulent contrivance of a defendant to arrest or delay the plaintiff's proceeding against him. But since the act of arrest complained of here is that of the state itself, by its own legislation, and through its paramount authority, which none can resist, we find no difficulty in implying from the new legislation and governmental conduct of the state an intention to exclude the time of disability from the statute, as is done in case of war. Hanger v. Abbott, 6 Wall. 532; U. S. v. Wiley, 11 Wall. 508. 513.—where it was ruled that although the right to sue was unimpaired, the "loss of the ability to sue, rather than the loss of the right. stops the running of the statute." And in Braun v. Sauerwein, 10 Wall. 218, where the limitation was suspended by the operation of an act of congress, just as we think this legislation operates, Mr. Justice Strong remarks of the decisions:

"They all rest on the ground that the creditor has been disabled to sue, by a superior power, without any default of his own, and therefore that none of the reasons which induce the enactment of the statutes apply to his case; that, unless the statutes cease to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue."

There are other applications of the doctrine quite as familiar, as in cases of delay pending appeals. Montgomery v. Hernandez, 12 Wheat. 129, 134. Moreover, this proceeding by mandamus is, in its constituent elements and its frame-work, capable of supporting even an equitable defense against the statute. Ang. & A. Corp. (11th Ed.) §§ 715, 721, 729; High, Extr. Rem. (2d Ed.) §§ 14, 457, et seq. The court does not grant or refuse the writ upon purely legal considerations. If the defendant has any equitable defense against it, he may set it up in his answer to the rule to show cause or alternative writ, and it will authorize the court to refuse the peremptory writ. So, if he sets up a legal defense, and the plaintiff can show an equitable answer to it, we see no reason

why the legal defense should prevail to obstruct the writ. Therefore we might issue this writ, notwithstanding the bar of the statute, if it be inequitable for the defendant to set it up. But by this we mean only such an equitable defense as would authorize a court of equity to relieve against the bar by its injunction, and not cases of mere hardship.

The next matter for consideration is the character of relief to be granted to the plaintiffs; and there are complications in the case which are perplexing, so much so that one of these petitions was originally filed as a bill in equity, but, under the orders of the court, was converted into an application for mandamus, for reasons that are obvious in the record. Under former writs, as to some of these judgments, taxes were levied, partly collected, and paid over. Some of these levies were commingled with other judgments from this and the state courts, one rate being intended to cover all, and now we are asked to compel another levy for the unpaid balance.

We have repeatedly held in this court that where a levy has been made sufficiently large to cover the judgment, with a reasonable allowance of margin for delinquencies, we would not compel a further levy for inadequacy until all the remedies afforded by law against delinquent tax-payers and their property had been exhausted. Otherwise the burden would be always placed wholly upon the prompt tax-payers, and levies, out of all proportion to the needs of the case, would be piled up, to go into the general fund, or be never collected. We adhere to this now; but the peculiarities of this case present, we think, an exception, unless the defendant shall, by its return to the writ, present facts that will bring the case within the ordinary ruling. It appears that there is no statutory receiver, as there was in the Memphis Case, to collect the delinquent taxes of the "extinct" corporation, and it is stated that not even can the old tax-books be found, and the facts concerning the condition of the levies are not known. A receiver was authorized by the legislation, and one of the governors of the state appointed one, but, yielding to the hostile pressure of public opinion, and the difficulties of giving bond, he declined to qualify. Subsequent governors have neglected or refused to appoint a receiver, and no provision has been made, in the administration of affairs, for the collection of those levies. viously, we cannot compel the governor to appoint a receiver, -or we do not wish, at least, to attempt that,—and this court long since intimated that it would not do so, as it would be nugatory, in all probability. High, Extr. Rem. (2d Ed.) § 14. Nor could we compel a person to accept or qualify as receiver, if appointed. Therefore we think that, for the purposes of this case, the defendant corporation, and the state itself, may be held to have abandoned the levies heretofore made, and the oreditors likewise; that it is thus demonstrated that the levies were inadequate to satisfy the judgments; and that the case stands as if it had been shown that the levies had been wholly exhausted, leaving a balance unpaid.

It is next insisted by the plaintiffs that since the legislature, by the act of 1881, levied a tax of one dollar, enacted that one-half of it be

paid upon the old debts, and provided the machinery for its collection, we should now compel that tax to be collected for each year that has transpired since the act was passed. As to this, it is to be observed that the act was a general one, applying to all "taxing districts" of the second class, and Brownsville was not organized as a taxing district for nearly two years afterwards; that being the time we have already excluded from the computation on the statute of limitations. Therefore it can scarcely be said to have been, as to Brownsville, a subsisting levy while the municipality was disorganized, and not rehabilitated under this act. came into force, as a levy, upon reorganization, that did not take place, we infer, until about the time the legislature again met, and changed the law, if it did not occur afterwards. The general act of 1883, already largely noticed, applied to all taxing districts, and contained, as stated, a broad repeal that perhaps, in itself, abrogated this former tax under the act of 1881; but the denizens of Brownsville did not seem to recognize this, for in 1885 another act, applicable to Brownsville, amended the act of 1881, repealed the former tax, and gave to the "taxing district" itself the largest powers of taxation for all purposes, even to pay "old debts;" which evident blunder, however, was speedily corrected by the extra session act of the same year, and the special legislation relating to Brownsville was brought in harmony with the general scheme, already explained, whereby the municipalities were prohibited from exercising the taxing power, except to pay the compromise bonds in default of levies by the legislature, etc. Moreover, the general tax acts already referred to, providing a single assessment for all purposes, and directing how county and municipal taxation should be accomplished, when authorized, of themselves, by their repealing clauses, abrogate all the foregoing special methods for Brownsville.

Now, these revocations of the taxing power under the act of 1885, and the repeal of the legislative levy under the act of 1881, are not, either of them, affected by the federal constitution; because, being subsequent to the contracts upon which these judgments were founded, they did not enter into, and become a part of, the remedy. Wherefore they were within the control of the legislature. So that, whether we consider the one or the other, they no longer exist as a basis for the coercive payment of these judgments through the operation of a mandamus.

But there is still another reason why we cannot proceed under the act of 1881. It may be doubtful, under the ruling of Lynn v. Polk, 8 Lea, 135, whether the legislature can levy a continuing tax beyond the two years for which it is elected, and whether that is not the utmost limit of its authority, under the state constitution. But we need now express no opinion on that point. It is well settled that, whatever be the power of a legislature in that regard, such levies are not favored, nor raised by implications and constructions of the statute. The intention to make a tax continuing or permanent must be clearly manifested by explicit enactment, otherwise the courts favor the principle of periodical levies, whereby the taxation is scrutinized in the constantly recurring assemblies of newly-elected representatives. U. S. v. Wigglesworth, 2 Story, 369; Adams v.

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Bancroft, 3 Sum. 384; Wilkinson v. Greely, 1 Curt. 439; Cooley, Tax'n, 202; 1 Desty, Tax'n, 102, 138; 2 Desty, Tax'n, 1055; Burroughs, Tax'n, 194, 554.

There is no such explicit manifestation of an intention to levy a permanent tax of one dollar, by the act of 1881, as is implied in the application to now enforce it against the taxing district of Brownsville, which was organized after the two years to which the levy would certainly apply.

The general result is that the plaintiffs are left to the same remedy that we applied in the Memphis Case, and they can have a writ only to that extent, unless the defendants, by their answer to the rule, show some better defense than has been suggested by their demurrers to the petition. We need not say, of course, that we cannot enforce any judgments of the state courts, and that as to these the petition will be denied. If the parties cannot agree as to any credits to be entered upon the judgments, that disagreement must be settled before the mandamus can issue, and, if desired, the clerk may, upon a reference, report the facts to the court, and the balances due. Some of these defenses would perhaps be more appropriate in an answer to the rule to show cause; but, on the demurrers to the petition, we take it, the defenses may be presented, and we have thought best to settle the case, so far as can be done, but without prejudice to the defendants to make any defense desired by response to the rule.

I am authorized to say that these were the conclusions reached by the court at the hearing, and that the circuit judge fully concurs in this opinion. Counsel will prepare the necessary orders. So ordered.

WADE, U. S. Marshal, for Use, etc., v. Wortsman and another.

Circuit Court, S. D. Georgia, E. D. January 25, 1887.)

1. COURTS—FEDERAL—ACTION BY MARSHAL ON FORTHCOMING BOND. In an action by the marshal on a forthcoming bond, given after claim to property levied on by attachment, and payable to him, the marshal is merely a formal party, and his residence in the same state with the defendant will not defeat the jurisdiction of the United States courts.

3. Same—Marshal may Sue, where.

Generally, it may be said that whenever the marshal performs, in the enforcement of remedies given by state laws, the same duties which are imposed by the law of the state upon the sheriffs of the state courts, he is entitled to maintain the same actions in the circuit court that the sheriff has in the state

** (Syllabus by the Court.)

Suit on Bond. Charles Nephew West and Wade Hampton Wade, for plaintiffs. Garrard & Meldrim, for defendants.

Speer, J. This motion is made to remand a suit brought on a forth-coming bond made by defendants to the marshal of this district, in an attachment cause brought by Curtis & Wheeler against L. W. Wortsman. The suit was originally brought in the city court of Savannah. Proceedings were instituted by the counsel of Curtis & Wheeler, who also represented the marshal, to remove the cause to this court. This was resisted by defendants, but that court directed the removal, and the defendants sought to reverse this decision by bill of exceptions to the supreme court of this state; but the decision was affirmed, and, when the cause was called for trial here, defendants made this motion to remand.

It is insisted by counsel for defendants that the forthcoming bond is made payable to the marshal; that he is a necessary party; and that, since he is a resident of the same state with the defendants, this court has no jurisdiction of the suit. This was the identical question decided by the supreme court of Georgia in the decision just referred to, (Wortsman v. Wade, decision rendered November 9, 1886.) The court there uses the following language:

"Where a levy was made by a marshal of the United States, a claim was interposed, and a forthcoming bond was given payable to such marshal and his successors, conditioned for the forthcoming of the property levied on and claimed, and where subsequently the successor of such marshal brought suit in a state court on such forthcoming bond, for the use of the plaintiffs in execution, who were non-residents of the state, the marshal was merely a formal party, without interest in the subject-matter of the suit, the plaintiffs in execution being the real plaintiffs in the action; and they could remove such action to the circuit court of the United States on the grounds of their nonresidence, although the marshal was a citizen of this state. The giving of a bond for the forthcoming of property in a claim case was a proceeding unknown to the common law, and is peculiar to the remedies provided by the statutes of this state; and while, generally, an action on a contract should be brought in the name of the party in whom the legal interest is vested, yet a suit on such a bond is for the benefit of the plaintiffs in fl. fa., who are the real parties plaintiff; and in this respect it differs from a bond given when an affidavit of illegality is interposed to a levy. Code Ga. §§ 3730, 3728, 3674, 3672, 3486, 3325, 3324, 3267, 2903; [Governor v. Hicks,] 12 Ga. 189; [Glenn v. Black, 31 Ga. 393; [Sharman v. Walker, 68 Ga. 148; [Edwards v. Perryman, 18 Ga. 374, 378."

It is insisted now, however, that the court did not consider the argument of counsel for plaintiff in error there, wherein it was contended that while it may be true that, in an action on a forthcoming bond under an execution, the marshal is merely a formal party, yet, in an action on a forthcoming bond under an attachment, the marshal is a necessary party. It is true that, in the supreme court of Georgia, Mr. Justice Hall, in rendering the decision, refers to the parties as "plaintiffs in execution," when it would have been more accurate to have said plaintiffs in attachment. Nevertheless it is impossible from the context, and from the references made, that the court could have misapprehended the nature of the record before it, nor is there anything in the construction of the Georgia statutes which could, in the opinion of this court, have led that court to a different conclusion. Section 3324 of the Code of

Georgia provides "that forthcoming bonds shall be payable to the levying officer." Section 3325 provides that, "upon the failure of the claimant to deliver such property according to the conditions of said bond, the levying officer may immediately sue the claimant and security upon the bond, and recover the full value of the property claimed, and also all damages, costs, and charges that the plaintiff may have sustained in consequence of the failure of the complainant to deliver said property."

These sections relate to claims and forthcoming bonds under attachments. Sections 3728 and 3729 of the Code relate to forthcoming bonds, where claims are made to property levied on by executions issued on general judgments. They likewise are made payable to the levying officer, and the decision of the supreme court of Georgia quoted above will equally apply to levies by means of attachment, and by means of common-law executions. The court must have considered their reasoning applicable to both cases, because they expressly refer to the sections of the Code providing for each. It follows, since this is the construction of Georgia statutes by the highest judicial tribunal of the state, that very great weight must be given to it; and, indeed, was not the jurisdiction of this court the matter under consideration, such decision would be paramount.

Aside, however, from this decision, weighty as it is, the jurisdiction of this suit is inherent in the organization and purposes of this court. The attachment was originally brought by non-residents. By virtue of their citizenship, they were entitled to bring it in the courts of the United A claim was interposed, and the defendants, having come into this forum, took charge of property in custody of its officer, and gave bond for its production at the time and place of sale; and, if they failed to produce the property when it was adjudged subject to sale, to respond in damages for such failure. Can it be said that the officer of this court, or the plaintiffs for whom he sues, are powerless to collect the damages occasioned, because the defendants have broken the contract which they made in order to obtain property already in the hands of the court? Must the marshal and the plaintiff turn their backs on the jurisdiction of the national courts, and set their faces towards the state courts? If this be true, then it is easily competent, in many suits of a civil nature, where non-residents are plaintiffs, when attempt is made to enforce the collection of the debt by final process, by simply giving a forthcoming bond to transfer the entire litigation from the national courts to the state courts. The effect of this would be to produce two suits, in different jurisdictions, to collect the same debt; and the national courts, instead of affording means for the sure and speedy enforcement of contracts made with non-residents, would be transformed into instrumentalities for delay and vexatious litigation. It may, I think, be laid down as a general proposition that wherever the marshal performs, in the enforcement of remedies given by the state law, the same duties which are imposed by the law of the state upon the sheriff of the state courts, he is entitled to maintain the same action in this court that the sheriff has in the state courts. Nor do I conceive the question now under consideration as open.

supreme court of the United States in Huff v. Hutchinson, 14 How. 587, held that "the marshal is competent to sue in a court of the United States, on an attachment bond, citizens of the state in which he is himself a citizen, averring on the record that the suit is brought for the benefit of the plaintiff in the original action, and that they are citizens of another state." He may also sue on a forthcoming bond. See, also, McNutt v. Bland, 2 How. 9; Irvine v. Lowry, 14 Pet. 293; Browne v. Strode, 5 Cranch, 303. A forthcoming bond is taken by the sheriff for the benefit of the plaintiff. Thompson v. Mapp, 6 Ga. 262; Code Ga. § 13.

The marshal having no interest in this suit save the proper performance of his official duty, his action being merely for the benefit of the plaintiffs, who are non-residents, his residence in the state cannot defeat the jurisdiction of the court, and the motion to remand is denied.

Norris and others v. McCanna.

(Circuit Court, W. D. Michigan, N. D. December, 1886.

 Fraudulent Conveyances—Intent—Question for Jury—How. Comp. St. Mich. § 6206.

Under How. Comp. St. Mich. § 6206, the question of the intent in conveyances alleged to be fraudulent is one of fact, and not of law; and, where a conveyance of his stock in trade by a married man to his wife is impeached as fraudulent, the value of the stock being largely in excess of the claims of the wife for advances to the husband, it is not error to refuse to charge that that fact is a "badge of fraud," and that the jury might find from that fact that the transfer was fraudulent and void, the jury having been instructed that such facts were for their consideration in determining whether there was fraud or not.

- 2. ESTOPPEL—By CONDUCT—TROVER AGAINST SHERIFF—CONSENT TO LEVY.

 Where the sheriff's certificate made no mention of the mortgage, nor indicated any lien subject to which the levy was made, the mortgagee of a stock of goods attached by creditors of the mortgagor is not estopped, in trover against the sheriff, from maintaining that the taking, under the attachment, was tortious, by the fact that his attorney consented to the levy, provided that it should contain a recognition of the mortgage.
- 8. Same—Husband and Wife—Partnership—Debtor and Creditor.

 While the facts that a married woman, apparently occupied as a helper in the same shop where her husband had his general store, had asserted no claim of interest in the goods, but on the contrary had suffered him to deal with them as his own, might estop her from claiming, as against creditors of the husband who had attached the stock, that she was a partner, and so entitled to an interest, when her assertion of an interest in it would disappoint the creditors, who had become such while the appearances held out were that the property was that of the husband, yet she is not estopped from asserting against such creditors that the husband was a debtor to her for actual advances to him as a loan.
- 4. TROVER AND CONVERSION—TORTIOUS TAKING—DEMAND. Where a transfer of goods by a debtor, on the fraudulent character of which attachments are based, is shown to be bona fide and valid, the taking under the writs is tortious, and a prior mortgagee of the goods may maintain trover against the sheriff without demand.

5. Partnership—Question for Jury.

When there is nothing in the testimony which would warrant the jury in finding that a husband and wife were partners, more than a vague recognition by the husband of an interest in the wife, (not amounting to a legal one.) and a sort of moral lien for the amount of the money of the wife which she had permitted the husband to invest in the business, the question of partnership between them should not be submitted to the jury.

6. Sheriff—Seizing Mortgaged Goods—Measure of Damages—How. Comp.

St. Mich. § 7682.

A sheriff who, with actual notice of an existing mortgage, prima facievalid, on a stock of goods, attaches the goods at the suit of creditors of the mort-gagor, who claim that the mortgage is fraudulent and void, and takes and maintains possession of them, in disregard of the mortgage, instead of seizing the property subject to the mortgage, and keeping possession only so long as was necessary to appraise and inventory it, and then returning it, if required, to the mortgagee, as provided by How. Comp. St. Mich. § 7682, is liable in trover, at the suit of the mortgagee, in damages to the amount of the mortgage, not exceeding the value of the mortgaged property.

7. SAME—No INDEMNIFYING BOND—How. COMP. St. Mich. § 7711.

The failure of a sheriff to take from attaching creditors the bond of indemnity provided for by How. Comp. St. Mich. § 7711, is his own neglect, and cannot be allowed any consideration to relieve him from liability for damages resulting from a wrongful seizure.

 Same—Order of Court Based on Void Law—Laws Mich. 1883, No. 193.
 The fact that No. 193, Laws Mich. 1883, was unconstitutional and void, will
 not render a sheriff liable who obeyed a mandate of the court, made under authority of that act, and turned over to a receiver property which he had attached.

9. Same—Damage by Fire.

A sheriff is not liable for the damage to attached goods in his possession, done by fire, although his seizure was wrongful, where it appears that the fire was accidental and was not caused by his negligence.

Trover. On motion for new trial by defendant. Ball & Hanscom, for defendant. Messrs. Riggs and Mapes, for plaintiffs.

SEVERENS, J. This cause was an action of trover, counts in case being also joined in the declaration, tried at the last term of the court held at Marquette, in which the plaintiffs recovered a verdict. The substantial facts in the case were as follows:

One Smith, having been engaged in the business of carrying on a general store at Manistique, had become indebted for purchases of stock to various parties, and, among them, the plaintiffs. There was also carried on in the same store a small line of jewelry business, which his wife, who occupied the store with him, had under her more especial management. The debt to the plaintiffs was for a considerable amount, and, feeling uneasy about it, they lodged their claim with R. G. Dun & Co.'s collection agency, at Chicago, for collection. Some part of the debt was not quite due, but would mature in a few days. was transmitted to W. F. Riggs, an attorney at Manistique, and he, on the twenty-first day of November, 1883, procured a chattel mortgage from Smith upon the general stock in the store, and also upon the jewelry; Mrs. Smith joining in the chattel mortgage, on account of a claim which she asserted in the jewelry. This mortgage ran to the plaintiffs, and, in terms, secured the payment of Smith's debt to them on the first day of December then following, and was immediately filed. The day after the giving of this mortgage Smith transferred to his wife his remaining interest in the mortgaged goods, in satisfaction of a debt due, as they both assert, from him to her, on account of moneys which she had advanced, and which had gone into the business. The amount of these advances, with the interest thereon, fell far short of the actual value of the interest thus transferred to her.

On the day succeeding this transfer, the defendant, who was sheriff of the county, levied two writs of attachment against Smith, and in favor of other creditors, on the mortgaged goods. There was a conflict in the evidence upon the trial as to whether these levies by the defendant were intended by him to be in defiance of the mortgage given to the plaintiffs, but the preponderance of the evidence tended to show that the sheriff, and the creditors whose writs he had, believed the mortgage to be fraudulent and void as to creditors, and that they therefore refused to recognize it. The sheriff's certificates do not mention the mortgage, or indicate any lien to which the levies were made subject. The goods were taken by the sheriff into his possession, and were removed by him from the store to another part of the village. The goods were inventoried and appraised. The evidence for the plaintiff tended to show that, after the inventory and appraisal, and after the mortgage became due, a specific demand was made in behalf of the plaintiffs upon the sheriff for the possession of the goods, and that the sheriff flatly refused to recognize any right in the plaintiffs under their mortgage. The defendants denied that such demand was made upon him, and insisted that his possession was assented to by Riggs, who represented the plaintiffs. At length an order was made by the circuit court of Schoolcraft county that the sheriff transfer these goods to a receiver appointed under the state law in reference to assignments. Act No. 193, 1883, since declared unconstitutional by the state supreme court in Risser v. Hoyt, 53 Mich. 185; S. C. 18 N. W. Rep. 611. Meantime, or rather before the order was executed, a part of the goods were destroyed by fire. The remainder were turned over to the receiver, disposed of by him, and the proceeds distributed to the creditors, the plaintiffs, however, not participating. This action was then brought.

The recovery by the plaintiffs was for \$1,354.45, being the amount secured by the chattel mortgage. No question was raised but that the value of the goods exceeded the plaintiffs' debt. A motion having been made for a new trial, argument thereon has been heard, and most of the grounds and reasons urged in behalf of the defendant have been already disposed of, leaving only the following questions for further consideration:

Upon the trial the counsel for the defendant presented a series of requests for instructions to the jury, which, grouping together certain features of the case, upon which argument could be made against the validity of the mortgage, and of the transfer from Smith to his wife, asked the court to instruct the jury that such circumstances constituted "badges of fraud," or, as in some of the requests, rendered the transaction fraud-

ulent and void as to creditors. The following, which is defendant's nineteenth request, is an example: "The fact appearing from Mr. and Mrs. Smith's testimony that the property transferred to her was largely in excess of Mrs. Smith's interest in the goods, or her claim, is a badge of fraud, and you may find from that fact that the transfer was fraudulent and void." The court refused such requests, holding that the question of the alleged fraudulent intent was one of fact wholly, and was for the jury to determine, upon all the evidence in the case; that while it was laid down as law in text-books that such facts as were embodied in these requests constituted "badges of fraud," still the court held that such expressions involved conclusions of fact as well as of law, and were of a class which Judge CAMPBELL, in Watkins v. Wallace, 19 Mich. 77, calls "technical and stock phrases of the bench and bar." The court was of opinion that, to charge as requested, would be to invade the province of the jury; and would practically go far towards turning such questions into matters of law instead of treating them as questions of fact. The court simply directed the attention of the jury to these features of the case, and instructed them that these, and all the facts, were for their consideration in determining whether a fraudulent intent inspired the transaction.

This action of the court in refusing the requests, and leaving the question of fraud to the jury, without any instruction as to whether these parts of the testimony tended to show fraud, is complained of, and made a ground of this motion for a new trial. But after full consideration, I am satisfied that the course taken on the trial was correct. The statute of Michigan (How. Comp. St. § 6206) declares that the question of fraud in such transaction shall be one "of fact, and not of law," and without such statute it is essentially so. The deduction of actual intent from circumstances proved is logically an inference of fact, and not of law. When the fraudulent intent appears upon the face of an instrument which the court is called upon to construe and give effect to, it becomes a matter of law, like all other matters thus coming into a case; but where the evidence is of facts, resting in parol, the jury are to say what are the inferences reasonably to be drawn.

The result is, in the language of the court in Gay v. Bidwell, 7 Mich. 519, 524, "to leave to the jury the duty of drawing all necessary inferences from facts." See, also, Oliver v. Eaton, 7 Mich. 108, where the court, adopting the doctrine of Smith v. Acker, 23 Wend. 653, declared it to have been the accepted rule in this state. It may be that cases may arise where the proof is so overwhelmingly one way that the court would be called upon to give explicit direction to the jury to find accordingly; but this is quite another matter, and such practice is not peculiar to any class of cases.

Another question, which was reserved for further consideration, was whether an error was committed by the court in charging the jury that, if they found the transfer from Smith to his wife to have been bona fide and valid, then the levy of the writs by the sheriff on these goods was without justification, and would not warrant any assumption of control

over them, the goods not being those of the defendant in the writs; and that, in such case, no demand was necessary to be made upon the sheriff for the possession before bringing this action.

This instruction is complained of on two grounds:

First. It is said that the testimony of Riggs shows that at the time the levies were made he assented thereto, and no doubt he testified that he assented to the levy, if it was made in recognition of the mortgage he had in charge for the plaintiffs. If that assent had been acted upon by the sheriff, it ought to follow that the plaintiffs would now be estopped from claiming that the taking was tortious. But the truth was that the sheriff was not led to make the levies by any assent of Riggs, and the levies would have been made whether he assented or refused. The defendant did not, therefore, take his course upon the footing of any consent of But a more satisfactory answer is that the condition of the assent was wanting, which was that the levy should be in recognition of his client's mortgage. The defendant could not be heard to say that he relied upon the assent thus given, and repudiate the condition on which it was It is not conceivable that Riggs assented to the levy without the condition. If he did, it would have been such an open betraval of his client's rights as to have deprived his act of any quality of agency.

Second. It is claimed that there was testimony which warranted the conclusion that Mrs. Smith was a silent partner with her husband in the business, and that, if so, the goods were liable to be seized on the writ against him; and authority is cited to the proposition that when goods have been sold to a copartnership which includes a silent partner, not known to the seller at the time of the sale, the writ against the known members will authorize the seizure of the entire property in the partnership goods, and that the silent member is estopped from making any claim to ownership, and from objecting to the seizure, on the ground that he was not made party to the suit. Lindl. Partn. §§ 482, 483, and notes; Pars. Partn. 290, 291. But here there was nothing in the writs, nor in the judgments, nor indeed in any part of the records, to show that the suit was against any partnership, nor against any other than Smith as an individual merely.

The case of *Inbusch* v. *Farwell*, 1 Black, 566, cited for the defendant, is not in point. There the suit was one professedly against a partnership. It appeared to be so on its face. The court held that the plaintiff, having discontinued as against two of the three partners because they were not in the jurisdiction, could take judgment against the third, and that execution thereon could be levied on partnership property.

It is easy to see how Mrs. Smith might be estopped from claiming she was a partner, when she had allowed her husband to use the property as his own, and when her assertion of a claim upon it would disappoint creditors who had become such while the appearances held out were that the property was that of the husband. But if she is estopped from claiming that she was a partner, and so entitled to an interest, she ought not to be estopped from asserting that her husband was a debtor to her, if such was the fact, for her actual advances to him as a loan. I

cannot find the elements in the case necessary to create such an estoppel. She has not, in such case, helped to deceive any one, more than in the case of another person who might have loaned him money without recorded security; and, of course, it cannot be pretended that there would be an estoppel in the latter case. The argument amounts to this: that Mrs. Smith is estopped from saying she was a partner, because her conduct denied it; and she is estopped from saying she was not a partner, because in truth she was. If the estoppels work both ways, she was in a dilemma, from which there was no escape but sacrifice. But while it has been plausibly urged, I do not think there were any facts in the case which should prevent Mrs. Smith from obtaining satisfaction for the advances she had made. They never claimed to be partners, and do not The defendant's claim that she was, is founded upon evidence of some loose and uncertain understanding between them that she had an interest in the goods to the extent of the advances, and that they shared the profits in some way, but in what proportions is not shown.

My opinion was and is that there was nothing in the testimony which would warrant the jury in finding that the husband and wife were in partnership. It was a vague recognition of an interest, not amounting to a legal one, nor having any defined scope or limits, but a sort of moral lien for the amount of the money she had permitted her husband to use. If, on such testimony, the jury should have found a partnership, such finding must have been set aside. It therefore could not properly be submitted to them. Improvement Co. v. Munson, 14 Wall. 442; Schofield v. Chicago, etc., Ry., 114 U. S. 615, and cases cited at

page 619; S. C. 5 Sup. Ct. Rep. 1125.

Finally, it appears to me that the verdict cannot be said to be contrary to legal justice in the case. The preponderance of the evidence went strongly to prove that, having constructive and actual notice of the plaintiffs' mortgage, the defendant proceeded in spite of it, and chose to make his levies, and take and maintain possession in disregard of it. Under the statute, he could have seized the property subject to the mortgage, and kept possession as long as necessary to appraise and inventory it, and then have restored possession, if required, to the mortgagee. How. Comp. St. § 7682; Bayne v. Patterson, 40 Mich. 659; King v. Hubbell, 42 Mich. 597, 603; S. C. 4 N. W. Rep. 440; Wood v. Weimar, 104 U. S. 786.

The mortgage was prima facie valid, and if the sheriff felt willing to act upon the claim of the parties whose writs he had, that the plaintiffs' mortgage was fraudulent and void, he could, as he ought to, have called upon those parties for indemnity. How. Comp. St. § 7711; Smith v. Cicotte, 11 Mich. 383. If he failed to do this, it was his own fault and negligence; and, while he is to be commiserated for his folly, he is in no situation to ask that the consequences of his proceedings should be visited upon others. Of course, the defendant is not liable for obeying the mandate of the court in turning over the goods to the receiver. Notwithstanding the law was void under which the court took that action, its order, remaining unrevoked, was obligatory upon the sheriff, and he

could not gainsay it. Wall v. Trumbull, 16 Mich. 233, and the cases there cited. Nor was he liable for the loss by fire, unless upon the ground that his wrongful act brought the goods within its reach, for it is not shown to have occurred through negligence on his part. The conversion, if it took place, was considerably prior to that time, and the rights of the parties had become fixed. I am therefore of opinion that the verdict of the jury upon the facts ought not to be disturbed, and that the judgment is in accordance with legal right.

The motion must be overruled.

Hospes v. Chicago, M. & St. P. Ry. Co.

(Circuit Court, D. Minnesota. February, 1887.)

CARRIERS—PASSENGER TRAVELING ON A PASS, INJURED.

Plaintiff was traveling on a railroad on a free pass, and about to enter a car, when the door was suddenly closed by the porter of the car, with such violence that he was thrown down, and injured his knee. Held, the railroad was bound to exercise a high degree of care for the personal safety of plaintiff, though he was traveling on a pass, but there must be reasonable proof of negligence. Proof of the mere fact that plaintiff was injured on the train by the door being shut against him does not, of itself, amount to negligence, where the carriage was gratuitous.¹

This action is brought to recover damages for personal injury caused by negligence as alleged. The plaintiff is a citizen of the state of Minnesota, and the defendant is a corporation organized under the laws of the state of Wisconsin. The plaintiff was traveling upon a free pass, upon the back of which was printed, substantially, the following indorsement: That the plaintiff accepting this pass, in consideration thereof, agrees that the company shall not be liable for an injury to the person by the negligence of its agents, or otherwise.

Plaintiff testified "that he was passing from the dining car into one of the sleeping cars in company with other persons, all of whom had a right to be in the sleeping car, and that immediately after the rest of the party had passed into the car, he, being the last one to cross the platform, raised his foot to place it upon the threshold of the door, when it was shut with such violence that a blow upon his knee threw him back across the platform of the car, onto the railing, and broke the skin of his knee." He further testified "that, in conversation with the porter of the car, had with him immediately, the porter expressed his regret at having shut the door upon him; and a short time thereafter, in another conversation, stated that it was a wonder that he was not killed, as it

As to the liability of carriers towards those traveling on free passes, see Camden & A. R. Co. v. Bausch, (Pa.) 7 Atl. Rep. 731; Griswold v. New York & N. E. R. Co., (Conn.) 4 Atl. Rep. 261, and note; Waterbury v. New York, C. & H. R. Co., 17 Fed. Rep. note, 674; Annes v. Milwaukee & N. R. Co., (Wis.) 30 N. W. Rep. 282; Lawson v. Chicago, St. P., M. & O. R. Co., (Wis.) 24 N. W. Rep. 618, and note.

(the door) went like a bullet out of a gun, but that he didn't know that any one else was coming after the rest of the company entered the car,

and didn't suppose there was."

When the evidence of the plaintiff closed, the defendant requested the court to instruct the jury that the plaintiff could not recover, for the reason that the carriage was gratuitous, and accepted subject to the conditions indorsed upon the back of the free pass, which request was refused. There was a verdict for defendant, and no exception was taken to the charge of the court. A motion is made by the plaintiff for a new trial, and it is urged that the verdict is contrary to the evidence. The only evidence of negligence is as above stated. It is insisted that the fact that an injury happened to the plaintiff raises a presumption of a want of care, and throws upon the defendant the burden of disproving it, which was not done.

Clapp & Macartney, for plaintiff.

Flandrau, Squires & Cutcheon, for defendant.

NELSON, J. I shall not dispute the doctrine of the plaintiff's counsel, squarely announced and insisted upon, that the engagement of a railway company, when a carriage for hire exists, is to carry safely, and if an accident occurs, and a passenger is injured thereby, proof of the accident makes out a prima facie case against the carrier; but here no contract existed between the plaintiff and the defendant, and the carriage was a The duty imposed upon the defendant was to exercise a high degree of care for the personal safety of the plaintiff, so that a jury, in considering the proof of the act which caused the injury to the plaintiff, must also examine into and consider, in connection with the proof of the act, all the surrounding circumstances, and determine whether it was negligence. It is immaterial from which side the circumstances are detailed in the evidence. There must be reasonable proof of negligence upon the part of the defendant, and it is the province of the jury to determine its sufficiency. The rule laid down by the United States supreme court, and cited by counsel for plaintiff, applies to a case of carriage for hire. Proof of the mere fact that the plaintiff was injured on the train by the door being shut against him, without more, does not amount to negligence, if the carriage is gratuitous.

Motion for new trial denied.

NEW HAMPSHIRE LAND Co. v. TILTON and others.

(Circuit Court, D. New Hampshire. February 8, 1887.)

COSTS—TAXATION—PLEA AMENDED BY ORDER OF COURT—COST OF SURVEYS OF LAND—COMPLIANCE WITH ORDER.

Where, in an action at law to recover the possession of certain lands, the defendant is ordered by the court to make his plea more certain, and, in order to enable defendant to file a proper plea in accordance with such order, it becomes necessary for him to make surveys and plans, the expense of such surveys and plans is not a part of defendant's taxable costs.

At Law.

Chase & Streeter, for plaintiff.

Aldrich & Remich and Bingham & Mitchell, for defendants.

COLT. J. The defendants ask to have allowed in their taxed costs against the plaintiff the expense of certain surveys and plans made and used by them in the preparation and trial of the case. The plaintiff, by its writ of entry filed at the May term, 1882, demanded possession of a large tract of land, about 50,000 acres, situated in Grafton county, New Hampshire. The declaration described the land claimed. The defendants in their plea filed August 24, 1882, disclaimed all lands in the plaintiff's declaration described, except certain lots. At the next term of court the plaintiff moved that defendants' plea be rejected on the grounds of uncertainty and insufficiency. Upon this motion the plaintiff claimed that defendants' plea did not tender an issue upon which a trial of a real action could be had, because the lots claimed by defendants had never been surveyed and marked upon the ground, and that, therefore, the lines of said lots could not be ascertained from the description in the plea. The defendants admitted that the lots claimed by them had never been actually surveyed and marked upon the ground. Upon hearing the parties, the presiding judge, against the defendants' objection, ordered that part of the plea describing the lots claimed by defendants rejected, and that the defendants furnish a plea describing the lines of the lots claimed by them by fixed, definite, and visible monuments upon the ground. To comply with this order, the defendants were obliged to make surveys, and, after making them, they filed an amendment to their plea, setting out by definite boundaries these lots. The surveys were made to perfect the defendants' pleading, and to furnish a plea in accordance with the order of the court.

Under these circumstances, I do not see how the defendants can recover for these expenses as a part of their taxable costs. They were ordered by the court to make their plea more certain. In order to enable them to file a proper plea, it became necessary for them to make the surveys. This was an expense incidental and necessary to their defense. It was not an expense incurred under any rule or practice of this court, or for the benefit of both parties. By section 914, Rev. St., the practice, pleadings, forms, and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, forms, and modes of proceeding of the courts of the state within which such circuit or district courts are held. Under the practice of New Hampshire, it would seem that the expenses of such surveys are not allowed as a part of the taxable costs. Ela v. Knox, 46 N. H. 16.

But, independently of the state practice, I find nothing in the federal statutes, or the practice of this court, that would seem to warrant the allowance of such an expense as a part of the taxable costs. The defendants urge that the allowance is within the discretion of the court, and that, as the expense was made necessary by the order of the court, it is

properly taxable as part of the costs, or that, at least, the plaintiff should pay one-half the amount. We are not dealing with a cause in equity, but with an action at law; and, where an expense of this character is made necessary in order to file a proper plea in an action at law, I know of no rule or practice which allows it to be included in the taxable costs. Motion denied.

Brockway, Adm'r, etc., v. Connecticut Mut. Life Ins. Co.

(Circuit Court, W. D. Pennsylvania. February 4, 1887.

1. Life Insurance—Action—Parties.

Where, on the application of S. as the declared beneficiary, he also paying the premiums, a policy of insurance was issued upon the life of B., the sum insured to be paid to the "assured," held, that S. was the assured and promisee, and an action on the policy by the personal representative of B. was not maintainable.

2. SAME—ASSIGNMENT—CONSENT OF COMPANY.

The fact that after the date of the policy an assignment thereof by B, to S. was indorsed thereon, without the concurrence of the insurance company, is an immaterial circumstance, neither changing the contract relations of the parties, nor importing their mutual understanding of their contract.

Sur demurrer to plaintiff's declaration. At Law.

B. F. Hughes, for plaintiff.

W. S. Purviance, for defendant and demurrer.

Acheson, J. This suit is upon a policy of insurance on the life of Beckwith S. Brockway, issued upon the written proposal of Daniel F. Seybert, setting forth the latter's desire to effect the proposed insurance, and that he had an interest to the full amount thereof in the life of said Brockway. To the inquiry, "for whose benefit the assurance is proposed," the written answer was, "Daniel F. Seybert." The original annual premium and the second annual premium, the only ones ever paid, were both paid by Seybert. By the terms of the policy the defendant company promises and agrees, "to and with the said assured," to pay the sum insured "to the said assured, his executors, administrators, or assigns," etc. The proposal and answers are expressly made part of the policy, and all are embodied in extenso in the plaintiff's declaration. The demurrer raises the question whether the right of action is in the plaintiff, the administrator of Beckwith S. Brockway, deceased, or in Daniel F. Seybert. The question is to be solved by ascertaining the person meant by the term "assured," as the same is used in the policy.

Now, as already stated, and as clearly appears on the face of the papers constituting the contract, Daniel F. Seybert was the applicant for the policy, in his proposal therefor claimed to have an interest in Brockway's life to the entire amount insured, was the declared beneficiary, and paid the premiums. In the absence, then, of anything indicating a contrary intention, the conclusion is irresistible that Seybert was the as-

sured and promisee. The point, indeed, is ruled by the case of Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. Rep. The policy of insurance sued on there and the one in suit here are in form precisely alike, and in their material facts the two cases do not differ. That some two months after the date of the policy an assignment from Brockway to Seybert was indorsed thereon seems to me an unimportant circumstance. The insurance company was not a party to that assignment, and never approved it. It was altogether an ex parte transaction. Therefore it cannot have the effect of changing the contract relations of the parties, nor does it import their mutual understanding of their contract. At most, it indicates only that Seybert and Brockway conceived it to be necessary that the policy should be so assigned.

I am of opinion that the declaration does not disclose any cause or right of action existing in the plaintiff, and that the demurrer must be

sustained.

MIAMI POWDER Co. v. HOTCHKISS.

(Circuit Court, N. D. Illinois. January 17, 1887.)

ATTACHMENT—FRAUDULENT CONVEYANCE.

Defendant, finding himself in failing circumstances, sold his stock, nominally worth \$8,000, to his son for \$6,000, taking therefor three notes of \$2,000 each, due in one, two, and three years, respectively, without interest, which notes he transferred to the bank, to apply the collections thereof on his indebtedness to the bank of \$6,040. No inventory was made, and the son had no means. But the son was 83 years of age, had been clerk in the business for many years, and was named as devisee of property worth \$5,000 in the will of his grandmother, who since making the will had been demnted, and whose health was so poor that she could not live long. Immediately after the sale defendant's sign was taken down, and that of his son was in a few days put up. The property sold would to any one else than the son have been worth no more than \$4,000 or \$5,000, and was not worth more to the son than what he paid for it. Held that, in the absence of a statute forbidding preferences, that was no attempt to defraud, hinder, or delay defendant's creditors that would sustain an attachment. creditors that would sustain an attachment.

J. N. Jewett and S. D. Puterbaugh, for plaintiff. Geo. B. Foster, for defendant. Stevens, Lee & Horton, for interpleader.

BLODGETT, J. The plaintiffs brought three suits by attachment in the Peoria county circuit court, and under the writs issued in these suits a stock of hardware in the store formerly occupied by defendant in the city of Peoria was levied on. These suits, by order of court, were consolidated, and subsequently the consolidated case was removed to this court. The plaintiff also brought a suit by attachment in this court; and the same stock of goods was attached by the marshal of this district; and by order of this court the suit removed from the Peoria county circuit court

and the suits originally commenced in this court were consolidated. Zenas N. Hotchkiss, the defendant in the original suit, pleaded an abatement of the attachment writs, denying the statements in the attachment affidavits that he had fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder and delay his creditors. Rudolphus R. Hotchkiss has also interpleaded in the cases, claiming that he is the sole owner of the property attached under the writs, and that the defendant, Zenas N. Hotchkiss, had, at the time of the levy of the said writs of attachment upon said goods and property, no interest in said goods, nor any part thereof; upon which said interpleader plaintiff has joined issue. These issues made by the plea in abatement and the interpleader were

tried without the intervention of a jury.

The facts, as they appear in the proof, are that, for many years, (since 1849, as I now remember the proof,) Zenas N. Hotchkiss had been engaged in business in the city of Peoria as a retail dealer in hardware; that on August 13, 1884, he sold to his son Rudolphus R. Hotchkiss the entire stock of goods in the store, together with the furniture used in the store, and the outstanding notes and accounts pertaining to his business, for the sum of \$6,000, for which amount he took three notes of the purchaser for \$2,000 each, payable in one, two, and three years from the date of said purchase without interest; and on the same day Zenas N. Hotchkiss transferred these notes to the Peoria National Bank, to be held and collected by the bank, and the proceeds applied upon certain indebtedness of the said Zenas N. Hotchkiss, a schedule or memorandum of which was attached to the notes, amounting in the aggregate to \$6,040; and a notice of the transfer of these notes was given to the creditors named in the schedule, and they assented thereto. At the time this sale was made, Zenas N. Hotchkiss was insolvent, and unable to pay his debts in full, and plaintiff was pressing for payment of the two notes then due, amounting to about \$1,300. This sale was made without an inventory. R. R. Hotchkiss was at the time of this transaction about 33 years old, and had for several years been in his father's employ as a clerk in the store, at a salary. Immediately after the sale the old sign of Z. N. Hotchkiss was taken down, and within a day or two afterwards a new sign, bearing the name of R. R. Hotchkiss, in plain, conspicuous letters, was put up in place of the old sign. At the time of this purchase, R. R. Hotchkiss was not in possession of any considerable property, but he was one of the devisees of his grandmother by her will, she being at the time quite an old person, and demented or imbecile; but her will had been made several years before, when she was of sound mind, and the condition of her health was such as to make it probable that, within a very short time, he would succeed to his share of the estate. The grandmother has since died, and he has realized \$5,000 or over for his interest in the estate. The fact of his expectations from the estate of his grandmother was well known in Peoria, where she and he resided. It also appears that after the sale R. R. Hotchkiss told one of the officers of the plaintiff that he had done as his father wished; that he expected to follow the instructions of his father,

and pay the \$6,000 purchase money on his father's debts to the bank. Nearly \$3,000 of the debts for which the notes were turned over to the bank was held by the bank, and the balance was nearly all made up of small amounts, on which personal friends of Zenas N. Hotchkiss were liable as indorsers, guarantors, or joint makers. The notes and accounts included in the sale of the personal property, aside from the stock of goods, were of very little value; and although the goods inventoried about \$8,000, yet many of them were much shop-worn, and their selling value would not exceed \$6,000, if it equaled that amount.

The position of plaintiff is that this sale was made to hinder and delay creditors, and was therefore fraudulent and void, as against the creditors of Z. N. Hotchkiss; and the reasons urged in support of this position are that the sale was made on unusual terms of credit, and to a son of the debtor, who was a man of no means or commercial credit, and in such haste that no inventory was taken, and that there was no visible

change of possession.

Since the repeal of the bankrupt law an insolvent debtor has an undoubted right in this state to prefer part of his creditors to the exclusion Smith v. Craft, 12 Fed. Rep. 856. Hotchkiss found himself insolvent, and had home debts, to the extent of about \$6,000, which he wished to pay in full, or as far as his property would go. His means of doing this consisted of this old stock of goods, which might have been invoiced at about \$8,000, but which, as the proof shows, would not have brought more than four or five thousand dollars at cash sale. The son was willing to take them, expecting to continue the business, and avail himself of his acquaintance with it, and what of the good-will of the trade he could command; and expected to realize the amount of the purchase money by the time the notes fell due. This was undoubtedly what he meant when he said to Mr. Decker, the plaintiff's agent, that he expected to do what his father wished, and pay the notes. It is doubtful if any other person would have assumed so large an indebtedness for this stock of goods. While the time was unusually long, the price, under the circumstances, must be deemed high. The purchaser was not wholly without means which would entitle him to credit. The proof shows that he had been offered a business partnership in which his interest in his grandmother's estate was to be considered as equivalent to \$5,000 capital. These expectations, while they gave him no money in hand, did give him credit; so that in assuming to buy out his father's goods, and continue the business, he was not wholly without means to justify the undertak-The grandmother's will was made, and, by reason of hopeless imbecility, she was incapable of changing it; so it was only a question of a short time when he would come into possession of his share of her estate.

Ordinarily the failure to take an inventory of a stock of goods, and the sale in a lump, is considered as a badge of fraud; but in this case the purchaser, for about 10 years, had been employed in the store, and had taken an active part in the business, and may be presumed to have known with quite approximate certainty the value of the goods. The change of sign over the front of the store was enough to notify all per-

sons dealing with the store of the change of ownership. Besides this, the plaintiffs at the time they made their attachment knew all about the sale to the son, and had seen and talked with both the father and son, and also with the attorney who had advised the transaction, and knew the terms of sale, and that the notes had been delivered to the bank to secure the scheduled creditors. Under these circumstances, I cannot say that the sale was fraudulent. Not being able to pay all his creditors, Z. N. Hotchkiss had a right to choose whom he would pay, and, at the time these attachments were issued and levied, not only had R. R. Hotchkiss given his negotiable paper for the goods, but that paper had been put in circulation in such manner as to vest rights in the creditors named in the schedule. The court will presume from the testimony in the case, and from the circumstances, that, if these creditors named in the transaction with the bank had not been secured by the pledge of these notes, they would have taken steps to obtain judgments; and their action in that respect would have been facilitated by the debtor to such an extent that they might have obtained judgments before the plaintiff's attachments. At all events, these creditors were evidently induced to lie still, and rely on the provision which the debtor had made for their payment; and, under the circumstances, it seems to me that more injury would be done to these creditors by finding this transaction fraudulent than by sustaining it.

The issue is therefore found for the defendant on the plea of abatement in the attachment case, and a judgment will be rendered that the attachment be abated; and the issue is found for R. R. Hotchkiss on his interpleader.

HAWKSHAW v. SUPREME LODGE OF KNIGHTS OF HONOR.

(Circuit Court, N. D. Illinois. January 17, 1887.)

1. Benevolent Societies—Proceedings—Records—Evidence.

While it is permitted to contradict the record of a voluntary society, or show that such records do not fully disclose all the proceedings of a body which ought to be recorded, proof of that kind must be so convincing and satisfactory as to leave no doubt but what the matter attempted to be interpolated into the records of the proceedings actually occurred.

2. Same—Rules—Suspension of Members.

In a voluntary society in which the standing of its members, and the mode of suspending and reinstating them in membership, is regulated by its laws, if the records of the proceedings of the body show that a member is not in good standing, he must be bound by these records, and the action of his society in that regard; especially when he has exercised his right of appeal, and the action of which he complains has been affirmed by the appellate tribunal.

8. Life Insurance—Benevolent Societies—Assessments—Payment—Insanity.

The rule that insanity is no excuse for non-payment of premiums or assessments of life insurance policies applies to the payment of assessments of benevolent societies.

At Law.

E. G. & W. C. Asay, for complainant.

C. C. & C. L. Bonney, for defendant.

BLODGETT, J. This a suit for the collection of the sum of \$2,000, which it is claimed accrued and became payable to the complainant from the defendant on the death of her husband, William Hawkshaw, by reason of the terms of the benefit certificate issued to him by the defendant lodge. The defendant is a corporation organized under the laws of Kentucky, and one of the objects of the corporation is declared to be the establishment of a "widows' and orphans' benefit fund," from which, on satisfactory evidence of the death of a member of the corporation in good standing at the time of his death, and who has complied with its lawful requirements, a sum to be determined by the lodge, not exceeding \$2,000, shall be paid to his family, or as he may direct. The organization consists of the supreme lodge; grand lodges in states, territories, and countries; and subordinate lodges for local work in cities and towns.

William Hawkshaw was, in his life-time, a member of the Star of the West Lodge, one of the subordinate lodges of the order located in the city of Chicago; and in June, 1881, there was issued to him a benefit certificate, by which the defendant agreed on his death, provided he was then in good standing in the order, to pay out of its widows' and orphans' fund to his wife, Margaret Hawkshaw, the sum of \$2,000, in accordance with and under the laws governing the order. This widows' and orphans' benefit fund of the supreme lodge, the defendant in this case, is derived from the collection of assessments upon the members; and one of the provisions of the constitution of the order is that each member shall pay an assessment made on him for this purpose within 30 days from the date of notice to pay the same, "and any member failing to pay such assessment within 30 days shall stand suspended."

It is conceded that this member died on August 19, 1884, and the only question is whether he was a member of the order in good standing at the time of his death. It appears from the proofs that on July 6, 1883, Hawkshaw paid assessment No. 121, of \$1.30; that assessment No. 122, of the same amount, became due August 12, 1882, and was not paid by him, but was paid by the Star of the West Lodge, of which he was a member, pursuant to section 7 of article 8 of the by-laws of said lodge, which provides:

"If any member is in arrears with one assessment at the expiration of 30 days, the lodge shall pay the same out of its general fund, and attach a fine of twenty-five cents to it, and at the same time notify such delinquent; and he must pay the same assessment and fine within 30 days of such notice, but no more than one assessment shall be paid for each member."

On the seventeenth of August, 1883, Hawkshaw made default in the payment of assessment No. 123, for the amount of \$1.30, and on the twenty-fourth of August, 1883, he was reported to his subordinate lodge as suspended for the non-payment of assessments, and such suspension ordered to be reported to the supreme lodge; and between July 31, 1883,

and the time of Hawkshaw's death, in August, 1884, 17 or more assessments of \$1.30 were made, none of which were paid by him, or by any one for him. The constitution of this subordinate lodge (the Star of the West) also provides that any member who has been suspended for nonpayment of dues, fines, or assessments, applying to be reinstated, must pay all arrears for dues, assessments, and fines charged at the date of such suspension; but such application for reinstatement must be made within one year; and, in case the application for reinstatement is made within 30 days of the time of such suspension, no medical certificate shall be required, unless so ordered by the lodge. That is, as I construe the rule, (section 3, art. 7,) a medical examination and certificate are required, as a matter of course, if application for reinstatement is made after 30 days from the date of suspension, but, if made within the 30 days, it is in the discretion of the lodge to require such medical examination and certificate. It also appears from the proof that from some time in June, 1883, perhaps as early as April of that year, Hawkshaw was mentally disordered, and at times insane, although no steps were taken to have him adjudged insane until February, 1884. From which, together with the other evidence in the case, I conclude that he was insane, at intervals,—say from April, 1883,—up to the time he was so adjudged, in February, 1884.

The records of the Star of the West Lodge show that on October 12, 1883, a motion was made by a member of the lodge to set aside the suspension of Hawkshaw, and reinstate him as a member, on the ground that he was insane at the time of the suspension, and was therefore unlawfully suspended. This motion was not entertained by the lodge, for the reason that it was made more than 30 days after the suspension, and was not accompanied by a medical certificate. An appeal from this action of the lodge was taken to the grand lodge of Illinois, where the action was affirmed, and this ruling of the grand lodge seems to have been reported to and approved by the supreme lodge. At least, no appeal was taken from the grand lodge to the supreme lodge, and the action of the former must therefore be held to be final, so far as the action of the order was concerned. Proof was offered tending to show that the motion to reinstate was made at an earlier date, and within 30 days from the time of the suspension, and that, for some reason, this motion was not entered of record; but, from all the testimony in the case, I have no doubt that the motion of October 12th, to reinstate, was the first motion made in the lodge on the subject, and that no earlier motion was brought before them.

While it may possibly be allowed to contradict the records of a voluntary society like this, or show that such records do not fully disclose all the proceedings of a body which ought to be recorded, yet it is clear that proof of that kind must be so convincing and satisfactory as to leave no doubt but what the matter attempted to be interpolated into the records of the proceedings of the body actually occurred. None of the witnesses by whom it is attempted to prove this alleged earlier effort at reinstatement speak by any data to strengthen or support their recollection, but

simply say they are sure it was less than 30 days after the suspension. Other witnesses are equally certain that they attended all the meetings, and that no such motion was made until that shown by the records. Therefore I say the proof of this motion within 30 days falls far short of such certainty as should be made in order to entitle it to supply the place of a record entry which had been neglected or omitted in the due course of the business of the body. It appears from the proof that the records of each meeting were read at the next succeeding meeting, and were subject to correction at such succeeding meeting; and it seems to me almost incomprehensible that if a motion of as much interest as this case seems to have excited had been made, and yet not duly entered of record, the omission could have passed the next meeting unnoticed.

But, even if such a motion was made, there is no proof of any offer to pay the dues and assessments which were in default at the time of suspension. It is true there is proof of a visit made about the tenth of August, 1883, by Mrs. Hawkshaw to Mr. Stein, who had been reporter or secretary of the lodge, and a statement to him of her readiness to pay all assessments. But that proof is wholly immaterial, because it appears that Mr. Stein was not then an officer of the lodge, and had no authority to accept payment of what was then due, and referred Mrs. Hawkshaw to the proper officer of the lodge to make such payments if she wished; but, for some reason, she dropped the matter there, and made no further attempt at payment, and no payment was made or offered by her to any officer of the lodge who had authority to accept it. So that we have the clearly-established fact that Hawkshaw had been suspended from his membership in this order about a year before his death for non-payment of assessments to keep up the very fund out of which the plaintiff now insists she shall be paid. But it is urged that this suspension was unlawful, because he was insane at the time he made the default for which he was suspended. There being no provision in the constitution or laws of this organization which declares, either expressly or by implication, that insanity shall be any excuse for default or forfeiture in the paying of assessments, I can see no reason why this case differs in principle on this point from the numerous cases that have been decided by the courts where insanity or incapacity from sickness has been urged as a reason why advantage should not be taken of a default in the non-payment of premiums or assessments of life insurance policies, and in that class of cases the rule seems fully sustained that insanity is no excuse for non-payment. Klein v. Insurance Co., 104 U. S. 88; Thompson v. Insurance Co., Id. 252; Wheeler v. Life Ins. Co., 82 N. Y. 543; Howell v. Life Ins. Co., 44 N. Y. 276; Yoe v. Benevolent Ass'n, 63 Md. 86.

If there is any distinction to be made between these cases and the one now in hand, it would seem that this is a stronger case against the beneficiary; because here the jurisdiction of the lodge was invoked to set aside the suspension and reinstate the member, and the lodge denied the relief. Indeed, I think this case might be wholly disposed of on the ground that this being a voluntary society, in which the standing of its

members and the mode of suspending and reinstating them in their membership was regulated and provided for by the laws of the society, if the records and proceedings of the body show that a member is not in good standing, he must be bound by these records and the action of his society in that regard, especially when he has exercised his right of appeal, and the action of which he complains has been affirmed by the appellate tribunal. The society, by its own laws, being made the judge of the standing of its members, such members are bound by its action on that subject, and I feel very clear that the courts ought not to entertain revisionary supervision over the action of such bodies when dealing with their members, except, perhaps, when fraud is charged and proven.

It is also urged that as this subordinate lodge has what was called a "sick fund," out of which members who should be sick for a week's time were entitled to be paid five dollars a week for not exceeding 13 weeks, therefore the subordinate lodge should have applied enough of this "sick fund" to pay this member's assessment to the supreme lodge so as to keep him in good standing. It is a sufficient answer to this proposition, I think, to say that the subordinate lodge assumed no such obligation to its members, under its constitution or by-laws. It does assume to pay one assessment, to save the member from default, and only one; and this must be reimbursed to his lodge within 30 days after notice of such payment, or he will be in default; and it also provides for payment of fines and dues of a sick member out of his weekly benefits, so as to prevent him from being in arrears to his own lodge while sick; but it does not assume to keep up the assessments made for the widows' and orphans' benefit fund, out of which death benefits like this are to be paid. A member may lose his standing in his subordinate lodge by failing to pay his dues and fines to that lodge, and may also lose it in the supreme lodge by failing to pay the assessments of the supreme lodge for the support of the widows' and orphans' benefit fund; but with the payment of assessments to this fund the subordinate lodge has nothing to do, except to pay one assessment, and this was done by payment of assessment No. 122, when the lodge's entire duty to this member was performed. The "sick fund" of the subordinate lodge and the "widows' and orphans' benefit fund" of the supreme lodge are entirely separate, and the subordinate lodge has no right to apply the sick fund to the payment of assessments for the "widows' and orphans' benefit fund." Besides this, there is no proof that Mr. Hawkshaw was at any time prior to his suspension even in condition to be entitled to the sick benefits. No visiting committee had ever reported him sick, and no benefits had ever been allowed or directed to be paid him. He was at times mentally disordered during the summer of 1883, but was about, and not even alarmingly affected, till about the twentieth of September, and this attack seems to have been only temporary at that time.

The issues are found for the defendant, and judgment.

United States v. Patterson, Keeper, etc.

(Circuit Court, D. New Jersey. January 81, 1887.)

1. Criminal Law — Sentence — Three Terms — "Running Concurrently"-

REV. St. U. S. § 5209.

Upon a plea of guilty to three indictments found under section 5209, Rev. St. U.S.,—one for the misapplication of funds of a national bank by the accused while cashier thereof, one for false entries to conceal such misapplication, and the third for making a false statement with intent to deceive the examining officers,—the district court pronounced sentence upon the accused as follows:
"That the prisoner be confined at hard labor in the state's prison of the state of New Jersey for the term of five years upon each of the three indictments above named, said terms not to run concurrently, and from and after the expiration of said terms until the costs of this prosecution shall have beed paid." Held, that the words, "said terms not to run concurrently," are uncertain and incapable of application, and therefore void; and that the sentences commenced at once, and ran concurrently.

2. SAME—JUBISDICTION OF UNITED STATES DISTRICT AND CIRCUIT COURTS—AP-PEAL-HABEAS CORPUS-JUDGMENT.

The judgment of the district and circuit courts of the United States in criminal cases is final, and cannot be reviewed by writ of error; but if a judgment, or any part thereof, is void, either because the court that renders it is not competent to do so for want of jurisdiction, or because it is rendered under a law clearly unconstitutional, or because it is senseless, and without meaning, and cannot be corrected, or for any other cause, the party imprisoned by virtue of such judgment may be discharged on habeas corpus.

8. HABEAS CORPUS—STATUS WHEN WRIT ALLOWED—WHEN DECISION MADE— EXPIRATION OF SENTENCE—DISCHARGE OF PRISONER.

On a habeas corpus the decision should be made upon the actual status of the case at the time of the decision, and not according to the state of things when the writ was allowed. When, at the time the writ of habeas corpus for the discharge of a prisoner, under three sentences of five years each running concurrently, was allowed, the first term of five years had not expired by lapse, although at least one of the sentences had been satisfied by means of remissions for good conduct. Held that, the five years having entirely elapsed since the allowance of the writ, the question of the applicability of the remission for good conduct to all the sentences may be waived and the prismission for good conduct to all the sentences may be waived, and the prisoner discharged.

On Habeas Corpus for the body of Oscar L. Baldwin. The petition for habeas corpus in this case was presented to Joseph P. Bradley, an associate justice of the supreme court of the United States, allotted to the Third circuit, on the thirtieth of December, 1886, and alleges that the petitioner, Oscar L. Baldwin, is imprisoned in the state's prison of the state of New Jersey, in custody of John H. Patterson, the keeper thereof, under judgment, sentence, and commitment thereon of the district court of the United States for the district of New Jersey, said judgment being rendered on the thirty-first day of January, 1882, upon petitioner's plea of guilty to three indictments found against him under section 5209 of the Revised Statutes of the United States, -one for misapplying the funds of the Mechanics' National Bank of Newark, of which he was cashier, one for false entries to conceal such misapplication, and the third for making a false statement with intent to deceive the examining officers; that, being set at the bar of said district court for sentence, the same was pronounced against him in the following words, as recorded in the records of said court, to-wit:

"The court do order and adjudge that the prisoner, Oscar L. Baldwin, be confined at hard labor in the state's prison of the state of New Jersey, for the term of five (5) years upon each of the three indictments above named, said terms not to run concurrently; and from and after the expiration of said terms until the costs of this prosecution shall have been paid."

—That, immediately upon the rendition of said judgment and sentence, the petitioner was committed to the custody of the keeper of said state's prison, and that from thence hitherto he has been and is now kept in said state's prison, at hard labor, according to all the rules and regulations of said prison, the same established and carried on in the case of all persons convicted under the laws of New Jersey, and sentenced to hard labor by its courts; that by the laws of said state the keeper of the state's prison is required to have kept a correct, impartial, daily record of the conduct of each prisoner, and of his labor, whether satisfactory or otherwise, and to lay the same before the inspectors as often as they may require; that the said inspectors, being satisfied that the record is properly kept, shall direct the keeper, for every month of faithful performance of assigned labor by any convict, to remit to him two days of the term for which he was sentenced; for every month of continuous orderly deportment, two days; and for every month of manifest effort at intellectual improvement and self-control, to be certified by the moral instructors, one day; provided, that in any month in which a convict shall have merited and received punishment no such remission shall be made, and, in case of any flagrant misconduct, the inspectors may declare a forfeiture of the time previously remitted, either in whole or in part, as to them shall seem just; that, on the recommendation of the keeper and moral instructor, it shall be lawful for the inspectors to remit an additional day per month to every convict who for 12 months preceding shall have merited the same by his continuous good conduct, and for each succeeding year, progressively, to increase the remission one day per month for that year.

The petitioner states that, by virtue of the 5544th section of the Revised Statutes of the United States, he is entitled to the benefit of these regulations; and that by reason of his good behavior he became entitled to and has been awarded such credits; and that by force thereof such deductions have been made from the said term of five years, for which he was sentenced, that said term expired and came to an end on the twentyfifth day of January, 1886, a remission of 372 days having been allowed to him; also that the costs of prosecution of said indictments have been The petitioner further states that he is advised by his counsel that he is not now detained in custody in said state's prison by virtue of any sentence; that a second term of five years' imprisonment has not begun, and will not begin, till the thirty-first day of January, 1887; and that he is therefore unlawfully detained in prison. He also, upon the same advice, contends that the judgment was unlawful, because it sentenced him to imprisonment at hard labor, whereas section 5209 of the Revised Statutes of the United States, under which he was indicted, imposed the punishment of imprisonment only. Also that no more than one sentence of five years' imprisonment could lawfully be imposed upon him under the said section, inasmuch as said offenses were each acts forming part of one act of misapplication of moneys. Also that the said sentence is unlawful for uncertainty, except as to the first term of five years' imprisonment, which has expired, and that the court had no lawful right or authority to impose any more than one term of five years' imprisonment on him. A duly-exemplified copy of the three indictments, and the proceedings thereon, and of the sentence pronounced against the petitioner, and of the award of remission of penalty by the inspectors of the state's prison, as stated in the petition, was annexed thereto, confirming the statement of facts set forth therein.

Upon this petition being presented to the said justice of the supreme court he allowed a writ of habeas corpus as prayed, and on the seventh day of January, 1887, the same was duly returned before the said justice. at his chambers, in the city of Washington. The return set forth as the cause of imprisonment the warrant of commitment by virtue of which the petitioner was detained in custody, and which consists of a statement of the three indictments, by their several titles, with a copy of the sentence as set out in the petition, duly certified by the clerk of the said district court. The return further states that it appears by the receipt of said clerk, under his seal, that the costs of the prosecution have been paid; also that, upon the books of the prison, the petitioner appears entitled to a remission from the first of the three terms of imprisonment of 372 days, whereby the period of his punishment under the same expired on the twenty-fifth day of January, 1886.

Annexed to the return is a writing signed by the petitioner and his counsel, waiving all right to the production of his body according to the command of the writ, before the judge issuing the same, and requesting the said judge to proceed to inquire into the cause of his detention, and give judgment thereon without such production. And a supplemental return of the keeper was presented, containing a copy of said waiver and consent, and certifying that in consequence thereof he refrains from producing the said body, but avows his readiness, and submits, to produce the same to answer any order which may be made by said judge.

Cortlandt Parker, for petitioner.

Job H. Lippincott, U. S. Dist. Atty., contra.

BRADLEY, Justice. I have duly considered the matter aforesaid, and will proceed to state the conclusion to which I have come, and the reasons thereof. It is manifest that the judgment or sentence in this case is uncertain in this respect: it imposes the penalty of imprisonment at hard labor in the state's prison for the term of five years upon each indictment, and adds that the said terms shall not run concurrently, but does not specify upon which indictment either of said terms of imprisonment is to be undergone. If the prisoner is to be detained in prison for three successive terms, neither he, nor the keeper of the prison, nor any other person, knows, or can possibly know, under which

indictment he has passed his first term, or under which he will have to pass the second or the third. If, for any reason peculiar to either of said indictments, as, for example, some newly-discovered evidence, should be a different face put upon the case, so as to induce the executive to grant the prisoner a pardon of the sentence on that indictment, no person could affirm which of the three terms of imprisonment was condoned. If a formal record of any one of the indictments. and the judgment rendered thereon, were, for any reason, required to be made out and exemplified, no clerk or person skilled in the law could extend the proper judgment upon such record. He could not tell whether it was the sentence for the first, the second, or the last term of imprisonment. Without the last words of the sentence, declaring that the terms of imprisonment should not run concurrently, it would be sufficiently clear and certain. It would then, by force of law, be a sentence of five years' imprisonment on each indictment, and each sentence would begin to run at once, and they would all run concurrently. Such a sentence is lawful and proper. But the addition that they were not to run concurrently, without specifying the order in which they were to run, is uncertain, and incapable of application. It seems to me that the additional words must be regarded as void.

The words used are undoubtedly equivalent to the words, "the said terms shall follow each other successively." But, if these words had been used, the case would not have been different. The inherent vice of being insensible and incapable of application to the respective terms, without specifying the order of their succession, would still exist. The joint sentence is equivalent to three sentences, one on each indictment. One of them is applicable to the indictment for misapplication of funds; but, if they are successive, which one? That which is first to be executed, or that which is secondly or thirdly to be executed? No intelligence is sufficient to answer the question. A prisoner is entitled to know under what sentence he is imprisoned. The vague words in question furnish no means of knowing. They must be regarded as without effect, and as insufficient to alter the legal rule that each sentence is to commence at once, unless otherwise specially ordered.

If this were a mere error, it could not be considered on habeas corpus. The judgments of the district and circuit courts in criminal cases are final, and cannot be reviewed by writ of error, and a mere error of law, if in fact committed, is irremediable; as much so as are the decisions of the supreme court. But if a judgment or any part thereof is void, either because the court that renders it is not competent to do so for want of jurisdiction, or because it is rendered under a law clearly unconstitutional, or because it is senseless, and without meaning, and cannot be corrected, or for any other cause, then a party imprisoned by virtue of such void judgment may be discharged on habeas corpus.

I do not say that the judgment in this case is void. It is a good judgment for the term of five years' imprisonment on each indictment. Perhaps these terms might have been lawfully made to take effect successively, if the order of their succession had been specified, although

there is no United States statute authorizing it to be done. But this was not done. No distinction was made between them in this respect, and, as neither of them was made to take effect after the one or the others, they all took effect alike; that is, from the time of the rendering of judgment. The additional words as to non-concurrence are void, because they are incapable of application. It is as if a man should be sentenced to successive terms of imprisonment on each of several indictments, and to hard labor, or to be kept on bread and water, during one of the terms, without specifying which. The latter part of such a sentence would clearly be void, for it could not be allowed to the jailer to exercise his discretion as to the application of the aggravated penalties.

If there were any way in which the district court could amend its judgment, the case might perhaps be different. But I see no way in which it could do so without passing a new sentence, and that it could not do now, after the term has passed, and after one term of imprisonment has been suffered. What right would the court have now to determine that the expired term was due to any particular indictment more than to either of the others?

I have carefully read the able opinion of the supreme court of New Jersey in the case of Gibbs v. State, 45 N. J. Law, 379, and agree to all that the court there says as to the right of a criminal court to extend its judgment and proceedings on the record in proper form, regardless of imperfections in the minutes of its clerk. But in the present case there are no materials in existence for altering the form of the judgment under consideration,—at least nothing but what may rest in the bosom of the judge; and for him to resort to his memory at this day to alter the judgment would be to render a new judgment. It is unnecessary to say that the honorable judge of the district court would not adopt a proceeding so questionable and hazardous. The district attorney has supplied me with a certified copy, literatim, with all the erasures and interlineations of the rough minutes; but they exhibit nothing upon which the court could base any substantial alteration in the judgment as re-

In this view of the case, it is unnecessary to consider the other questions raised by the petition, and by the prisoner's counsel on the argu-But it does suggest another question which cannot be entirely overlooked. When the habeas corpus was allowed, the first term of five years had not expired by lapse of time, although at least one of the sentences had been satisfied by means of the remissions allowed for good Considering the three terms of imprisonment as by law running concurrently, do those remissions apply to all three of the sentences. or to only one of them? If to only one, and I had to decide this case. as in ordinary civil actions, according to the state of things when the writ was issued, I might be obliged to remand the petitioner into custody, and put him to the expense and trouble of another writ. think that on a habeas corpus, where the personal liberty of the citizen is involved, the decision should be made upon the actual status of the case. And as the five years have now entirely elapsed, and all the concurring terms have been fulfilled, the question of the applicability of the remission for good conduct to all the sentences may be waived, and the prisoner be lawfully discharged, without deciding it. He is discharged accordingly.

JULIUS WINKELMEYER BREWING Co. v. WHITNEY, Surveyor, etc. 1

(Circuit Court, E. D. Missouri. January 13, 1887.)

Customs Duties—Castings of Iron—Parts of Ice-Machine.

Iron castings, intended to form parts of an ice-machine, but which have to be put together after their arrival here, and to which other parts have to be added, in order to make a complete machine, are "castings of iron not specially enumerated or provided for," within the meaning of Schedule C of the tariff act of March 3, 1883, and are dutiable at one and one-fourth cents per pound.

At Law.

Suit to recover back \$417.75, duties paid under protest upon iron castings intended to form part of an ice-machine. All parts of the machine were not imported, and the parts imported had to be put together, and others added after their arrival in this country. The parts imported were classed as manufactures of iron, and a duty of 45 per cent. ad valorem charged, under clause 216 of Heyt's Compilation. The plaintiff claims that the goods were only dutiable, under the provisions of Schedule C of the tariff act of March 3, 1883, at the rate of one and one-quarter cents per pound, as "castings of iron not specially enumerated or provided for."

Shuman & Defrees, for plaintiff. W. H. Bliss, for defendant.

TREAT, J. The testimony in this case does not vary the construction of the acts of congress reached by the circuit court of the United States for the Northern district of Illinois in the case of Wolff v. Spalding, 26 Fed. Rep. 609. Accepting the decision of that court as the proper construction of the revenue act, and duly considering the testimony offered, the court holds that the plaintiff is entitled to recover.

Judgment will be given accordingly, for the sum of \$417.75, and costs.

¹Edited by Benj. F. Rex. Esq., of the St. Louis bar.

DIECKERHOFF and others v. Robertson, Collector.

(Circuit Court. S. D. New York, January 7, 1887.)

CUSTOMS DUTIES—ACTION TO RECOVER BACK—BILL OF PARTICULARS—AMENDMENT—REV. St. U. S. §§ 2931, 3012.

In suits to recover duties illegally exacted by collectors of customs, while, notwithstanding the mandatory language of Rev. St. U. S. § 3012, which enacts that suit shall not be maintained unless the bill of particulars containing the matters specified be served within 30 days after due notice of the appearance of the defendant, amendments as to formal matters not involving substantial rights, which had been omitted or misstated by inadvertence, may be allowed, the court will not allow an amendment which will introduce a new cause; as, where two suits are brought, the transfer to one of them, brought within the short bar of 90 days from the decision of the secretary of the treasury, provided by Rev. St. U. S. § 2931, of the cause of action in the other, which was not brought until after the expiration of that limitation.

At Law. Motion to amend bill of particulars.

The moving affidavit of the plaintiffs showed: (1) That two suits between the same parties were pending,—one numbered 9,187, and the other 10,072. (2) The first suit was brought within 90 days after the decision of the secretary of the treasury on the appeal to him under section 2931, Rev. St. U.S. (3) The second suit was not commenced until more than a year had elapsed after the decision of the secretary of the (4) The plaintiffs did not know, at the time of the commencement of the first suit, that any decision had been made by the secretary of the treasury on their appeal, covering the entries in the second suit. (5) A bill of particulars in each suit was served within the statutory Section 3012, Rev. St. U. S. (6) The plaintiffs asked for an time. amendment to the bill of particulars in the first suit, by adding or transferring thereto 11 entries contained in the bill of particulars in the second suit.

Dudley F. Phelps, for the motion, cited Pott v. Arthur, 15 Blatchf. 314. Henry C. Platt, Asst. U. S. Atty., opposed, cited Rev. St. U. S. §§ 2931, 3012; Williams v. Cooper, 1 Hill, 637; Arnson v. Murphy, 115 U. S. 579, 586; S. C. 6 Sup. Ct. Rep. 185.

WALLACE, J. Since the decision in Pott v. Arthur, 15 Blatchf. 314, this court has frequently exercised the power of permitting plaintiffs, in suits to recover duties illegally exacted by collectors of customs, to amend the bill of particulars as to essential contents, notwithstanding the mandatory language of section 3012, Rev. St. U. S., which enacts that the suit shall not be maintained unless the bill of particulars containing the matters specified be served within 30 days after due notice of the appearance of the defendant. In that case Judge Blatchford construed the statute as directory merely, and allowed the dates of the invoices which had been omitted to be supplied by amendment. In subsequent cases, when a similar application has been made, the amendment sought has always been as to some formal matter, not involving any substantial rights of the defendant which had been omitted or misstated by inad-

vertence; and the United States attorney, probably feeling that it was hardly consistent with the dignity of the government to seek to defeat a just claim by insisting upon a trivial slip in practice, has not opposed the application further than by refusing to consent to its allowance. present motion, however, stands upon a different footing, and the effort is now made by the plaintiff, by an amendment of the bill of particulars, to transfer a cause of action, pending in another suit brought by the plaintiff against the defendant, (No. 10,072,) to recover duties from that suit to this, (No. 9,187.) No 10,072 was not brought within 90 days after the decision of the secretary of the treasury upon the appeal relative to the duties in question, and consequently will be defeated by the short bar of section 2931, Rev. St. This suit, brought to recover other items of duties, was brought within 90 days after the cause of action in No. 10,072 accrued; and under the form of the complaint, if the plaintiff can amend his bill of particulars, he can try his right to recover for the duties which cannot be recovered in the other suit. In effect, the court is asked, where a plaintiff has brought two suits for causes of action that might have been united in the first of them, and is met by a defense in the second which is fatal, to allow him to amend his pleadings in the first, and introduce as a new cause of action the one which he cannot sustain in the second suit.

Although section 954, Rev. St. U. S., confers power upon the courts of the United States to exercise the widest discretion in permitting amendments of pleadings, it would be an abuse of this discretion to permit a plaintiff thereby to revive a cause of action that is dead. In The Harmony, 1 Gall. 123, Judge Story said:

"That the statute of limitations would run against a cause of action then before the court has been held a good reason for allowing an amendment as to such cause of action. But in such cases the court will not admit of an amendment, if it be to introduce a new substantive cause of action, or new charge against the defendant."

He refused to allow the amendment, because it sought to introduce a new substantive charge, and the cause of action would be gone on an original information.

To permit the amendment now asked for would be a palpable violation of section 2931, which, in declaring that the decision of the secretary shall be final and conclusive unless suit is brought within 90 days after the decision, evinces in the plainest terms the intention of congress that this class of actions, which could not be maintained at all except for the permission of congress, shall be brought within that period or not at all.

The motion is denied.

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In re Boston & Fairhaven Iron-Works.

Ex parte CHILD.

(District Court, D. Massachusetts. November 18, 1884.)

Bankruptcy—Debts Provable—Infringement of Patent—Profits—Rev. St. U. S. § 5067.

A claim for an account of profits against an infringer of a patent-right is provable against his estate in bankruptcy, under Rev. St. U. S. § 5067.

In Bankruptcy.

C. E. Washburn, for the creditor.

F. B. Greene, for the assignees.

NELSON, J. Cyril C. Child offered for proof against the estate of the Boston & Fairhaven Iron-works, in bankruptcy, a decree for \$5,640.26, recently rendered in his favor by the circuit court of the United States for this district, in a suit in equity for the infringement of a patent pending against the bankrupt corporation at the commencement of the bankruptcy proceedings. It was admitted at the hearing that the decree was solely for profits actually received by the corporation before the bankruptcy from the wrongful use of the invention secured by the plaintiff's patent, without any addition for damages; also that the decree might be admitted to proof under Rev. St. § 5106, if the court should be of opinion that such profits constituted a debt provable under the bankrupt act.

The bankrupt act allows proof of "all debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing, but not payable until a future day;" and further provides that "all demands against the bankrupt, for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts;" and also provides that "when the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate." Rev. St. § 5067. The language of this section is broad enough and was intended to include all debts founded on contract, express or implied, and all wrongful appropriations of personal property of every description, for which an action at law or in equity could be maintained against the bankrupt.

¹Note by the Court. Reversed on appeal in the circuit court by Colt, J., on the ground that a claim for profits for the infringement of a patent is a claim for unliquidated damages for a tort, and therefore not provable; citing, as authorities for this, In re Schuchardt, 15 N. B. R. 161; Black v. McClelland, 12 N. B. R. 481; In ra Hennocksburgh, 7 N. B. R. 37; Child v. Boston & Fairhaven Inon-works, 137 Mass. 516, and Root v. Railway Co., 105 U. S. 189. See 23 Fed. Rep. 880.

It can be no valid objection to the proof that infringement of a patent is in the nature of a tort. Damages for mere personal torts, such as false imprisonment, (In re Hennocksburgh, 7 N. B. R. 37,) assault and battery, (Black v. McClelland, 12 N. B. R. 481,) deceit, (In re Schuchardt, 15 N. B. R. 161, slander, (Zimmer v. Schleehauf, 115 Mass. 52,) are not provable, unless reduced to judgment or otherwise liquidated before bank-But wherever an action of trover, or trespass, or money had and received, will lie at common law for the conversion of property, the cause of action is provable. Thus, if the bankrupt has unlawfully converted to his own use personal property; or has committed trespass on land by cutting and carrying away growing trees, or removing fixtures; or has obtained money or property by fraud, forgery, or embezzlement—the cause of action is provable as a debt. "Debts created by the fraud or embezzlement of the bankrupt" are provable. Section 5117. The wrongful conversion by the husband of the wife's separate property is provable as an equitable debt. In re Blandin, 1 Low. 543. These are all cases of tort, yet they are provable nevertheless.

To the objection that the claim is for unliquidated damages for a tort, there are two answers: First, the act allows proof of unliquidated damages for the wrongful conversion of all kinds of personal property, and provides for their assessment; and, second, profits of an infringer of a patent are not unliquidated damages. They are as capable of being ascertained by simple computation, as the amount due on a promissory note. Courts of equity do not award unliquidated damages except in cases where there is no possible remedy at law. The right to damages in addition to profits given by Rev. St. § 4921, is a statute remedy, and does not af-

fect the question.

Nor is it an objection that such profits are only recoverable in equity. Equitable debts are provable on the same footing as legal debts. It was said by Judge Lowell in Re Buckhause, 2 Low. 331: "I have often decided that equitable debts may be proved under our bankrupt act, and I am not aware that a contrary decision has been made." See, also, In re Blandin, supra. It is a rule that any debt for which the creditor could have maintained a bill in equity against the bankrupt at the date of the bankruptcy can be proved; and the right to sue in equity is conclusive in favor of the right to prove in bankruptcy. The only exception is when the claim is barred by some conflicting equity as between different classes of creditors. In re Lane, 2 Low. 333. In such cases the debt may be proved against a surplus, and is released by the discharge. The district court is possessed of ample powers as a court of equity to ascertain the amount due on any equitable debt.

The theory on which courts of equity award profits against an infringer is stated and explained with great force and clearness in the elaborate judgment of Mr. Justice Matthews in Root v. Railway Co., 105 U. S. 189. It is only necessary to refer to that case for all the learning and all the leading authorities on the subject. It was decided in that case that a bill for an account of profits only, filed after the expiration of the patent, when the right to an injunction no longer remained, could not

he maintained, for the reason that the right to an account of profits was incident to the right to an injunction, and the fact of infringement alone created no such fiduciary relation between the patentee and the infringer as to confer jurisdiction on a court of equity to administer the trust; and compel the trustee to account. But in deciding this the court was careful to reaffirm with emphasis the well-established rule that, having once acquired jurisdiction upon the equitable ground of relief by injunction, the court would retain the cause for the purpose of administering a complete remedy; that, not being permitted by the principles and practice in equity to award damages, it would treat the infringer as though he were a trustee for the patentee in respect to profits, and would give profits as a substitute for damages; and in taking the account it would apply the same rule which it adopts in cases of trustees who have committed breaches of trust by an unlawful use of the trust property for their own advantage, and require the infringer to refund the amount of profit which he has actually realized. Pages 214, 215. The court cited with approval the language of Mr. Justice Miller in Burdell v. Denia, 92 U. S. 716:

"Profits are not the primary or true criterion of damages for infringement in an action at law. That rule applies eminently and mainly to cases in equity, and is based on the idea that the infringer shall be converted into a trustee as to those profits, for the owner of the patent which he infringes."

What of all things in the world the court did not decide in Root v. Railway Co. was that, having jurisdiction to grant relief by injunction, it would not treat the infringer as a trustee for the patentee as to profits. and that profits are unliquidated damages. When the right to an injunction exists, the infringer's liability for profits is the same as that of a trustee who has misapplied the trust property to his own advantage: and he is held liable to account on the just and equitable principle applied in so many cases, both by courts of law and equity, that the wrongful use of the property of another raises on the part of the wrongdoer an implied contract to account to the owner for what has been gained by the use. If the patent has expired before the commencement of the proceedings, without suit brought, profits would not be provable in bankruptcy any more than they would be recoverable in equity. Railway Co. is authority for that. They are a debt in bankruptcy when they are a debt in equity, and no less or more a debt in one case than in Profits are frequently decreed against an infringer where no injunction is or can be granted. Clark v. Wooster, 119 U.S. 322, 7 Sup. Ct. Rep. 217; Hoe v. Boston Daily Adv. Co., 14 Fed. Rep. 914. Whether damages for infringement are provable, it is not necessary to inquire. that question not now being before the court.

Under the late English bankruptcy act of 1869, which differed from our act in expressly excluding from proof all demands in the nature of unliquidated damages founded on tort, and in not permitting proof of demands for goods and chattels wrongfully taken, converted, or withheld by the bankrupt, but which as to other provable debts was the same, profits for the infringement of a patent were provable as a debt arising in

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contract. Watson v. Holliday, 20 Ch. Div. 780. In this respect the present English bankruptcy act of 1883 is the same as that of 1869. Robs. Banks, (4th Ed.) 258; Id. (5th Ed.) 281, 282; 32 & 33 Vict. c. 71, § 31; 46 & 47 Vict. c. 52, § 37. Watson v. Holliday was affirmed in the Court of Appeal; Sir George Jessel, M. R., in pronouncing the judgment of the court, remarking: "The only fault I have to find with the judgment of the court below is that it is too long. The case is very plain, and beyond argument." 31 W. R. 536; 48 Law T. (N. S.) 545; or, as reported in 52 Law J. Ch. 543: "The answer to that objection is that it is not a demand for damages, and is provable; the point is simply unarguable." S. C. Jessel, Dec. 489. The case is not to be found with the Court of Appeal cases in the Law Reports, having been left out apparently as not presenting a question of enough difficulty and uncertainty to justify its being printed. By the law of England, as by ours, profits for infringement are given only as incident to the remedy by injunction. Root v. Railway Co., 105 U. S. 207-213.

It was held by Judge Story that damages for the infringement of a patent were a debt within the meaning of a statute making the members of a manufacturing corporation liable for its debts in certain cases. Carver v. Braintree Manufy Co., 2 Story, 432. The supreme judicial court of Massachusetts has recently decided that profits of an infringer were not a debt, within the meaning of a similar statute. Child v. Boston & Fairhaven Iron-works, 137 Mass. 516. But these cases can have but little bearing in construing the provisions of a statute establishing an elaborate

and comprehensive system of laws, such as the bankrupt act.

The case shows that the bankrupt corporation has received money from the wrongful use of property belonging to this creditor, for which it was liable to account, and at the date of the proceedings he was prosecuting his remedy for its recovery. The amount due has since been ascertained by the decree of the circuit court in the manner prescribed by law. The estate has been augmented at his expense to the full amount of the decree. That the patent had not expired before suit brought is testified by the decree itself. The debt does not seem to lack a single element necessary to make it provable. The same fault that was found by the court of appeal with the opinion of KAY, J., in Watson v. Holliday might also with equal justice be found with this; and for the same reason. The point is altogether too plain for argument. In my judgment it would be a pernicious as well as unreasonable interpretation of the act to hold that debts like this are not to share in the distribution of the bankrupt's estate. Proof allowed.

Eastern Paper-Bag Co. and others v. Standard Paper-Bag Co. and others.

(Vircuit Court, D. Massachusetts. January 28, 1887.)

1. PATENTS FOR INVENTIONS—SATCHEL-BOTTOM PAPER BAGS—INFRINGEMENT—

EQUIVALENT MECHANISMS.

In reissued letters patent No. 9,202, of May 18, 1880, to Margaret E. Knight, for improvements in machines for making satchel-bottom paper bags, the essence of the improvement is the employment, in the making of the diamond fold, of a finger to push back a portion of the open end of the tube in connection with a blade or tucking-knife, which moves under the finger. In defendants' machine the diamond fold is only partially formed by means of pincers or nippers mounted on a moving roller, which takes hold of the upper ply of the tube, and draws it a proper distance over the roller, while the under ply of the tube is held down by a spear-pointed separator. Held no infringement, the nippers mounted on the moving roller not being the equivalent of the finger, nor the moving roller the equivalent of the tucking-blade.

3. Same—Adjustable Machines—Disclaimer.

The Chandler invention (letters patent No. 267,774, of November 21, 1882, to Clarence A. Chandler) is for an improvement on the Knight machine, by means of which different sizes of bags can be made adjustable on the same machine. This is done by making one portion of the machine adjustable to the other. Held, in view of the disclaimers in the specifications, that the invention does not cover all mechanisms for making satchel-bottom paper bags, in which the tube-forming, feeding, and cutting mechanism, and the diamond-fold laying mechanism, are in a fixed frame, and the bottom-folding and past-

ing mechanisms are in an adjustable frame, which is adjustable backward and forward with relation to the fixed frame.

In Equity. Bill for infringement. B. F. Thurston and Livermore & Fish, for complainants. Chauncey Smith, for defendants.

COLT, J. The defendants are charged with infringement of the fifth claim of reissued letters patent No. 9,202, dated May 18, 1880, granted to Margaret E. Knight, and of letters patent No. 267,774, granted November 21, 1882, to Clarence A. Chandler. Both patents are for improvements in machines for making satchel-bottom paper bags. The fifth claim of the Knight reissue reads as follows:

"The finger, N, or equivalent device, whether fixed or movable, to operate upon the inner side of the tube, and hold or push back a portion of the open end of the tube while the diamond fold is being formed."

In the original patent the patentee says that she believes herself to be the first to invent a device to hold back or push back a point or portion of one edge of the paper tube while the blade or tucking-knife forms the first fold. The essence of the Knight improvement is the employment, in the making of the diamond fold, of a finger to push back a portion of the open end of the tube in connection with a blade or tucking-knife which moves under the finger. It is manifest that the finger alone could not make the diamond fold, but it is the finger co-operating with the blade which produces the result.

In defendants' machine the diamond fold is formed, or partially formed, by means of pincers or nippers, mounted on a moving roller,

which takes hold of the upper ply of the tube, and draws it a proper distance over the roller, while the under ply of the tube is held down by a spear-pointed separator. In Knight's machine the blade must move under the finger to make the fold, while the finger remains stationary. In defendants' machine the pincers and roller on which they are mounted move together. In the Knight machine the finger never takes hold of or grasps the paper at any point, and it could not without tearing it. In defendants' machine the pincers must take hold of and grasp the paper firmly at a certain point, and, if they relax their grasp before the mouth is formed, the machine will not work. These are some of the differences between the two machines which are apparent upon inspection and comparison. It is further urged, with much force, that the open mouth formed by the nippers, roller, and spear-pointed separator is not a diamond fold, as the paper is not creased by these means, but that it is necessary to complete the diamond fold for the blank to be compressed between the succeeding pair of rollers. A comparison of the instrumentalities employed, and mode of operation of the two machines, makes it perfectly clear that there is no infringement, whether claim 5 be construed to cover only the finger, or by implication the finger cooperating with the blade. In no legitimate sense, even upon a broad construction of the Knight patent, can it be said that the nippers mounted upon the moving roller are the equivalent of the finger, or that the moving roller is the equivalent of the tucking-blade. It is unnecessary to consider the other defenses raised in the Knight patent. The Chandler invention is for an improvement on the Knight machine, by means of which different sizes of bags can be made adjustable on the same machine. This is done by making one portion of the machine adjustable The claim is as follows: to the other.

"In a machine for making satchel-bottom paper bags, the combination of tube-forming, tube-feeding, tube-cutting, and diamond-fold laying mechanisms, having bearings in a fixed frame, with another frame adjustable backward and forward, relatively, on said fixed frame, and fixed thereto during the operation of the machine, and the bottom-folding and pasting mechanism borne by said adjustable frame, and adapted to cross-fold the diamond fold in two places, parallel each to the other, whereby the machine may be adjusted to make bags of different sizes from tubes or blanks of different width, substantially as described."

It cannot be seriously contended that the specific form of mechanisms enumerated in this claim, or the means of adjustment described in the specification, are to be found in defendants' machine. The position is taken, however, that the Chandler invention is not limited to the form of mechanisms, or to the particular means of connecting the two sets of mechanisms, but that it covers all mechanisms for making satchel-bottom paper bags in which the tube-forming, feeding, and cutting mechanism, and the diamond-fold laying mechanism, are in a fixed frame, and the bottom-folding and pasting mechanism are in an adjustable frame, which is adjustable backward and forward with relation to the fixed frame. I cannot give such a broad construction to this claim.

Chandler did not invent a new principle of mechanics. The idea of adjusting one part of a machine to another, to adapt it to different conditions of work, was old. In this case, as in others, the claim must be construed and limited by what is found in the specification and drawings. These will show the real scope of Chandler's invention. Chandler took a Knight machine, and made it adjustable. He saw that, in order to adapt a Knight machine to bags of different sizes, it was necessary to make the rollers and blades adjustable with respect to the diamond-fold laying mechanism, because it is manifest that the leading end of the diamond fold will vary in length with the width of the bag, and it follows that, in order to enable the cross-fold mechanism to properly receive the ends of the diamond fold, it must be capable of adjustment. The specification says that the leading end of the diamond fold "will project more or less, according to the width of the bag, and it is to enable the rollers, j, k, to properly receive the leading end of the diamond folds, differing in length, that the said rollers, with the blades and head, D, or the parts for cross-folding the diamond-folded portion of the bagblank, are made adjustable towards and from the cutting and diamondfold laying mechanism." But the adjustment herein described is not claimed broadly by Chandler, as is shown by the following disclaimer found in the specification:

"I do not broadly claim adjusting the rollers in a paper-bag machine towards and from the tube-severing mechanism, merely to place the rollers at the proper distance therefrom to enable them to catch the end of the paper, and hold it, as the paper is being cut off for the bag."

The patent also contains two other disclaimers, relating to some of the specific mechanisms employed. To sustain the claim of the Chandler patent as against these defendants, and in view of the disclaimers, it must be held to cover all machines containing the combination set out in the claim, independently of the means of adjustment or of the forms of mechanism which go to make up the different elements described. Believing such a construction of the claim to be untenable, I must find that the defendants have not infringed.

The position is also taken by the defendants that part of their tubecutting and diamond-fold laying mechanisms is found in the adjustable, and not in the fixed, frame, and that, therefore, they have not the combination composing the claim. This defense might deserve a more careful consideration, if I did not think the other ground already considered conclusive of the case.

Bill dismissed, with costs.

STARLING v. St. PAUL PLOW-WORKS.

(Circuit Court, D. Minnesota. February 8, 1887.)

1. PATENTS FOR INVENTIONS-LICENSE-TERMINATION OF LICENSE.

A licensee of letters patent, under a contract by which he is permitted to manufacture and sell the article covered by said patent, cannot without the consent of the licensor, terminate the rights conferred by the license, and, there being no limitation on its face, the license continues until the expiration of the present letters patent.

 SAME—INFRINGEMENT—IMPROVEMENT IN SULKY-PLOWS—ACTION AGAINST LI-CENSEE.

The first claim of letters patent No. 154,298, dated August 18, 1874, for an improvement in sulky-plows, covering the combination of a crank-bar, plowbeam, and axle, for the purposes set forth, so as to enable the horses to pull the plow out of the ground by the adjustment of the lever in the notches of the curved bar, held to be infringed by defendants in the manufacture of plows in which the mechanism used is only such mechanical changes as increase the power of the lever from a single to a compound action, reversing its movement from a lever moving forward to one pulled towards the driver, and in which a perforated segment and spring-dog are used, in connection with which the lever operates to raise and lower the plow-beam, these being only mechanical changes and equivalents; and a change in the device for depressing the plow-beam in front will not defeat the right of the patentee to an action for breach of contract against a licensee of his patent.

3. SAME—NOVELTY.

In an action against a licensee for breach of a contract of license for the manufacture and sale of sulky-plows, covered by letters patent No. 154,293, dated August 18, 1874, when the contract of license contained no recital or admission by the licensee that the licensor had invented the improvement in sulky-plows, and plaintiff having joined issue on the defense of want of novelty set up in the answer, no estoppel being pleaded, and the defendants having introduced in evidence letters patent No. 116,956, No. 120,560. No. 123,505, No. 182,772, No. 134,121, and No. 148,147. held that plaintiff's improvement was not anticipated by either of these patents, neither of them having the combination of the plaintiff, for the purposes described in his patent.

At Law.

Frackelton & Careins, for plaintiff.

J. B. & W. H. Sanborn, for defendant.

NEISON, J. This is a suit for a breach of contract. The plaintiff is a citizen of Nebraska, and the defendant of the state of Minnesota. The defendant is a naked licensee of a patent, (No. 154,293, dated August 18, 1874,) under a contract executed December 17, 1877, by which it is permitted to manufacture and sell the Starling sulky-plow in the following territory, viz.: "Wisconsin, Minnesota, and Dakota, and all that part of Iowa north of the Northwestern Railway, and all that territory west and north of the above-described territory." A royalty of \$2.50 per plow was exacted to be paid on accounts rendered July 1st and January 1st of each year. After the defendant had manufactured and sold between 35 and 40 plows under the license, and on or about December 5, 1878, written notice was given the plaintiff that the construction of this sulky-plow was unsatisfactory and useless, and many had been returned as unserviceable and that the defendant would thereafter manu-

facture a sulky-plow of its own design, and renounced its license. The defendant, after the notice, rendered an account up to January 1st, and since then has manufactured about 960 plows, called "Starling Plow," designed by Berthiaume, and about 350 plows called the "Harris Plow." The plaintiff insists upon a breach of the contract of license. Issues are joined under the pleadings, and, a jury being waived, the case is tried by the court.

Starling Invention, Authorized to be Manufactured and Sold by Defendant. In this, the plaintiff's invention, there is a crooked axle and a crank-bar bent twice at right angles, passing through a box bolted to the plowbeam towards the rear. The end of this bar nearest to the driver's seat or right wheel of the sulky rides upon the inner end of the journal of The lower end of a spring lever, which projects upward along a curved bar on the right side of the driver's seat, is connected rigidly with this end of the crank-bar. The curved bar, with notches on the outside to receive this upright lever, is attached to the axle and part of a brace running from the axle to the tongue: and thus the crankbar bolted to the plow-beam can be held in any position to which the lever is adjusted. The plow is thus locked either in the ground, at any desired depth, or up at any desired height; and, in practical operation, when raising the plow up, the point comes out of the ground first. the front of the plow-beam is attached a jointed or hinged foot-lever. composed of a vertical bar, the upper end of which is joined to a lever upon which the foot of the driver may be placed, and the lower end is pivoted to the brace above mentioned, running from the axle to the tongue, and also to the plow-beam. A stop is fixed at the rear part of the tongue, so that when the foot-lever is raised the rear end strikes against it. The driver can also lock the forward end of the plow-beam down by this lever. The manner in which the crank-bar rides on the inner end of the journal, and the lever is attached, is distinctly pointed out in his drawing, figs. 3 and 4. "The first claim is for the combination of the crank-bar lever, plow-beam, and axle, for the purposes set forth, so as to enable the horses to pull the plow out of the ground." This is done by the adjustment of the lever in the notches of the curved bar. "The second claim is for a combination of the foot-lever and stop with brace-tongue and plow-beam, as shown and described" in the specifications of the patent.

1. I find that the defendant could not, without the consent of the plaintiff, terminate the rights conferred by the license, and, there being no limitation on its face, the license continued until the expiration of the present letters patent.

2. The Starling plow is of utility, and an operative machine, although

it might work better in some soils than in others.

3. I find that the first claim of the plaintiff is manifestly infringed in the Berthiaume and Harris plows, so designated; and the mechanism used is only such mechanical change as increases the power of the lever from a single to a compound action, reversing its movement from a lever moving forward to one pulled towards the driver. In the Berthiaume

plow a perforated segment and a spring-dog are used, in connection with which the lever operates to raise and lower the plow and beam, which are mechanical changes and equivalents only. In the Harris plow substantially the same device is used. While in the Berthiaume plow the device used for depressing the plow-beam in front is unlike Starling's, the change in that particular would not defeat the right of plaintiff to an action for breach of contract.

4. I have hesitated about going into the question of novelty, but, there being in the contract of license no recital or admission that plaintiff had invented this improvement in sulky-plows, and the plaintiff having joined issue on the defense of want of novelty set up in the answer, and not pleaded an estoppel, I have reluctantly allowed the defendant to introduce evidence on that issue, and find that the plaintiff's improvement is

not anticipated by any of the patents introduced in evidence.

Hay & Freeman's Patent, No. 116,956, dated July 11, 1871. patent for an improvement in cultivators there are two crank-axles, on which the ground-wheels run. One is attached to the upper side of the main axle, which supports the frame and its plows, while at the opposite end the other is attached to the under side. There are levers attached to each end of the axle, with other devices described, so that an independent vertical adjustment of the wheels in relation to the axle is obtained, and thus the main axle is supported at any required height from the ground, and with one end higher than the other, and, by a locking device, the lever will hold the wheels at any height desired. This device is to regulate the depth of the furrow to be cut. an inverted "U" form loosely secures the plow-frame to the axle, with its ends pivoted to the main axle. When this bar is turned upward, the frame and plows are raised upward, and moved forward until the arms of the bar are carried forward a vertical point, so as to support the frame, and keep the plows out of the ground. This is done by a lever attached by a link to the frame. There is no mode of locking, by the lever, the plow in the ground at any required depth, or raising the point of the plow by the lever, and locking, so that the horses can pull it out of the ground. The object of this invention, in part, was to mount the main wheels so as to be capable of independent vertical adjustment, and arrange the main plow-frame so that it may be raised or lowered.

Worrell & Rynerson's Patent, No. 120,560, dated October 31, 1871. This patent plow has an axle raised in the middle, and, similar to the Hay and Freeman, has a transverse bar, which is supported in the rear to the plow-beam by a hinge, the swinging plate secured rigidly to the bar, the arms of which, extending forward, are pivoted to the vertical parts of the axle. One arm extends forward, and forms a foot-rest. The beam is supported so that pressure on the foot-rest elevates the beam and plows. The draught is upon the tongue, to which a curved rack and an elbow lever are pivoted. The short arm of this lever in the rear turns upon a transverse pin, which passes through a vertical loop to which the forward end of the plow-beam is hung by an eye-bolt. The teeth of the rack facing the lever enables the depth of the furrow to be regulated by

raising the points of the plow. The plow is kept in place by the rack, which is made to engage with the transverse pin at the proper point of elevation. When the points of the plow are raised by this device, it is not possible to lower by a reverse action of the lever. Should an attempt be made, resistance would come from the tooth of the rack engaged. The object of the foot-lever is to enable the driver to raise the plow entirely out of the furrow, and out of contact with the ground; but, as soon as his foot is removed, the plow falls back. There is no device for locking the plow at any required depth, and the foot-lever, which is an extension of the yoke or transverse bar, will not raise the point of the

plow.

Owen's Patent No. 1, No. 123,505, dated February 6, 1872. In this sulky attachment for plows is a drop-iron, passing through the tongue and a "T" piece at the bottom, over the forward part of the beam, with a device on the drop-iron for regulating the depth at which the plough shall run by a pin passing through holes in the drop-iron above the tongue, and a sliding sleeve stop, secured below in any desired position by a set-screw. The driver, having secured the stop to the drop-iron at the desired position, and fixed the pin in the drop-iron above the tongue. is enabled, by treading on the "T" piece, to strike the front end of the beam, and depress it so that it enters the ground to an extent limited by the pin. He then withdraws his feet, and the stop strikes under the The driver does not operate this device while the plow is in No jointed foot-lever is used, as in the plaintiff's patent. Owen, by his device, controls the depth of furrow, and keeps the plow in place. There is a foot-rest upon the arm of the yoke or hanger, which extends forward as in the last machine, and, by placing his foot upon it, the driver can employ his weight in elevating the plow. axle is composed of two crank-arms, and there is also a hand-lever pivoted to the right crank-arm, and on this pivot is a cog-wheel loosely mounted, gearing with another cog-wheel attached to the arm of the yoke or hanger, and a ratchet-wheel, which is attached to and moves with the cog-wheel pivoted to the crank-arm. The hand-lever has a spring-pawl pivoted to it, and a device by which the pawl will engage with the ratchet-wheel. This device enables the driver, seated above, to raise the plow out of or off the ground by pulling the lever towards him. There is a latch pivoted to the axle, extending rearward, and, when the plow is elevated high enough, the latch engages with a shoulder in the hanger or yoke, and supports it. The driver, with the foot-rest, can aid in raising the plow when he operates the lever. An arm projecting from the lever, at a point near where it is pivoted downward in front, operates as a stop, by striking the axle so that, when the plow is raised to a desired height, the driver can hold it by the foot-rest, and let the hand-lever down in front until the stop strikes the axle, and then, by engaging the pawl with the ratchet, and releasing the pressure from the foot-rest, the weight of the plow keeps the pawl locked. The plow can be held at a certain elevated position, but not locked in the ground. Neither will the lever raise the point of the plow out of the ground; and

the front device, running through the tongue, will prevent the tilting of

the point of the plow when raising it out of the ground.

Owen's Patent No. 2, No. 132,772, patented November 5, 1872. In this patent the plow, when elevated, may be locked to insure proper depth of furrow; but when a small falling and locking lever, which is pivoted to a pawl as a balance, is thrown back, and the plow is lifted so that the pawl is withdrawn from the ratchet, it will drop to the ground. The lever used will lock the plough so as to prevent it from going deeper, but the point of the plow cannot be raised by the lever.

Worrell Patent, No. 134,121, dated December 17, 1872. There is no locking lever described in this patent as in Starling's, and no device like his for raising the point of the plow, or locking the plow in the ground.

Harrison Patent, No. 143,147, dated September 23, 1873. This invention has a device attached to the hub of the right wheel, by means of which the plow is raised out of the ground by the power of the team, but no hand or foot lever arrangement for raising the plow out of the ground.

Neither of these patents have the combination of the plaintiff, for the purposes described in his patent, and do not anticipate the invention.

The conclusion is that the plaintiff is entitled to a royalty on 1,310 plows, at \$2.50 each, making the amount of \$3,275, for which sum judgment is ordered.

F. O. MATTHIESSEN & WIECHERS SUGAR REFINING Co. v. Gusi and others.

(District Court, S. D. New York. January 25, 1887.)

1. Carriers—Of Goods by Vessel—Bill of Lading—Presumptions—Exceptions—"Weight Unknown"—Short Delivery.

The stamping of the bill of lading by the master, with the words "weight unknown," repels the prima facie presumption as to the weight shipped, which otherwise arises from the statement of the weight in the margin of the bill of lading; and, in case of alleged short delivery in weight, other proof of the weight shipped must be made.

2. Same—Sea Damage—Evidence—Extent of Loss—Negligence.
Where sea damage may arise from different causes, either with or without negligence in the ship, the nature and extent of the damage may be material in determining to which cause it should be assigned. *Held*, in this case, not sufficient damage proved to establish presumptive negligence in the ship.

8. Same—Damage to Cargo—Dunnage—Sweating. The bill of lading for 4,800 bags of sugar, loaded at Havana, to be delivered at New York, stated in the margin the aggregate net weight. In the body of the bill of lading it was stated, "Weight and contents unknown;" and across the face of the bill of lading there was also stamped, "I do not know the weight or contents, and am not liable for sea damage." Upon a libel filed against the ship, alleging short delivery in weight, and injury through want of dunnage, it appearing that the ship had met with very heavy weather, being for a time nearly upon her beamends, when the number would not such ing for a time nearly upon her beam-ends, when the pumps would not suck; and some loss thereby necessarily arising through drainage in the bilges, without the ship's fault; and only 1 bag being empty, and only 30 bags being apparently "slack;" and the stains upon some 1,600 bags being shown by proof,

and the circumstances, to have arisen mostly from sweating, a sea peril; and no evidence of the weight shipped being given, other than the bill of lading; and the whole number of bags shipped being delivered: held, that there was no sufficient proof, either of the amount of loss in weight, or of the number damaged by sea water, as distinguished from sweating, to establish either any actual loss through want of customary and sufficient dunnage, or any negligence of the ship, as the cause of loss.

In Admiralty.

Sidney Chubb, for libelants.

Jas. K. Hill, Wing & Shoudy, for respondents.

Brown, J. This libel was filed to recover for loss and damage to 4,800 bags of sugar brought from Havana to New York, in December, 1885. Upon the evidence, it appears that about 1,614 bags exhibited external marks of stain or damage, 30 bags were "slack," and 1 empty. The slack and empty bags, as the proof shows, were not a greater loss than is usual in voyages at that season, and in tempestuous weather. Two severe gales were encountered on this voyage, and for a considerable time the vessel was nearly upon her beam-ends, so that her pumps would not draw. The slack and empty bags came from the bilges. Under the circumstances, this small loss in slack and empty bags shows no evidence of negligence on the part of the ship, since some loss by drainage, under such circumstances, was unavoidable, without any presumptive fault of the ship. Such a loss presumptively falls within the ex-

cepted perils of the seas.

There is no sufficient evidence to show any material loss of weight beyond the slack and empty bags. Allowing the very considerable excess of tare claimed by the libelants over that estimated at the custom-house, the actual loss in weight, as compared with the net weight stated in the bill of lading, is but 2,213 pounds, a very small difference; certainly not a proof of negligence, under the circumstances of this voyage. The libelant claims an alleged natural increase in the weight of sugar. there was no proof on this subject. Some cargoes lose in transit; others Nor is it, in my judgment, competent to charge the ship with a loss of weight upon a mere comparison of the weight stated in the margin of the bill of lading with the estimated proper gain on the voyage. The bill of lading, besides the printed statement, "Weight and contents unknown," had also stamped across its face a special clause, "I do not know the weight, or contents, and am not liable for sea damage." The whole number of bags received was actually delivered. The master testified that he had no knowledge of the weight, except that stated and given to him on making out the bill of lading. I know of no case where, under such circumstances, the bill of lading was treated as sufficient evidence of the weight shipped, although there is such an intimation in the case of The Sloga, 10 Ben. 318. But proof was there made of the actual weight put aboard. In the subsequent case of The Ismaele, 14 Fed. Rep. 491, under a similar bill of lading, proof of the weight on shipment was held necessary, and this was affirmed on appeal; and even the additional proof taken was held insufficient by Mr. Justice Blatchford.

Rep. 559. See Clark v. Barnwell, 12 How. 272, 283; The Querini Stam-

phalia, 19 Fed. Rep. 123.

The English authorities seem to sustain the same view. Jessel v. Bath, L. R. 2 Exch. 267; Lebeau v. General Steam Nav. Co., L. R. 8 C. P. 88, 96; The Peter der Grosse, L. R. 1 Prob. & Div. 414; Scrutton, Charter-parties, 52. When the vessel takes no part in ascertaining the weight shipped, and by the bill of lading states "weight and contents unknown," there seems to me no reasonable intendment, from the mere statement of the weight as given by the shipper, that the master means to accept that statement as binding on him, or as any evidence of the weight shipped in case of an ascertained shortage on delivery; or to assume the burden of proving the actual weight shipped in a distant port. So intolerable a burden upon the ship seems to me to afford the strongest presumption of a contrary intent.

In the present case the circumstances are stronger. The special stamping of the words, "I do not know the weight," upon the face of the bill of lading, clearly repels any presumption that the ship was to be held in any degree to the precise weight stated in the margin of the bill of lading. The burden, in case of alleged short delivery, rests, therefore, upon the libelant to prove the weight shipped by other evidence than the bill

of lading.

Nor is there sufficient proof of any actual damage to the sugar beyond that incident to the proved sweating, which is a sea peril; though the bags were shown to be stained. None of the libelants, and no person in their employ, who presumptively would have known of the damage to the sugar and the nature and extent of it, were called as witnesses. The very imperfect and casual inspection made by the witnesses for the underwriters is not, to my mind, satisfactory proof that the cargo was damaged otherwise than to a very limited degree through the proved The respondents' evidence proves that there was sweating apparently sufficient to account for the stains upon most of the bags. The witnesses on both sides say that the stained bags came out from amid others not stained, which is an evidence of sweating, and not of damage from want of dunnage. The evidence as to dunnage is very conflicting; but much of the difference in the opinions of the experts would seem to be explained by the peculiar model of the vessel. The sharp angle of her bottom, it is shown, affected materially the requisites in the details of dunnage, and the depth necessary along the bilges, according to the usual custom in such cases.

The case is one in which, owing to the different causes from which damage may arise, proof of the nature and extent of the damage is essential, in order to determine whether there was presumptively, or in fact, any negligence in the ship. I do not think the libelant has sufficiently established such negligence, (Six Hundred and Thirty Quarter Casks of Sherry Wine, 14 Blatchf. 517,) and the libel should therefore be dis-

missed, with costs.

THE N. B. STARBUCK.

HARTT v. THE N. B. STARBUCK.

(District Court, S. D. New York. January 31, 1887.)

COLLISION—WHARVES AND SLIPS—WEAK BOATS—WANT OF NOTICE.

It is negligence and a fault for old and weak boats, without giving notice of their weakness, to expose themselves along the wharves and slips to the hazards of ordinary contacts and blows from other vessels; and upon injury from a blow, unjustifiable as respects a good boat, they should in such cases recover but half their damages.

In Admiralty.

Goodrich, Deady & Goodrich, for libelants.

Carpenter & Mosher, for claimants.

Brown, J. On the fourteenth of September, 1884, the steam-tug Starbuck, with the Wallace, a large vessel, lashed upon her port side, went up the East river with the flood-tide, for the purpose of landing the Wallace along the side of the Noble-street pier, Brooklyn. count of the size of the Wallace, it was necessary to land her first against the outer end of the pier. While the tug, some distance out in the river, was rounding to against the tide for that purpose, the libelant's schooner, Nellie Bloomfield, bound for the same dock, ran in and occupied the end of the pier. A few minutes before, the schooner Collins had occupied the same place, and, in order to make room for the Wallace, had dropped astern into the slip above, with her bowsprit heading down, across the Noble-street pier. The libelant's schooner was requested to remove in order to permit the Wallace to come along-side; and, for that purpose, the Collins was moved further back in the slip, along-side a bath-house, which was moored in the slip some 30 feet from the end of the pier, and the libelant's schooner dropped back into the previous position of the Collins, heading down river, and along the westerly side of the bath-house. This brought her starboard side nearly in line with the end of the pier. The tug thereupon came up with the Wallace alongside the pier, and, in doing so, the Wallace struck more or less heavily against the side of the libelant's schooner, in consequence of which some of the timbers and planks were found to be broken, or crushed, for which this libel was filed.

There is considerable dispute in regard to some of the details of this case. It is not necessary to speak of them at length. The weight of proof, considering the opportunities of the witnesses for observing the nature of their respective duties, and the impression naturally made upon their minds, is, I think, decidedly to the effect that the Collins lay along the northerly side of the bath-house, with her bowsprit pointing in a direction nearly across the river, so that the libelant's schooner could not move further out of the way without the aid of a tug, or unless the Bloomfield were first moved further away. I cannot find it a fault,

therefore, in the libelant's schooner, that she remained where she was. Under these circumstances, I think the tug took the risk of landing the Wallace along the end of the pier in such a way as to inflict no severe blow, or any rougher contact with the libelant's schooner than is usual or naturally to be expected in navigation about the piers and slips. If this blow or contact was no greater than such an ordinary contact or blow, the libelant had no cause of complaint, unless he had previously given notice of some special weakness of his vessel that required more than usual care. The Reba, 22 Fed. Rep. 546; The Syracuse, 18 Fed. Rep. 828. But no such notice was given.

In spite of the testimony and judgment of some of the witnesses for the tug, I am satisfied, as in the cases above cited, that the blow inflicted was such as was unjustifiable as respects either a new or an old boat. The parting of the hawsers, and the breaking of chains by which the bathhouse was secured, and against which the libelant's schooner lay, seem to me conclusive evidence on this point, in confirmation of the libelant's As in those cases, also, there is sufficient evidence of the rottenness of the wood exposed in the side of the libelant's schooner, when she was repaired, to convince me that the schooner was not in a condition of fair or ordinary strength, but weak, and unfit for the usual contacts of vessels about the slips. The C. R. Stone, 9 Ben. 182. It is impossible to tell what injury would have been inflicted on a sound schooner by a blow such as this, while I have no doubt that it would have been much less than happened to this schooner. There is no other way, therefore, than to divide the damage, as was done in the cases cited; since both are to be treated as in fault, contributing to the damage that actually oc-To allow old boats, that give no notice of their weakness, a right to be fully repaired, would encourage them to run in the way of others.

A decree may be entered for half the damages, and a reference taken, if they are not agreed upon, to ascertain the amount.

THE SALLIE McDEVITT v. THE J. W. PAXSON.1

(Circuit Court, E. D. Pennsylvania. January 18, 1887.)

COLLISION—NEGLIGENCE.

The owners of the respondent hired the libelant to carry a cargo of sand from their wharf, on the Rancocas creek, New Jersey, to Baltimore. They sent their own tug to tow the libelant in and out of the creek. The creek is sinuous, and difficult of navigation. The channel, water, and obstructions were well known to the respondent, but not to the libelant. While the respondent was towing the libelant out of the creek, the libelant ran into an obstruction, and soon after sunk. Held, that the movements of the libelant were legally and actually under the control of the respondent; that it was the respondent's duty to conduct the libelant so as to keep her clear of obstructions; and that, in failing to do this, the respondent was negligent.

Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

In Admiralty.

Appeal from district court. See 24 Fed. Rep. 302.

H. R. Edmunds, for libelant.

Flanders & Pugh, for respondent.

McKennan, J. This case involves and turns upon a single question of fact, viz., was the respondent guilty of negligence in the performance of the duty which he undertook to perform in reference to the libelant, whereby the injury complained of was caused? The barge Sallie McDevitt was hired about the fifteenth of November, 1882, by the owners of the steam-tug J. W. Paxson, to carry a cargo of sand from their wharf, in Rancocas creek, New Jersey, to Baltimore, they furnishing their own

tug to do the towing in and out of said creek.

The barge proceded to the place of loading, and the cargo was put on board of her. Rancocas creek is sinuous, and somewhat difficult of navigation, but its channel and water, and the obstructions in it, while the libelant was not familiar with them, was specially well known to the respondent. The McDevitt was taken in tow by the Paxson at the end of a hawser 40 to 60 feet long, and the tug had in tow another barge, the Murray Manville, which was attached along-side of her; the McDevitt drawing about six feet and one-half, and the Manville about five and a half feet. Just below a sharp bend in the creek, where the channel is only about 30 to 35 feet wide, a sunken wreck had remained for 25 years, which was well known to the respondent. It inclines from the shore, and extends to the edge of the channel, and over it the water flows about three feet in depth. At this point the collision occurred, the libelant running afoul of the sunken wreck, knocking a hole in her bottom in her port bow, and causing her to sink a few miles below. tug was running under one bell, about two miles an hour, at the time, and the barge was steering so as to head between the tug and the Manville. The movements of the barge were, legally and actually, under the control of the tug, and she was therefore bound to conduct her so as to keep her clear of an obstruction with the existence and location of which she was perfectly familiar. This was altogether practicable, and this obligation she did not discharge. She assumed such a place in the channel as to push the barge along-side of her onto the obstruction, and to bring the stern tow, which drew more water than the Manville, directly in contact with it. This was negligence, and caused the injury.

The allegation of the respondent that the McDevitt was not steered so as to keep directly in the wake of the tug is against the weight of the evidence, as is also the hypothesis that, just before the collision, the McDevitt steered to port, and then to starboard, by which she was brought into contact with the obstruction, and that this was caused by the un-

skillful steering of the McDevitt.

Upon the whole, I am satisfied the decree of the district court was right, and a decree will therefore be prepared and entered in this court for the sum awarded in that court to the libelants, with costs.

PARKER v. Tiers and others.1

(District Court, E. D. Pennsylvania. February 4, 1887.)

CARRIERS—OF GOODS—CONTRACT TO FURNISH CARGO—BREACH—DAMAGES.

A. contracted with B., a ship-master, to furnish him a cargo "of about 150 tons of bones." He furnished 106 tons, but failed to supply the remainder. In an action by B. against A., for damages for breach of contract, held, that 5 tons was a fair allowance, and that B. was entitled to recover what he would have made by carrying the additional 89 tons.

In Admiralty.

Theodore M. Etting, for libelant.

F. S. Brown, for respondent.

BUTLER, J. By the contract, respondent undertook to furnish a cargo "of about 150 tons" of bones, and the libelant undertook to carry this number of tons. There was no express stipulation where they should be stored, but it seems to have been contemplated that, after filling the hold, the balance should be placed on deck. The contention by respondent that the libelant, when loading, claimed that he was only to receive what could be stored in the hold, and refused to receive more, is not sustained by the proofs. It is true that Mr. Fitch swears to this, but his testitimony is met by that of the master, who, although not called after Mr. Fitch had testified, nor in anticipation or with knowledge of what this witness would say, swears to facts wholly inconsistent with Mr. F.'s testimony. All the material circumstances of the case, bearing on the subject, also, are irreconcilable with Mr. Fitch's testimony. At the very time when this witness (whose miscalculation, or mistake, caused the litigation) says the libelant refused to take more bones, the libelant was protesting in writing against the violation of his contract in not furnishing the 150 tons. From the beginning to the end the libelant's conduct was consistent with the position that he expected to carry this quantity, and with no other. It is impossible, therefore, to avoid the conclusion that Mr. Fitch is mistaken, or unreliable.

If the respondent had furnished 145 tons, I would hold that the terms of the contract had been complied with. I am inclined to think that a materially greater shortage than this would not be allowable. He furnished 106, and must be held responsible for failure to furnish the balance of 145, to-wit, 39. The libelant's damages are therefore what he would have made by carrying this additional quantity according to the terms of the contract.

A decree will be entered accordingly.

Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

Hunt v. Fisher and others.

(Circuit Court, W. D. Tennesses. February 7, 1887.)

1. REMOVAL OF CAUSES-STAYING PROCEEDINGS OF STATE COURT-REV. St. U.

S. § 720.

Notwithstanding the prohibitions of Rev. St. U. S. § 720, if the preliminary injunction staying the proceedings of the state court be granted by a state court, the cause will not be remanded upon removal to the federal court.

2. EQUITY PRACTICE - REMOVAL OF CAUSES - NEW PARTIES - PLAINTIFF COM-

PELLED TO MAKE.

If there be parties interested in the subject-matter of a suit in equity, which has been removed to the federal court, who have been intentionally omitted from the bill, upon their application, the plaintiff will be compelled to amend his bill, and bring them in, on pain of remanding the cause to the state court, where the cause can be consolidated with other suits there pending, to which the applicants are parties, or of having his bill dismissed.

8. COURTS—STATE AND FEDERAL—JURISDICTION TO VACATE DECREES.

Neither state nor federal courts will undertake to review or correct the errors of each other, but either, as will any court of equity, may inquire into a title procured through judicial proceedings in the other, and, if found based on the fraudulent practices of the parties, the latter will be restrained from taking any advantage under such proceedings.

4. JUDICIAL SALES—INADEQUACY OF PRICE.

Where title to property worth many thousands of dollars was purchased at a judicial sale for \$100, the purchaser was restrained from taking any title by the purchase, because the facts showed that the sale was made under adverse circumstances, when creditors jointly interested were not parties, and the decree was procured, and the sale made, in a court distant from that in which the land was situated, etc.1

- 5. EQUITY—Assignment for Creditors—Proper Parties to Foreclose Bill. Where a partner conveyed his interest to another upon the lien of a contract that the latter would pay his debts, mentioned in the contract, and himself an annuity, the creditors should be made parties to any foreclosure bill, unless some reasonable excuse be given for omitting them; and one creditor alone will not be permitted to procure a sale, binding on the others, which it would be inequitable to sustain because of an inadequacy of the price realized. If the purchaser pay a fair price, the omitted creditors might be remitted to a remedy against the fund; but, if not, they can pursue the land in his hands, and enforce their lien.
- 6. Same—Dual Relation of Creditor and Debtor—Estoppel—Res Adjudi-CATA

Where a debtor conveyed his property to secure his debts, and, by the same conveyance, secured himself an annuity, he occupies a dual relation to the parties to the contract; and, if the bill be filed by one creditor to foreclose the lien for his sole benefit, the fact that the assignor is made a defendant in his capacity of debtor only does not preclude him from filing a bill, in his capacity of creditor, to avoid the sale for inadequacy of price. The estoppel must be confined to the scope of the bill, and not comprehend anything beyond that scope.

7. Assignment for Benefit of Creditors—Election by Assignee of Those TO BE PAID—CONSTRUCTION OF STIPULATION TO THAT EFFECT.

Where it was provided by a contract that the assignee should pay a certain class of creditors to a given amount, and might "elect" such as should be paid,

A judicial sale will be set aside for gross inadequacy of price, accompanied by fraud, oppression, or other unfairness in the conduct of the sale. Davis v. McGee, 28 Fed. Rep. 867; Bean v. Hoffendorfer, (Ky.) 2 S. W. Rep. 556, and note. See, also, Carden v. Lane. (Ark.) 2 S. W. Rep. 709.

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it was held that, on the whole instrument, it was not intended to secure only those selected by the assignee, nor was such "election" necessary to fix the right to the lien provided, but the stipulation was simply a protection to the assignee against being compelled to pay more than the given amount, and actual payment would be conclusive on any creditors remaining after the amount to be paid should be exhausted.

In Equity.

On April 6, 1874, John W. Walker and his wife entered into the following contract:

"I, John W. Walker, have this day bargained and sold, and do hereby alien, convey, and confirm, to Martha C. Walker, her heirs and assigns, forever, and to her sole and separate use and benefit, with full and complete power of alienation, as though she was a feme sole, the following described real estate, personal property, choses in action, claims and rights, etc., viz.: The real property lying and being in the county of Decatur, state of Tennessee, known as the 'Brownsport Furnace Property,' and now belonging to the firm of Young & Walker, my interest in said firm being one-third, and which said real estate is designated as follows: One tract of eight thousand and eighty-three acres, more or less, and more particularly described in a deed made by David Dick, Jr., to the firm of Young & Walker, which deed is dated the fourth day of December, 1866, and is registered in the register's office of Decatur county, in Book No. 5, pages 645 and 646; also nine hundred and forty-four and one-half acres, conveyed to said Young & Walker, by William Henry, by deed dated December 9, 1867, and registered in said office, Book No. 5, pages 750 and 751; also one other tract of thirty acres, conveyed to said firm by David Welsh, and dated the nineteenth of February, 1872, and registered in said office, Book No. 6, page 441; also another tract of sixtyfour acres, conveyed to said firm on the sixteenth day of April, 1872, by deed of Joseph Marion, and registered in said office in Book No. 6, page 483; also nine hundred and forty-one and one-half acres, conveyed by Mack Murphy to said firm by deed dated the twelfth day of April, 1872, and registered in said office in Book No. 6, pages 484, 485, 486, 487; also a tract of four hundred and twenty-eight and one-half acres, conveyed to said firm by Jonathan Leister, in 1867, and registered in said office, and is bounded by the lands of said Walker & Young on the south and east of said Henry tract. All of the deeds of said lands as registered are here referred to and adopted for a more particular description of the same, and all of said lands constitute twelve thousand acres, more or less, and are in part bounded by the Tennessee river on the east; and on the north by the lands of the heirs of Wallace Dixon and Paul Fisher and Lewis Hendel; and are bounded on the west by the lands of Wm. Yarborough's heirs, P. Ferguson, John Blount, and J. J. Steagold; on the south by lands of Jonathan Leister, James Mancey, W. D. Wyatt, James Yarborough, Mrs. Yarborough, Gannaway Jennings, J. G. Yarborough, L. D. Crowley, and the lands of Thomas McClanahan,—to have and to hold to the said Martha Walker, her heirs and assigns, forever. And I covenant that I am lawfully seized and possessed of one-third interest in said land, and have a good right to sell the same. Also I convey to the said Martha C. Walker, to her sole use as hereinbefore specified, my entire interest of one-third in all the merchandise in the store-house at said furnace, together with all bookaccounts, notes, etc., now owing to said firms, both due and undue. Also all my interest of one-third in mules, harness, oxen, wagons, tools, iron ores, charcoal, wood, pig-iron, bills receivable, cash, etc., and all other personal property connected with said furnace, and necessary to its operation, and now upon said premises; my intention hereby being to assign and set over and convey to said Martha C. Walker all my interest in said firm and copartnership, and substitute her to all my rights therein, as fully and completely as I can or may, with this exception: Young & Walker have this day conveyed fifty acres of said land, as shown by deed of this date; said fifty acres I reserve, and do not include in this conveyance, although the same is within the general boundaries.

"In consideration of the premises, the said Martha C. Walker agrees and binds herself to assume and pay, or have paid, all the just and legal debts of said firm, so far as John W. Walker's interest of one-third partner is bound therefor, and she takes his shoes in respect to the same fully and completely: and, to secure and make certain the payment of said firm's debts, said Walker, for himself and on behalf of said creditors, reserves a full, complete, and perfect lien upon all the property herein conveyed until said debts are paid, and the rights of said creditors are to be in nowise affected by these conveyances, and, as to them, their rights, or they, are to be as though these conveyances had never been made. In further consideration, the said Martha C. Walker further undertakes and assumes to pay or have paid the individual debts of said John W. Walker to a sum not exceeding fifteen thousand dollars, and, in paying the same, the said Martha C. is to elect which of said debts she will pay, and the same is to be paid at such times as she and the said creditors may agree upon; and, in order to secure the payment of these debts, a full, complete and perfect lien is reserved upon the real estate herein conveyed, and any balance of said sum of fifteen thousand dollars not used in the payment of said debts is to be paid to said Walker. In further consideration, the said Martha C. Walker is to pay to the said John W. Walker, for and during the term of his life, the sum of one thousand dollars a year, to be paid half-yearly from the date of the acknowledgment and probate of this conveyance, in installments of five hundred dollars; and, to secure the payments of this annuity, said Walker retains a lien upon the realty conveyed. In further consideration of this conveyance said Martha C. Walker hereby releases all the estate, present or future, of said John W. Walker, from any claim she now has or may have as his wife, his widow, or otherwise; and said Walker hereby declares the said Martha C. a feme sole, as regards all the property herein conveyed, or its proceeds, and forever renounces all his rights to any estate she now has, or may hereafter acquire, either as husband, survivor, or otherwise, and confess full and complete power of alienation of all or any part thereof upon her, without his assent thereto, that being given herein, and to be exercised by her alone; subject, however, to all the liens herein reserved, which liens are to continue until the several sums secured thereby are paid and discharged.

"This April 6, 1874.

JOHN W. WALKER. [Seal.]
"MARTHA C. WALKER. [Seal.]

"Acknowledged before the clerk of the county court of Davidson county, by both parties, on the ninth of April, 1874. Registered in register's office of Decatur county, in Book No. 7, page 220, on the sixteenth of April, 1874."

Prior to this contract, Walker and Charles B. Young, as Young & Walker, had carried on a successful iron-manufacturing business, but domestic troubles arose, which it was the object of this contract to end. Soon after it was executed there was a divorce. Mrs. Walker married Young, and they carried on the business in the same firm name, paying Walker his annuity, and certain of the debts, until they failed, and Young, on the sixth of March, 1876, filed his petition, and was adjudged a bankrupt. There was a composition in bankruptcy, and Young conveyed the whole property; his wife joining to convey her one-third, held under the foregoing contract, to trustees under the composition. These

were authorized to borrow money, and conduct the business, which they did, disastrously.

The mortgagees under this arrangement filed their bill in the federal court of bankruptcy on March 18, 1881, to foreclose the mortgages made by the composition trustees, which was done on April 27, 1882, and the plaintiff here, Samuel F. Hunt, became the purchaser at a sale made July 1, 1882. Long prior to this, however, on May 16, 1876, Walker, whose annuity was in arrears, filed his bill for the execution of the foregoing contract in the chancery court of Decatur county, where the property was situated. He died in 1878, and his administrator, Jacob F. Fisher, continued to prosecute the suit, obtaining a decree of sale, for the amounts due on the annuity, and to the creditors, both partnership and individual, who had come into that suit, and also into an administration suit filed July 11, 1880, in the same court, upon an allegation of insolvency. This decree was made March 22, 1883. But on September 19, 1876, Baxter, the receiver for a bank at Nashville, holding an individual debt against Walker, had filed his bill in Davidson county, where Young and wife resided, against them, Walker and the bankrupt trustees, alleging that his debt had been "elected" by Mrs. Young under the foregoing contract, and he prayed to have it paid by a sale of the property. One or two other creditors came in, and claimed to be also "elected" by Mrs. Young, and there was a decree of sale. The creditors in this decree agreed to buy for joint account, and one Hunt became the purchaser for \$100; but he assigned his bid to the plaintiff here, Samuel F. Hunt, and the title was decreed to him, he also being the assignee of all the debts interested in the decree. This decree of sale was made June 22, 1880, and the sale was had on November 5, 1881. After Walker's death, and on October 31, 1879, upon scire facias duly served, this suit had been revived against Fisher, his administrator. Walker had filed an answer before he died, admitting the contracts, and setting up certain defenses he claimed against the right of the Baxter debts to share in the security. Fisher, the administrator, paid no attention to the scire facias served on him, nor to the suit at Nashville. It is proved that he was quite an ignorant man, and he did not comprehend the proceeding. Elizabeth Hunt, and one Trafford, as administrator of Gaylord, filed petitions, and they were admitted as creditors, and these and the Baxter debt are assigned to the plaintiff here.

Having thus acquired title to the whole property under the bank-ruptcy bill, and to this one-third under the Baxter bill, Samuel F. Hunt, on July 24, 1883, filed his bill in the chancery court of Decatur county, setting up his title, and praying that Fisher, the administrator of Walker, should be enjoined from proceeding under his decree of sale. This bill was filed only against Fisher and the clerk and master who had been appointed to make the sale. He obtained the fiat of the chancellor for the injunction, and then removed the cause to this court, where a motion to remand which was overruled. Thereupon the creditors whose claims had been allowed in the decree which had been enjoined, filed a petition, asking to be made parties defendant, and for leave to file a cross-bill, claim-

ing a benefit under the contract, setting up the inadequacy of price, a combination of bidders, and other matters alleged against Hunt's title. The court made an order requiring the plaintiff to amend his bill, and make these petitioners parties defendant, on pain of remanding the cause to the state court, or dismissing it, as the defendants might elect. The amended bill was filed, and leave given the defendants to file a cross-bill, which they did, setting up their claims under the contract and the state court proceedings, attacking the plaintiff's title, asking that he be restrained from claiming under it, and for an execution of the contract. The proof shows that the property was, at the time of the sale, very valuable, the witnesses differing in their estimates; and that now it has greatly increased in value, some estimates making it as high as \$200,000. The other facts appear in the opinion of the court.

J. C. Bradford, for plaintiff.

Pitts & Hays and Porterfield & Hawkins, for defendants.

HAMMOND, J. But for Bondurant v. Watson, 103 U.S. 281, 287, I should have remanded this case; as to retain it would seem a violation of section 720 of the Revised Statutes, which prohibits the courts of the United States from staying proceedings in the state courts. seemed to me that the reason of that statute, the mischief sought to be prevented by it, and its prohibition, apply as well to a final decree staying a state court proceeding as to that stay which comes of a preliminary injunction, and that it operates, necessarily, to exclude from the broad language of the act of March 3, 1875, (18 St. 471, 472; Rev. St. [2d] Ed. [§ 738,) all cases sought to be removed which have for their object any stay of the proceedings in a state court. Otherwise the federal courts acquire, by removal, a power heretofore denied to them, for substantial reasons, which all commend, and without any directly manifested intention of congress to repeal the prohibition. Yet the case first cited, and Smith v. Schwed, 6 Fed. Rep. 455, confine the statutory prohibition wholly to preliminary injunctions; so that, while we cannot stay the state court's proceedings in the beginning of a case, we may at the end of it,—a distinction certainly not indicated by section 720 of the Revised Statutes, and, possibly, not contemplated by the removal act of This is now referred to because the plaintiff, who brought this case here from the state court, insists that we cannot sit as a supervising court to review the proceedings of the chancery court of Davidson county, through which, by a sale, he acquired his title; yet this title he seeks to protect by asking us to enjoin the further proceedings of the chancery court of Decatur county, wherein the defendants have procured a decree of sale. Undoubtedly it would have been better for all parties to have remained in the state court. By the consolidation of this case with that the defendants had brought through the administrator of Walker, or by the concurrent hearings of the two cases, this controversy might have been settled. But, separated, as they have now been, by the plaintiff's removal of this case, that method of bringing the parties together was not available; and the defendants thereupon objected here

that they should not be enjoined from proceeding in the state court, unless they were given an opportunity here to make defense, and, by crossbill, to seek the relief, by foreclosure sale, that they were there attempting to procure. But the difficulty was that the plaintiff had not made them parties to his bill, and on their motion he was required to amend and bring them in. Of that order he now complains, and asks to be allowed to dismiss the amendment.

But, aside from the prohibition of the statute already referred to, there can be no doubt of our jurisdiction, or that of any court of equity, to grant the relief prayed, either by the bill or cross-bill. It is a controversy over the title to the property, and the fact that either side claims through judicial proceedings is immaterial. Mr. Justice Bradley shows this conclusively when he says:

"In such cases the court does not act as a court of review, nor does it inquire into irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it." Johnson v. Waters, 111 U. S. 640, 669, 4 Sup. Ct. Rep. 619; Barrow v. Hunton, 99 U. S. 80, 83.

But the difficulty of giving that full relief which, in cases as complicated as this has been, a court of equity desires to grant, could only be overcome by the order that was made, that the parties in interest who had been left out of the bill should be brought into it. Although the administrator of Walker was a party defendant to plaintiff's bill, and it was he that was injured by it, yet the real actors were the creditors who were seeking to realize their debts by enforcing the security Walker had provided for them. These the plaintiff left out, and now insists that this administrator must stand for Walker, and in his shoes, so far as necessary to enable plaintiff to estop him, in that capacity, from prosecuting his suit in behalf of the estate of Walker, but that he does not represent the creditors, and cannot set up their rights under the contract. For this very reason they should have been made parties to this bill, particularly as they were parties to the proceedings sought to be enjoined, -if not technically such, substantially so, by the filing and prosecution of their claims in that suit. The notion that Walker's administrator can be brought into this bill to represent Walker himself, but may be left out as a representative of the creditors, and that, the creditors themselves being also left out, the plaintiff has the advantage of excluding all consideration of their rights until they take some independent proceeding, is wholly untenable. The truth is, these new defendants should have been made parties to the Baxter bill, filed in Davidson county, under which plaintiff claims title, either as defendants or as plaintiffs, in whose behalf as well as his own Baxter should have proceeded, and the failure to make them such is the very foundation of their right to complain against Whatever else may be said of the contract by Walker, of April 6, 1874, as between him and his creditors, it was an assignment for their benefit. One of them, ignoring the others, in a county distant from that in which the land lay, and from his residence, finding other parties to the contract there, filed a bill against Walker, his lately divorced wife, and her new husband, to foreclose the security for his own benefit alone. She was not a trustee for the creditors in any sense that she represented them as a party to the suit, but was a purchaser from and a guarantor to Walker, the debtor. Walker did not represent those creditors in any sense what-The bill was not filed in behalf of the plaintiff creditor, and others who might come in, nor did it give any excuse for not making them parties, -- such as that they were too numerous, or were unknown after diligent inquiry to discover them, or were non-residents, or the like. This was clearly a violation of that procedure which governs a court of equity in such cases, and enabled that creditor to do what is here insisted upon shall be continued, namely, exclude the other beneficiaries, and take the property. The other creditors should have been made parties. Mortg. § 1394 et seq.; Id. 1398; 1 Daniell, Ch. Pr. (1st Ed.) 329; Id. (5th Ed.) 190 et seq.

It is true, the holders of the legal title being before the court, the irregularity was such that, possibly, if a purchaser had bought at an adequate price, and paid his money into court, his title would not have been disturbed, but the discarded beneficiaries would have been left to follow the proceeds, as in *Re Howard*, 9 Wall. 175, and *Williams* v. *Gibbes*, 17 How. 239; and consult *Myers* v. *Fenn*, 5 Wall. 205, and 2 Daniell, Ch. Pr. (5th Ed.) 1205.

But in this case it is urged that the creditors should be left to assert their rights against the purchaser by some independent proceeding, while he, in the manner already suggested, shall be allowed to restrain the administrator on the ground that, Walker having been a party, the administrator cannot be allowed to seek another sale. In addition to what has been already said on that subject, it may be remarked that the administrator, under the Tennessee system, or creditors, may proceed to enforce such securities, and the administrator possesses a dual capacity of representation,—one for the debtor, and the other for the creditor. If he be estopped in one, it does not necessarily follow that he is estopped in the other, and certainly not that the creditors are estopped in a case like this, where they have a specific lien to sue in their own behalf; and, as already shown, it is a proper practice to compel a plaintiff to bring in proper parties.

But here there was another abundant reason. The plaintiff is a non-resident of Tennessee, where this land lies, and, if he were the only necessary party, there might be difficulty in filing a bill against him in this state, and hence the land could be reached only by the roundabout way of a bill against him in Ohio to compel him to convey it, or share it with the other beneficiaries. So, when he comes here to file his bill, it is eminently proper that the other parties in interest should be allowed to come in, and make themselves parties, and that he should not be allowed to exclude them by the simple process of leaving them out, in continuation of the policy of exclusion inaugurated when the bill under which he claims title was filed.

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The result is that the motion of the plaintiff to be allowed to dismiss his amended bill, and to vacate the order compelling him to file it, should be denied. A plaintiff has not always the privilege of dismissing his bill at pleasure. Stevens v. Railroads, 4 Fed. Rep. 97.

The decision of this question, upon the foregoing reasons, almost disposes of the plaintiff's case. That he is not entitled to restrain the other creditors, who had an equal right with the plaintiff in the suit through which he acquired his title, from proceeding to realize their share of the security in the same way that that plaintiff realized his share, is too plain for any argument. They, not being parties to the decree of sale under which he bought, are not bound by it; and why, then, should they be enjoined from acquiring any title they may in hostility to the plaintiffs? only possible ground on which the plaintiff could appeal to a court of equity is that, after a purchase of the legal title,—if he can be said to have acquired that title on the facts of this case relating to the circumstance that this was partnership land, into the complications of which we need not go,—he should have been made a party to the proceedings of the chancery court of Decatur county, in which the decree of sale he seeks to enjoin was had. But one branch of that proceeding was commenced before the bill under which he claims was filed, and the other the insolvent proceeding—before he purchased, and he it was who bought pendente lite as to both those proceedings. Besides, the other creditors had a right to proceed, treating his title as a nullity, until they, or the purchaser under their sale, should acquire whatever title they might, and try conclusions with him in an action of ejectment.

Perhaps another contention of the plaintiff should be noticed here, if only to announce a conclusion of the court already intimated at the argument; that is, that these creditors do not show that they were ever "elected" by Mrs. Walker, and, not having done so, are entitled to no share in the security, and should, for that reason, be enjoined. This is a misconception of the instrument, we think. It was not the intention to be gathered from the deed that only such creditors as she might choose should be paid. It was not a nower conferred on her for that purpose, but simply a privilege, given as a protection against paying more than \$15,000, if there should be a larger amount due, or, in other words, that, having paid creditors to the extent of \$15,000, she should not be compelled to pay any others; and, in that sense, she would have "elected" to pay those who had received payment from her, and the fact of payment would be conclusive of the right to receive under this stipulation. It was a convenient way of protecting her against larger payments; but, evidently, the parties contemplated that not so much was really due, and provision is made that the balance of the \$15,000 should go to Walker himself. Therefore no creditor could be excluded under this stipulation, unless it could be shown that the \$15,000 had been exhausted, which would be the same thing as showing that she had "elected" the creditors she would pay. Nothing like that is shown here, but, on the contrary, the inference is that it has not been exhausted by any payments made by her. In this view that stipulation does not aid the plaintiff.

We come next to the question of inadequacy of price, and about that a statement of facts leaves but little else necessary to be said. That property, worth then and now many thousands of dollars, should be sold for \$100, seems impossible, but more impossible is it that a court of equity should establish the title on the facts of this case. Clark v. Trust Co., 100 U. S. 149, 152; Eyre v. Potter, 15 How. 42, 60; Erwin v. Parham, 12 How. 197, (L.C. Pnb. Co. Ed. and note;) 2 Abb. Nat. Dig. (Ed. 1885) 500 S 14 and cases sited

1885,) 592, § 14, and cases cited.

Young had become bankrupt in March. In May, Walker filed his bill in Decatur county, where the land was situated, for the execution of the contract. In June there was a bankruptcy composition, and in August a deed by Young and wife to trustees in pursuance of its terms. In September, the bill under which plaintiff claims was filed, under the circumstances already stated, in Davidson county. Walker, who was only interested as a creditor for his annuity, and any share of the \$15,-000 not exhausted in paying debts, and who already had a bill of his own pending in Decatur county, filed an answer in October. followed the efforts of the trustees under the bankruptcy composition to extricate the property by a mortgage, and a continuance of business with the furnace, which proved futile and disastrous. Meantime, Walker had died insolvent, and, as the proof shows, was never at any time able to protect the property or his interests, either in his own behalf, or in that of those creditors who had been ignored by the bill under which plaintiff claims. Young and wife were not able to protect it or the creditors. The bankruptcy trustees had only further involved it. Fisher, the administrator of Walker, as the proof shows, was an ignorant man, and did not comprehend the scire facias served upon him, and neglected it. But, suppose he had comprehended it, what could he have done? The estate was insolvent, and he had no funds, either to carry on the litigation or to purchase at the sale. So, when the sale took place in November, none of the joint beneficiaries were in a position to protect their interests at the sale by forcing a larger price, and making the property sell for enough to pay all the debts secured, nor were they in such a relation to the case as to be bound to do that, and to be precluded, if the property did not bring enough, as of their own fault. The circumstances were calculated to deter bidders, and depreciate the prop-Leaving others interested out of the bill was in itself sufficient to secure a small price for the property, and drag it down at the sale. Again, Baxter's bill was constructed on the erroneous theory that no creditor, not "elected" by Mrs. Walker, [Young], could share in the \$15,-000. But this did not apply to Walker himself, whose interest in that question might be identical with Baxter's, since he would get the surplus. Nobody was made a party to contest that theory, and it could not be settled by that bill. Hence, any person contemplating to become purchaser, being well advised, would conclude that the bill, in the absence of all proper parties, was so ill framed as to render the title doubtful, and this would invite inadequacy. An advantage of a small price, gained under such circumstances, cannot be maintained under any rule upon that subject known to the books.

But let us look a moment somewhat further, at the attitude of Walker, and of his administrator. Why was he a party defendant to that Davidson county bill at all, and what relief could be had upon its allegations as against him, and as to which he or his administrator is now estopped by the res adjudicata? The legal title was not in him, nor any title. was a creditor for his annuity, postponed to all other creditors, and had a lien, for the enforcement of which he had the same right to pursue the land by his bill in the county where the land was that the plaintiff in the Davidson county bill had to pursue it there, where the Youngs re-Being made a party defendant did not affect that right or his bill. If the Davidson county creditor could go alone, so could he, and neither could affect the other creditors or represent them. As the debtor, he was a proper party, no doubt, on the defendants' side of the case, but as a creditor he belonged to the plaintiff's side; but he was not bound to assume that relation in that suit, having a bill already pending in Decatur county, filed before this Davidson county bill was filed. If the first bill filed obtained the jurisdiction, the Davidson county plaintiff should have gone there, rather than bring Walker to his forum. As a debtor, the decree against him could be only for the debt, and to that extent would be bound, and not further. Indeed, the prayer of the bill seeks no other relief against him, nor is there in it any allegation or statement to bind him as a creditor to take his share of the lien under that proceeding; nor does the decree of June 22, 1880, give any relief against him, and there is nothing in it to preclude him from following any remedy he may have against the land to enforce his lien. He was enjoined, along with the Youngs and the bankruptcy trustees, from disposing of the one-third interest, but, as far as I can see, there was not in the bill, or the proceedings, anything to bind him in his capacity as a creditor for his annuity. So far as I can see, he might have let the bill go by default, without the least injury to his rights, except to preclude him from denying the Baxter debt as a proper charge against him, and as entitled to share in the security he had provided for it and the other debts. Baxter did not recognize him as a creditor, did not invite him to share in the proceeds as such, nor sue in his behalf, any more than he did in that of other creditors. He did not attack his claims under the contract, nor suggest anything against his right to a share of the common security, nor ask any decree against him in that regard; and yet now the plaintiff, claiming through Baxter and a sale under his bill, asks that Walker, or his representative, be excluded from all share in the security, as if there was something within the scope of his bill to preclude him from doing so, on the principle of res adjudicata. But there is not. Why, therefore, should he be enjoined, then or now, from prosecuting his Decatur county bill to secure his annuity, or the balance of the \$15,-000, after the payment of his individual debts? There is absolutely not the slightest reason arising out of the Baxter bill, on any principle of estoppel or res adjudicata.

When, therefore, Walker's relation to the plaintiff in this case, in his capacity of purchaser of the one-third interest, comes to be examined, his administrator stands just as any other creditor would, having a lien under

the contract, and just as the other defendants here do. The notion that there is anything in the bill of Baxter, Rec'v'r, v. Young and others, or the proceedings subsequent to the bill, to bind him to the purchase any further than the other beneficiaries are bound, is wholly illusory, and grows out of the bare fact that he was a defendant to that bill. But being a defendant did not bind him to anything except the relief sought and decreed against him, and there is nothing decreed against him as a creditor and co-beneficiary. I thought at the hearing, and so intimated, that he, at least, could not pursue the lien in his favor, as against the plaintiff here, the purchaser. But it only requires the inspection of the record carefully to see that he is bound no further than I have indicated, namely, as a debtor, and that, as a creditor, he was not bound to take his share of the security in that case. He was not asked to do so, and his right to take elsewhere was not denied. Prior to that bill he had filed his own. and this did not interfere with him. If the purchaser, as before stated, had given a fair and adequate price, he might have had the equity of saying to Walker and the other beneficiaries that they must pursue the fund paid into court, or the creditors who had unduly appropriated a too large share of it, for a refunding of their share; but, having paid only \$100, he is precluded from that equity, and, as against Walker or the other co-beneficiaries, he can now take nothing by his purchase because of an inadequacy, under circumstances which avoid the sale, as giving an undue advantage. By the complications growing out of the facts already stated, and the bankruptcy proceedings and sale in that court, to say nothing of the agreement among the creditors interested in the Baxter bill to bid jointly for the property, it was sold under such adverse circumstances that it is not wonderful that it brought only \$100. But no court can sustain the plaintiff's title, either as against the other secured creditors or Walker.

I need not say that the fact that the plaintiff has become the assignee of all the debts sued for in the Baxter bill does not strengthen his position on this question of inadequacy. He cannot tack the relation of creditor to that of purchaser, for obvious reasons, and thereby better his title. The parties secured by the contract had the right to have the property sold under such propitious circumstances as would bring the most money, and the plaintiff here, not having advanced his bid or given a fair price, cannot have the property. The utmost equity he can claim is to come in as a secured creditor along with the rest, take his place in the line of rank to which he belongs, under the contract of April 6, 1874, and receive his share of the preceeds of a fair foreclosure sale. As a purchaser at the bankruptcy sale, he represents Young and wife as to this one-third, as well as the other two-thirds there purchased; and, if there should remain a surplus after paying all the claims secured by the contract to be foreclosed, the plaintiff would be entitled to that.

Again, it may be worth nothing that the suggestion of insolvency of Walker's estate was made January 1, 1880, and before the decree on the Baxter bill, and (if it were necessary to strengthen the position of the defendants) operated, possibly, as a statutory injunction, under our in-

solvent laws, against any further procedure with the Baxter bill except by leave of the insolvency court. But I do not deem it necessary to go into that.

Having reached this conclusion, the next matter to be determined is the nature of the decree to be rendered. My own judgment was and is that, strictly and technically, the decree should be simply to dissolve the plaintiff's injunction, and on the cross-bill restrain him from claiming the benefit of any title he here sets up to the property in controversy, as against any of the defendants, thus allowing them to proceed with their decree in the Decatur county chancery court, and leaving the plaintiff to protect himself as best he may, by application to that court, where the first bill was filed, to execute the contract. This seems to me the better course, because of those considerations growing out of the possession by the state courts of the jurisdiction which has been impeded by this bill, and that resulting comity which I so like to preserve and observe in all cases. But the parties on both sides are averse to this, and anxious to close the litigation here and now, in a court where, for the first time, all those interested in the property are met upon equal terms as to their opportunities to present their respective claims. Yielding to this desire, I am willing to go further than indicated, and, upon the cross-bill, to execute the contract as it has been suggested the rights of the parties require.

At first I thought that perhaps the partnership creditors claiming here should be postponed until the others had been satisfied, on the ground that they do not show why they have not been otherwise paid out of the partnership assets; but I can see, from the record, that there is a strong presumption that these assets have been applied to other partnership debts, or wasted without fault of those here presenting their claims. This was originally partnership property, and, by the contract, partnership creditors stand first, and the individual creditors next, and then Walker for his surplus of the \$15,000, if any, and the annuity unpaid up to his death. The claims represented by the plaintiff will take their place in either class to which they belong. The plaintiff will be declared the trustee of the legal title for the benefit of all concerned, under the decree of this court, and, unless he choose to pay the amounts due, and the costs properly chargeable, within 90 days from the date of the decree, the property involved will be sold by John B. Clough, as special commissioner, upon such terms as to the time and place and mode of payment as the parties may agree upon in the decree to be entered, or to be hereafter fixed by the court. And, if the parties cannot agree as to the amounts to be so paid by the plaintiff, and to be fixed by the decree, there may be a reference to said commissioner to report instanter, from the proof, the said amounts, and the costs properly chargeable, including the costs of this case, so that the decree may definitely ascertain the said amounts. And he will likewise report the order of priority. So ordered.

In re STEWARD.

(Gircuit Court, S. D. New York. February 11, 1887.)

WITNESS — MASTER APPOINTED IN ONE DISTRICT COMPELLING ATTENDANCE IN

ANOTHER.

The United States circuit court in one district has power, under rule 78 in equity, to issue a subpœna requiring a person living in that district to appear and testify before an examiner, or before a master appointed in another circuit, and who is discharging the duties of his office in the former district, and may also, under that rule, punish the witness for refusing to obey the subpœna.

In Equity.

Robert G. Ingersoll, for the motion. Thomas Thacher, against the motion.

SHIPMAN, J. The circuit court of the United States for the district of Indiana appointed A. J. Ricks, Esq., special master, to take and state the accounts of a receiver in two cases pending before said court, and, among other things, to inquire and report into the amount, consideration, and ownership of any receiver's certificates which may have been issued by said officer. The master found it necessary to take the testimony in the city of New York of some witnesses living in said city, obtained an order of this court for a subpæna, which was duly issued by the clerk, and was duly served upon Herbert Steward, a person who has his legal domicile in Connecticut, but who lives in this district. Steward personally attended before the master on the day, but not at the hour, named in the subpœna, and promised to attend again at the hour appointed by the master, but did not do so. By order of this court he was again subprenaed to appear and testify before the master, at a named place in said city, and on a named day, and, in default of appearance, was directed to appear before this court on another day to show cause why he should not be punished for contempt. The subpæna and notice were duly served, Steward did not obey the subpœna, the parties have now appeared, and the question at issue is as to the power of this court. by its subpæna, to compel Steward's attendance before the special master appointed by another circuit court in a cause pending therein.

It is settled, and the practice has been in accordance with the decision, that a circuit court in one district has power, under the sixty-seventh rule in equity, to appoint a special examiner to take testimony in another circuit. Railroad Co. v. Drew, 3 Woods, 691. The decision is founded upon the literal language of the rule, and is justified by the fact that a different construction would prevent the convenient taking of testimony. If circuit courts have such power, I am of opinion that under rule 78 this court has power to issue a subpena commanding a person living in this district to appear and testify before an examiner, or before a master who has been appointed by another circuit, and who is discharging the duties of his office in this district, and is also enabled

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under said rule to punish such person for refusing to obey the subpœna. A power in the circuit courts to appoint an examiner or a master to take testimony, beyond the jurisdiction of the court which appointed him, would not be very useful unless the court within the jurisdiction possessed also the power to compel the attendance of witnesses before such officer. Rule 78, which was passed under the general authority of the supreme court to prescribe "the modes of taking and obtaining evidence" to be used in equity suits, recognizes such power. I find that said Steward has been guilty of contempt, but, as the object of the hearing has been to obtain the opinion of the court upon the questions of law, I shall not impose a large fine; but I direct that he pay, as a penalty for said disobedience, the costs and the disbursements pertaining to the disobeyed subpœna, and to this proceeding for contempt, to be taxed and allowed by the clerk.

FULLER and another v. HARRIS.

(District Court, D. Alaska. 1887.)

1. Mines and Mining—Claims—Record of Location—Rev. St. U. S. § 2324.

A record made in a memorandum book of the location of a placer mining claim, without designating any natural object or permanent monument, or any designation or work by which the placer claim could be identified, the memorandum book being retained in the possession of the locator of the claim, held to be not in compliance with section 2324, Rev. St. U. S., and of no legal force as a record.

2. Same—Location—No Record—Relocation—Relation of Title.

At the time of the location of a quartz mining claim by the employes of the claimant, there were no local rules of the mining district requiring a record of the location. Subsequently the claim was relocated by the owner so as to conform to the requirements of the act of congress. Held that, as there was a real location of the claim by the employes of the claimant, his title dated back to the first location.

8. Same—What Claimant Entitled to—Trespass—Damages—Rev. St. U. S. § 2892

By section 2323, Rev. St. U. S., the locator of a mining claim is entitled to hold and enjoy the profits of the surface included within the boundary lines of his claim, and, if in possession of the claim in person or by agent, any one who enters upon and takes therefrom mineral or other valuable substances is liable in damages as a trespasser.

4. ESTOPPEL — ADMISSION IN RECEIPT — ONE EMPLOYED TO LOCATE MINING CLAIMS—EMPLOYER'S LOCATION PRIOR TO HIS OWN.

One who was employed by another to prospect for and locate mining claims, in his receipt for wages received for said work, certified that his employer's claim was the first one located in the neighborhood; and thereupon his employer procured laborers, and expended money and labor in developing the mine. Held, that the employe was estopped from setting up a prior claim in himself, and that it was immaterial whether the admission in the receipt was true or false, the fact of its having been acted upon being conclusive upon the party making the admission.

'As to estoppel by admissions and declarations, see Moore v. Spiegel, (Mass.) 9 N. E. Rep. 827, and note; Johnson v. Connecticut Fire Ins. Co., (Ky.) 2 S. W. Rep. 151, and note.

5. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—EVIDENCE AVAILABLE BEFORE

Where it appears, from the affidavits filed upon a motion for a new trial on the ground of newly-discovered evidence, that the new evidence proposed is substantially the same evidence as that introduced at the trial, and that certain records sought to be introduced were available to the party making the motion as evidence at the trial, the motion will be denied.

In Equity.

Dawson, J. This action was brought in June, 1885. Plaintiff Fuller alleges in his complaint that in August, 1880, he hired the defendant, Harris, and one Joseph Juneau, to prospect and locate mining claims for him; that defendant and said Juneau did on the fourth day of October, 1880, discover and locate what is known as the "Fuller First," in Silver Bow basin, near the town of Juneau, and that subsequently defendant, Harris, located a placer mining claim overlapping the quartz location of plaintiff. Defendant's answer was a general denial. A temporary injunction was granted by my predecessor, and made returnable to the May term, 1886, of the district court.

A trial was had on the twenty-fourth day of May, 1886, in the district court, and a jury impaneled to find certain facts, to-wit: Was the Fuller First (the quartz lode) located prior to the location of the placer mine located by Harris in his own name? and the value of the ore taken by Harris from that portion of the placer claim which overlapped the quartz location. The jury found by their verdict that the quartz lode was first located, and that plaintiff Fuller had been damaged \$7,200 in consequence of Harris operating the placer mine during the years 1883 and 1884; whereupon the court rendered a decree divesting defendant of any claim or title to that portion of his placer claim which overlaps plaintiff's quartz lode, made the injunction perpetual, and rendered judgment against defendant for \$7,000.

Defendant now files his motion asking that the decree and judgment be set aside, and he be granted a new trial on the ground of newly-discovered evidence,—the fraudulent concealment of material facts by the plaintiff, and the commission of perjury by Joseph Juneau, who testified as a witness on the trial of this cause.

Before discussing the merits of the motion, it may not be amiss to briefly review the evidence. The proof was quite convincing that in August, 1880, defendant and Juneau were outfitting at Sitka, and started on a prospecting tour under a contract in the name of one Pilz, but Fuller furnishing the supplies. On the fourth day of October, 1880, they discovered and located a quartz ledge in Silver Bow basin, 1,500 feet in length by 600 feet in width, and named it the "Fuller First." Subsequently, on the twelfth day of October, Harris and Juneau located a placer mining claim (the richest portion of which overlapped the "Fuller First") in their own name. Juneau seems to have disposed of his interest, and, by a system of conveyances peculiar to mining camps, his interest is now vested in one Williams. Pilz disposed of his interest in the quartz location (it being two-fifteenths) to the plaintiff Coleman, who,

upon motion, was made a party plaintiff when the above facts were disclosed in the progress of the trial.

The defendant, Harris, claims that he and Juneau, upon the discovery of the quartz ledge which was located in the name of and for Fuller, in the presence of three Indians who could neither speak nor understand our language, held an election, under the provisions of the act of congress of May 10, 1872, (section 2324, Rev. St.,) at which he (Harris) was elected recorder for the mining district, which he then christened "Harris Mining District," and made a record of the location of the placer claim, dated on the fourth day of October, 1880. While it appears from his pass-book in which the record was made that the Fuller First was located on the twelfth day of October, 1880, Joseph Juneau testified at the trial that he and Harris located the quartz lode (the "Fuller First") on the fourth day of October, and the placer claim on the twelfth day of October, overlapping the quartz lode, and that Harris changed the record accordingly. The evidence of Juneau is materially strengthened by the circumstance of Harris having given Fuller a receipt for his wages earned while prospecting, in which he certified, over his own signature, that the quartz lode designated as the "Fuller First" was the first location in Silver Bow basin.

It appears from the evidence and circumstances that both Harris and Juneau acted in bad faith, and abused the confidence reposed in them by Fuller, and, but for the fact of their subsequent disagreement, the real fact of the fraudulent alteration of the record might never have been known. Harris and Juneau now make most bitter and malignant charges against each other, but, upon a careful examination of the case, I may well doubt if either of them is the unconscionable reprobate which each would make the other appear. It is indeed sad that two men, who were so closely allied in the daring and hazardous enterprise of extorting from the bowels of the earth a fortune, should now invade the vocabulary of acrimony in search of epithets with which to blacken each others' character, and transmit to their offspring an inheritance of dishonor.

The record made by Harris in his pass-book was by no means a compliance with the act of congress of May 10, 1872. While the act extended many favors to and aimed to facilitate miners in the enterprise of locating and establishing titles to the mineral lands of the United States, still it requires certain formalities. The miners of each mining district may make regulations, but they must not be in conflict with the laws of the United States. One of the requirements is that the location must be distinctly marked on the ground so that the boundaries can be readily traced, and the act requires that all records of mining claims shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims, by reference to some natural object or permanent monument, as will identify the claim. To say nothing about the absurdity of the election at which Harris claims to have been elected recorder, it requires but a glance at his memoranda to see that the entry made by him in relation to the placer mine location wholly fails to comply with the act of congress. It begins nowhere and

ends nowhere. There is neither a natural object, or permanent monument, or any designation or mark, by which the placer claim can be identified. The idea that such a record complies with the law, or that it imparted any notice or information to the public, is too absurd to require serious consideration. The liberality extended by congress to prospectors and miners was not intended to entirely dispense with legal rules, or abrogate the fundamental principles of law. The court is not to presume that congress intended that a man could procure his election as recorder in the manner in which Harris did, -make a record utterly void of legal requisites, of a placer mine rich in precious metals, and carry that record in his coat-pocket. The object of all public records is to impart notice to the public of all such matters as the law requires to be of record, and such records are open to the inspection of the public. But it is difficult to understand how the public, or how the plaintiffs, could know of this placer location by Harris, the imperfect record of which was by him secreted. The mineral lands of the United States are usually prospected and located by sturdy adventurers, who have imperfect notions of the application of legal principles, and hence congress has prescribed what the record of a mining claim must set forth. 2324, Rev. St.

The evidence further discloses the fact that upon the execution and delivery of the receipt by Harris to Fuller, in December, 1880, in which he certified to Fuller that the Fuller First—the quartz lode—was the first location in the basin, Fuller, as soon thereafter as was convenient, procured wage-workers, and expended both money and labor in developing the mine. It is a well-established principle of law that admissions, whether of law or fact, which have been acted upon by others, are conclusive against the party making them, in all cases, between him and the party whose conduct he has thus influenced. Kinney v. Farnsworth. 17 Conn. 355; 1 Greenl. Ev. § 207. It is wholly immaterial in the application of this principle whether the admission made by Harris was true or false; the fact that it was acted upon by Fuller, that he was influenced by it, and induced to spend his money, renders it conclusive as against Harris. Trustees' Presb. Cong. v. Williams, 9 Wend. 147; Livermore v. Herschell, 3 Pick. 38; Davenport v. Mason, 15 Mass. 85.

The next point raised by the motion is that of newly-discovered evidence by the defendant. The motion is supported only by the affidavit of Harris, and the certificate of the present mining recorder, and sets forth that the location of the Fuller First was made on the twelfth day of October, 1880, eight days after the location of the placer mine. But these records were available to Harris before the trial, and his evidence before the jury was substantially the same as now set forth in the motion. The general rule in relation to newly-discovered evidence, in order to entitle a party to a new trial, is that it must not be merely cumulative, but it must be shown to be material in its object, going to the real merits of the case, and it must be made to appear that reasonable diligence on the part of the party offering it could not have secured it at the former trial, and ought to be of such nature and force as to be decisive and pro-

ductive of an opposite result upon the merits on another trial. Wise v. State, 24 Ga. 31; Smith v. Matthews, 6 Mo. 600; Crozier v. Cooper, 14 Ill. 139.

Motions of this kind are to be received with great caution, for there are few cases tried in which something may not be discovered, and for the further reason that it tends to the introduction of perjury. It is infinitely better that a single person should suffer mischief or loss than that every suitor should have it in his power, by keeping back a part of his evidence, and then swearing it was mislaid, or that he was ignorant of its materiality, to destroy verdicts, and introduce new trial at his pleasure. Yet there may be cases in which the party applying for a new trial has been diligent, or has been deceived or thrown off his guard, in which, in equity and good conscience, he should be permitted to bring forward and introduce newly-discovered material evidence. But is this such a case? I think not. The defendant, Harris, knew of the records, lived in the town where they were kept, had made the entries himself, and his neglect to produce them is inexcusable.

Another point made in the motion is that Fuller, on the fourth day of April, 1881, relocated the Fuller First, and it is argued that the relocation by Fuller was an abandonment of the first location by Harris in Fuller's name. It is now contended that the record Harris made, bearing date of October 4, 1880, gave him title to all that portion of the placer mine which overlaps the quartz lode by reason of the relocation But it must be observed that, according to the evidence of Harris himself, there were no local rules of the mining district requiring a record on the fourth or even on the twelfth of October, 1880. Defendant's counsel seems to overlook the fact that the record is to be provided for, and its effect determined, by the local laws or regulations of miners in the district, and, if no record had been provided for, which provision must precede the act of recording, then no record was necessary. Fleece, etc., Co. v. Cable etc., Min. Co., 12 Nev. 312. If a record is proyided for by local rules, it must, under the mining laws of the United States, contain an accurate description of the locus of the claim by reference to natural or permanent monuments.

Although the record of the first location for Fuller, and in his name, was imperfect, and made in the absence of rules and regulations of any organized mining district, yet, as a physical fact, the location was made for him and in his name by Harris and Juneau while they were in his employ, sustaining the relation of agents, charged with the execution of a trust, and any act by them, or either of them, detrimental to Fuller's interest while that relation existed, was void. An abuse of a trust can confer no rights on the party abusing it, or on any one claiming in privity with him. Story, Eq. Jur. § 1258. It was lawful for Fuller to relocate his claim in April, 1881, so as to conform to the requirements of the act of congress, and his title dated back by relation to the first location by Harris and Juneau. Fiction in law is sometimes resorted to to prevent injustice. The relation back to the first delivery of a deed, so as to give it effect from that time, is often allowed in the furtherance of

justice, and to prevent injury from events happening between the first and second delivery. 4 Kent, Comm. 454. Now, by the principles of analogy, Fuller's relocation of the quartz lode in April, 1881, related back to and took effect from the first act of his agents in October. There could be no intervening interest to Harris, because he was an original wrong-doer, and had violated his trust.

It is argued by defendant's counsel that, regardless of the priority of location, the defendant was not a trespasser, and the case of Bullion Min. Co. v. Crossus Min. Co., 2 Nev. 168, is referred to. It is quite evident the learned judge who delivered the opinion in that case was hampered by

some local law or regulation, for he says:

"The doctrine of the common law, that he who has a right to the surface of any portion of the earth has also the right to all beneath and above that surface, has but a limited application to the rights of miners and others using the public lands of this state."

That decision was rendered in July, 1866, six years prior to the act of congress under which the parties to this cause are contending. The

present mining laws, (see section 2322, Rev. St.,) say:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, 1872, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations."

From this section it is manifest that congress intended the locator should hold, be entitled to, and enjoy the profits of all the surface included within the boundary lines of his claim, and, if in possession in person or by agent, no one had a right to enter upon and take therefrom mineral or other valuable substance. Actual possession of the quartz lode by plaintiff prior to the years of 1882, 1883, and 1884 was sufficient evidence of title to authorize him to maintain this action, and recover damages against a trespasser. Campbell v. Rankin, 99 U. S. 291; Copp, U. S. Min. Lands, 413.

The allegation in defendant's motion of the fraudulent concealment of material facts by plaintiff is not sufficiently proven. A court of equity cannot set aside proceedings, and grant relief against judgments, unless the proof of fraud, concealment, or imposition is clear, positive, and unequivocal. Story, Eq. Jur. § 252. The motion in this case having only the support of the defendant, who gave substantially the same evidence before the jury as is set forth in the motion, is not sufficient to warrant

the court in disturbing the judgment.

The motion is overruled.

ARNOLD v. KEARNEY and others.

(Circuit Court. N. D. Illinois. February 7, 1887.)

DEPOSITION—REFUSAL OF WITNESS TO SIGN—REMOVED CASE.

In a cause begun in a state court, and subsequently removed to a federal court, the deposition of a witness was taken previous to removal by a shorthand writer. Before the short hand notes were written out for reading to the witness and signature by him, according to the requirements of the state statute, the cause was removed. Then the witness refused to sign his deposition. Held, that the federal court had no jurisdiction over the taking of the deposition, and could not compel the witness to sign it.

In Equity.

Tenney, Bashford & Tenney, for complainant.

Moses & Newman, for witness.

BLODGETT, J., (orally.) This case presents a somewhat novel question. The suit is a bill in equity, commenced in the state court, and after an answer had been filed, but before an issue had been made by filing a replication, the complainant, on notice duly served, and, as far as I can see, in conformity with the Illinois statute in that regard, proceeded to take the deposition of a witness. The deposition was taken, in what is now a common mode of procedure in this city, by a short-hand writer, and, after the witness had been interrogated on the part of the complainant, and cross-examined by the defendant, the matter was suspended until the short-hand writer could write out the deposition. After this examination was so far closed, and before the testimony was written out, the suit, on application of the complainant, was removed to this court, and the record sent here. After the case had been docketed in this court, the complainant applied to the witness to go before the notary, and sign and verify the deposition, which had been in the mean time reduced to writing; and this the witness refused to do, saying, in substance, that he had been so advised by defendants' attorney. The court is now asked to compel the witness to complete his deposition by signing and swearing to it.

I am of opinion that this court has no jurisdiction to enforce the proposed order, because whatever was done towards taking the deposition was done while the case was within the jurisdiction of the state court, and before this court acquired jurisdiction of it. It seems to me to be one of those inchoate proceedings which must fall with the removal of the case from the state court. The deposition was not completed under the statutes of Illinois until it had been read to the witness, or read by him and signed and sworn to by him. Why the defendants' attorney advised him not to sign it is not disclosed, and I do not think it is material, for the purposes of this question, that it should be shown. It is enough that whatever was done by the witness was done under the jurisdiction of the state court, and if that court cannot enforce it,—and I have no idea that it can,—then the jurisdiction to enforce whatever remains undone is lost.

I do not attach much force to the suggestion, made in behalf of the witness, that the case was removed to this court on the application of the complainant, and that the latter, having removed his case, cannot complain of the loss of this deposition, because it is lost by his own act, as it seems to me to make no difference who removed the case; but the difficulty is that this witness had not yet made his deposition when the case was removed, and as the state court has lost jurisdiction of the witness, and he never was within the jurisdiction of this court, there is no power in this court to compel a completion of the deposition. The question is a novel one, and, so far as I have been able to examine, with the industry of counsel to aid me, I do not find that it has ever been raised or decided. I think the proceeding is one which must be held to have fallen between the two jurisdictions, and the inconvenience is one which must be borne as an incident to the right to remove cases from the state to the federal courts, and also as an incident to the practice of taking down testimony by short-hand, to be afterwards written out at length, and then completed by the signature and oath of the witness.

The motion is overruled.

COTZHAUSEN v. KERTING.

(Circuit Court, E. D. Wisconsin. December 26, 1886.)

EQUITY—RELIEF AGAINST JUDGMENT AT LAW—PERJURY—CONSPIRACY AND SUB-

It is not sufficient ground for relief in equity against a judgment at law that the verdict was obtained by perjury; and the addition, in a bill praying such relief, of allegations of conspiracy and surprise, does not make a case for interference in equity, with the enforcement of the judgment.

Bill in Equity to obtain relief against judgment at law. On demurrer to bill.

- H. C. Sloan, for complainant. G. W. Hazelton, for defendant.
- DYER, J. The defendant in this bill recovered a judgment against the complainant in the circuit court of the United States for the Northern district of Illinois in an action of trespass. The suit in which the judgment was rendered grew out of the foreclosure by the complainant, Cotzhausen, of certain chattel mortgages which he held upon property in the possession of the defendant; and the complainant was adjudged a trespasser in enforcing a foreclosure as to certain articles of property which it was claimed by the plaintiff in that suit were not covered by the mortgages. Suit at law being brought upon the judgment in this court, the complainant files the present bill, on the equity side of the court, to enjoin the prosecution of the action, on the ground that the

judgment was obtained by fraud. The bill is demurred to for want of equity, and the question is, does the bill present a case entitling the complainant to the relief prayed for? I am of the opinion that it does not, and a brief reference to the averments of the bill will, I think, make it quite apparent that no other conclusion can be reached, consistently

with principles of equity practice.

The bill begins by alleging that the judgment referred to was procured by fraud and perjury on the part of Kerting, "and certain other parties conspiring and combining with him for that purpose." A general allegation of fraud, such as this, is insufficient. As a matter of pleading, it is indispensable that the fraud, and the acts of the parties which it is claimed constitute the fraud, be specifically and distinctly pointed out, that the court may see whether grounds for the relief invoked, exist or not. However, the demurrer being a general one, on the ground of want of equity, the question is not whether particular allegations are in and of themselves sufficient, but whether, upon the whole bill, a case is made for relief in equity. In recognition of the principle in equity pleading just stated, the bill proceeds to state the particulars of the alleged fraud as follows:

"And in that behalf your orator avers and alleges that, on or about the twenty-fifth day of September, A. D. 1880, at the city of Chicago, he caused to be foreclosed two certain chattel mortgages given by the American Oleograph Company, covering a large stock of mortgaged chattels, several thousand in number, used and employed in carrying on a lithographing and engraving business, under the name of the Chicago Lithographing Company; that, for a long time theretofore, said Kerting had been in the possession, control, and management of said business and property, using and operating the same as if they were his own; that on the foreclosure it was ascertained that a number of the mortgaged chattels were removed from the premises, and missing, among which were lithographing stones and other articles of great value: that on the sale there remained a deficiency of \$5,147.58, which still remains unpaid; that, when ousted by said sale, strenuous efforts were made by said Frank Kerting, extending over a number of years, in a variety of legal proceedings instituted against your orator, his law partner, and his local attorney and agent, who conducted said foreclosure sale, to set aside and invalidate the same, and thus to recover possession of said business and property, but that all of said proceedings proved fruitless and unavailable; that, having failed in his efforts in this direction, said Frank Kerting filed, in February, 1884, his pracipe for a summons in the superior court of Cook county, State of Illinois, against your orator, who had become the purchaser of the mortgaged property at the foreclosure sale, and in said suit thus instituted, being the same referred to in the original cause herein, he charged in his complaint, trespass vi et armis, your orator with having unlawfully taken and carried away, on the twenty-fifth day of September, 1880, a large amount of personal property said to belong to him individually, among which were some forty or fifty lithographing stones, and color-grinder, and varnish-machine, and paper-cutter, and desk, counter, and chairs, a lot of electrotypes, pictures, chromos, some work in process of being finished, and other small

Thus far nothing is stated except introductory matter, showing the origin and character of the controversy between the parties. The bill then proceeds further to allege—

"That said suit was subsequently removed to the United States circuit court for the Northern district of Illinois, and, being at issue in said court, and coming on to be tried before a jury, in that behalf duly taken and sworn between the parties, and upon the trial of said issue, the said Frank Kerting did then appear and tender himself, and was received to give evidence on behalf of himself, and did then take his corporal oath, and was duly sworn; and then, and upon the trial of said issue, it became and was a material question in the same whether, after the foreclosure sale, the said Kerting made a demand upon this defendant for any of the property which he thus individually claimed outside of the mortgaged chattels, and whether he fairly disclosed to your orator his claim of title thereto; and thereupon the said Kerting, having been so sworn as aforesaid, devising and wickedly intending to cause and procure a verdict to pass for him, did then and there falsely, willfully, and corruptly depose, and give evidence in substance and to the effect, that he made demand for said property because not embraced in said mortgages, and was refused possession thereof; and whereas, in truth and in fact, he never made any such demand, or in any other manner laid claims to any of the property above referred to, nor ever disclosed his right to any portion thereof, except by contesting and impeaching the foreclosure sale generally."

If the question whether the plaintiff in the Illinois suit claimed and demanded the property in question before suit brought, was a material one on the trial of the case, then it simply constituted one of the facts in issue concerning which the parties could themselves testify, and upon which they could adduce such other evidence as they may have had at hand bearing upon it. The whole gist of the allegation is that Kerting swore falsely that he made a demand for the property. That is all there is of it. In other words, it would seem that he testified on the trial that he made a demand. It is alleged that in so testifying he committed perjury. It must be assumed that the complainant, if the question was a material one, met it with testimony on his part. At least, it was his duty to do so, just as it was to meet any other issuable fact in the case. was then the ordinary case, so far as the bill shows, of a contest between parties upon an issue of fact, on a trial before court and jury, where presumptively both parties had an equal footing, and each had an equal opportunity to present his side of the case, and where the jury, after considering the evidence, accepted the claim of one party rather than that of the other. To this point, that is all there is of the case made by the bill. It is not a sufficient ground for relief in equity against a judgment at law that one of the parties, or that some witness, or many witnesses, testified falsely upon a material question of fact in issue. If, upon such grounds, a court of chancery were to reopen issues settled by verdict of a jury, and thus relieve suitors from judgments recovered at law, it is difficult to see where litigation would stop, and what stability there would be in the adjudications of courts of law. Moreover, if the complainant were able to show, as he would have to do if this bill were maintained, that perjured testimony was given on the trial of the suit at law. and that such testimony caused a verdict against him, then his form of relief was in a motion for a new trial, addressed to the trial court. It was matter that came directly within the province of that court; for, according to the allegations of the present bill, the question involved was one of fact, material to the issue. It was therefore legitimately and strictly the subject of review on motion for a new trial.

But the bill in its stating part further proceeds as follows:

"Furthermore, then and there, upon the trial of said issue, your orator, among other things, claimed title in himself under and by virtue of a sheriff's sale on judgment and execution, in the case of The Butler Paper Company v. Frank Kerting and the Chicago Lithographing Company, all of which duly appeared from the records and files of the court wherein said judgment was rendered; and it became and was, under the rulings of the presiding judge, a material question on said issue and trial whether this execution levy prior to the sale was abandoned by the judgment creditor, and whether said sale thus regularly appearing of record was fictitious or bona fide, and consequently whether the title of said Kerting, if any he ever had, to the property above referred to had become extinguished by such sale; and thereupon the said Kerting, devising and wickedly intending to cause and procure a verdict to pass for him, did then and there, by his own corporal oath, and that of the president of the judgment creditor, conspiring and conniving with him for that purpose, falsely, willfully, and corruptly depose and give evidence, and thus made it to appear in substance and effect, that said levy was withdrawn and abandoned, that no sale on execution was in fact made, and no money realized as purported by the record, and that the pretended proceedings were fictitious; whereas, in truth and in fact, the return of the sheriff as to his levy and sale was true, in every particular correct, and in conformity to the facts as they occurred and transpired at the time, so that all right, title, and interest of said Frank Kerting, if any interest he ever had, were fully extinguished by such sale, and acquired by your orator."

What has been stated of preceding allegations of the bill applies with equal force to this. If it was a material question on the trial of the suit at law whether the execution levy referred to, which was one of the sources of complainant's title, was abandoned by the Butler Paper Company, and whether the sale thereunder was fictitious or bona fide, then the complainant was compelled to meet that question with testimony, as an issue of fact in the case. The plaintiff in the suit at law, it seems, attacked the sale. It therefore devolved upon the defendant in the case to defend and maintain the sale. If his evidence was insufficient, or was overborne by testimony against him, that is not ground for relief in equity. The issue was one involving title. Both parties had to meet it; and, as already stated, even if false testimony was adduced on one side in maintaining the issue, that does not give the complainant a footing in equity to avoid the verdict and judgment. Again, this was a matter reviewable by the trial court. If it were shown that injustice had been done to one side by false swearing on the part of the other, or that the defeated party had been surprised, and therefore had not been able to meet such false testimony, it was within the power of the court to set aside the verdict, and grant a new trial.

The bill further proceeds:

"And your orator further shows that at the time of foreclosure of said chattel mortgage, and for several months thereafter, your orator had no possession or control, direct or indirect, actual or constructive, over the greater portion of the goods and chattels said to have been taken and carried away by your orator; that the color-grinder, varnish-machine, paper-cutter and labels, and

the work in process of execution, were then held as claimed by third parties, strangers to your orator, in manner following, to-wit: The color-grinder, varnish-machine, and two bundles of labels, containing about twenty-five hundred sheets, had been seized and taken, and were then held, under a writ of attachment against said Frank Kerting at the suit of one Otto Waltersdorf, and were afterwards, to-wit, on the twenty-first of October, 1880, sold on execution to satisfy the claim of said Waltersdorf, amounting to \$165, more or less, and purchased from him, said Waltersdorf, under date of October 22, 1880, for the sum of \$137.43, then to him in hand paid; that the papercutter was held by Goodwillie, Wyman & Co., who had repossessed themselves of the same because Kerting did not comply with the terms of a conditional sale under which he had acquired possession, and had paid but an insignificant amount on account of the purchase money thereof; that said paper-cutter did not come under the control of your orator until on or about October 30, 1880, when he bought the same from the above firm in consideration of \$200, to them in hand paid; that the work in process of execution was assigned by said Frank Kerting himself, on or about September 20, 1880, to one of the press hands, for the purpose of having the same finished, and the net proceeds thereof applied to the payment of wages then due to the employes of the shop; that the electrotypes and wood-cuts referred to as having been taken and carried away never came to the hands or knowledge of your orator until several years thereafter, when a box containing the same was found by employes of the shop, stored away on the top of a stone-rack, upon discovery whereof the same were at once tendered to said Kerting, who, however, refused to receive the same; that no chromos, views, or anything of the kind, have come to the possession of your orator, unless it be intermixed with mortgaged goods of the same kind and character, and that no use of any such stuff was ever made by your orator, because utterly worthless, and of no commercial value; that all of these facts, matters, and things were well known to said Frank Kerting, but that then and there, upon said trial, and when all of the above matters were material to the issue, the said Kerting, devising and wickedly intending to cause and procure a verdict to pass for him, did make it falsely and fraudulently appear, by his oath and testimony, and the testimony of said Otto Waltersdorf, then conspiring and conniving with him for that purpose, that the execution sale of the color-grinder, varnish-machine, and labels, in the case of Waltersdorf v. Kerting, was fraudulent and void, for the reason that the judgment debt was collected and paid between the time of the levy and the execution sale; that the said Frank Kerting had absolute title to the paper-cutter, and that the sale of the same had not been conditional as claimed and asserted on the defense; that he, said Kerting, had not disposed of any of the goods, chattels, and things said to have been thus wrongfully taken, carried away, and converted by your orator, and that said property was of large value; whereas, in truth and in fact, the judgment of said Waltersdorf had not been paid, the paper-cutter was conditionally bought, and only twenty or twenty-five per cent. paid thereon, the press-work had been assigned as aforesaid, and the whole interest of the said Kerting in and to the entire property. if any he individually owned, was but nominal, and not worth to exceed, in the aggregate, fifty dollars,—all of which said Kerting well knew as aforesaid."

It would be but repetition of what the court has held in its comments upon other allegations in the bill, to point out the reasons why these averments present no grounds for a court of equity to interfere with the suit on the judgment. The issues were all such as might legitimately arise in the Illinois suit, and those issues, as they are set out in this bill, can-

not be litigated over again here. I repeat that the complainant's remedy for the alleged wrongs done him was in the court that tried the case. It would be most anomalous, and open the door to perpetual controversies, if a court of chancery were to put its strong hand upon judgments at law, and say that they shall not be enforced, where it can be made to appear that, in a trial at law resulting in judgment, perjury was committed by witnesses sworn in behalf of the successful party. For such wrong the injured party is not without remedy, but his remedy is in the

court that had original cognizance of the controversy.

Counsel in argument laid much stress upon certain allegations in the bill to the effect that the alleged false testimony was given in pursuance of a combination or conspiracy between Kerting and other parties, and it was insisted that, therefore, the fraud complained of was not remediable in the court where the case was tried. I am wholly unable to see how the allegation that the alleged false testimony was given in pursuance of such a combination as is charged, adds any weight to the averments that the parties testified falsely, and that, therefore, an unjust verdict was rendered. The wrong done, if any, consisted in the alleged false swearing upon the questions of fact in issue between the parties. The result complained of must have been brought about, not by any previous conspiracy, but by the false testimony, if any, given on the trial. A conspiracy without an overt act committed in pursuance of it, is harm-Upon the allegations of the bill it must be considered that the alleged injury to the complainant resulted from the false swearing or per-That is the gist of the fraud which is set up in the bill. ping the pleading of its verbiage, it consists of the charge that the verdict in the suit at law was obtained by false swearing on the part of Kerting, and two witnesses examined in his behalf. It does not help the complainant's case to state, as he has done, that the alleged fraud and perjury were not anticipated by him when he entered upon the trial of the action, because that is simply stating a case of surprise, from which, if well founded, the trial court could relieve him.

It is alleged in the bill, that, under the practice of the federal court in Illinois, the issue on the trial of the case was not such that the complainant could fairly or reasonably anticipate that the plea of title in himself, acquired from third parties on execution and private sale, would or might be avoided in rebuttal by testimony of the false nature and character referred to, and that he had no reason and opportunity to anticipate or meet such false and fraudulent statements. If the defendant in his plea in that case set up title to the property in himself, he must have known that, in an action of trespass, that title could be attacked; and, in any event, it is clear that the power of the trial court to protect the complainant against any such wrongs as are complained of in this bill was adequate, and it is not for this court to say that such power would not have been exercised upon sufficient and proper grounds shown.

To stay the suit at law, and to now go into an investigation of the matters set up in the bill, would be, in my judgment, equivalent to re-

opening the very issues tried in the case at law, on the equity side of the court, and would be equivalent to granting in equity a new trial of a suit tried at law. This cannot be tolerated.

On the whole, I am of the opinion that the bill does not state a case entitling the complainant to the relief he seeks, and therefore that the demurrer should be sustained, and the bill dismissed.

WALKER v. TRIBUNE Co.

(Circuit Court, N. D. Illinois. February 14, 1887.)

1. LIBEL AND SLANDER—WHAT ACTIONABLE—"CRANK."

The word "crank" has no necessary defamatory meaning; and for a newspaper to publish an item that a certain pamphlet, written by a lawyer who was also the author of a text-book on the law of patents, was "the effusion of a crank," is not actionable without a charge in the declaration of the alleged defamatory meaning of the word by an appropriate innuendo, and an aver-

ment and proof of special damage.

2. Same—Pleading—Innuendo—Demurrer.

A charge in the declaration that the purpose of the publication in applying the term "crank" to the plaintiff was "to impute to him sundry qualities, aims, and methods highly inconsistent with usefulness as a lawyer, or as an author," is not an appropriate averment or innuendo that the word was used in a defamatory sense, and the declaration is bad on demurrer.

3. SAME-SPECIAL DAMAGE.

The mere statement in the declaration that the plaintiff, by reason of being thus called a "crank," had been deprived of divers great earnings in his profession, and had lost royalties on the sales of his book, is too vague and indefinite to serve as an averment of special damage, and the declaration is bad on general demurrer.

4. SAME—JUSTIFICATION.

Whether or not the character of a pamphlet alleged by the defendant to be the "effusion of a crank" warranted the application of that term to the plaintiff, is a matter of justification to be pleaded and proved by the defendant, and the declaration is not demurrable for failing to set the pamphlet out.

At Law. Action to recover damages for a libel.

A. H. Walker, for himself.

A. S. Trude, for defendant.

BLODGETT, J. This is a demurrer to a declaration filed by the plaintiff in this case. The declaration avers, in substance, that plaintiff is, and has been for several years past, a lawyer by profession, and the author of a text-book upon the law of patents, and also the author of a pamphlet entitled "The Paine Bribery Case and the United States Senate;" that defendant, intending to cause it to be suspected and believed that plaintiff was a man of crude, ill digested, ill considered, and wild ideas and aims, and to be supposed to be without skill, tact, adequate information, or common sense, on the fourth day of September, 1886, in this district, did wrongfully, falsely, and maliciously cause to be composed, printed, and published, on the editorial page of the Chicago Tribune of

that date, the following false and defamatory language concerning the plaintiff, and concerning said pamphlet; that is to say: "The pamphlet on the Paine Bribery Case and the United States Senate, by Albert H. Walker, is plainly the effusion of a crank;"—meaning thereby to publicly characterize the plaintiff as a "crank," and thus to publicly impute to him sundry qualities, aims, and methods highly inconsistent with usefulness and success as a lawyer and author, whereby plaintiff has been greatly prejudiced in his credit and reputation, and caused to be considered an unreliable and injudicious person, and destitute of those qualities on which the earnings of a lawyer or a serious author depend; and has been greatly vexed and mortified, and has been deprived of divers great earnings which would otherwise have accrued to him in his professional duties, and divers great royalties which otherwise would have been paid to him on sales of his books.

The demurrer is general and special, the grounds of the general demurrer being (1) that the word "crank" is not in itself defamatory or actionable, and there is no averment or innuendo in the declaration stating that the defendant's meaning, or the sense in which the word was used, was such as to make it defamatory, or imply any libelous intention; (2) that the pamphlet referred to in the defendant's criticism as "plainly the effusion of a crank" should have been set out, so that the court could judge whether the language used by the defendant in regard to it was

justified from the tenor of the pamphlet itself.

The ground for special demurrer is that there is no averment of special damage or injury to the plaintiff by reason of the alleged defamatory matter.

In regard to the first point stated, it must, I think, be conceded that to call a person a "crank" is not of itself actionable. It is not a word which, by its common meaning in the English language, imports that a person has been guilty of a crime, or exposes him to hatred, contempt, ridicule, or obloquy, or which would tend to injure him in his trade or profession. The word has no necessary defamatory meaning, and, if it was used by the defendant in a defamatory sense, such sense must be given it by an appropriate allegation or innuendo to that effect. The meaning alleged in the declaration is "thus to publicly impute to him [plaintiff] sundry qualities, aims, and methods highly inconsistent with usefulness as a lawyer or as an author." This is not enough. Some opprobrious or defamatory meaning—something which would show that the expression used would tend to bring the plaintiff into contempt or hatred, or charge him with a criminal offense—is necessary. It is no libel upon a man who has entered the field of authorship to underrate his talents.

As to the second point, it was not necessary for the plaintiff to set out his pamphlet as part of the declaration. If defendant wishes to justify the application of the epithet or word "crank" to the plaintiff, in connection with this pamphlet, it can so plead, and put the pamphlet in evidence before the jury.

The special cause of demurrer assigned, that there was no averment of special damage to the plaintiff, need not, as it seems to me, have been

specially stated, as I think the law is well settled that, when the alleged libelous words are not in themselves actionable, the plaintiff must not only charge the defamatory meaning by an appropriate innuendo, but he must also aver and prove special damage, and a failure to do so may be taken advantage of by general demurrer.

** In Pollard v. Lyon, 91 U.S. 225, it is said:

"Where the words are not in themselves actionable, because the offense imputed involves neither moral turpitude nor subjects the offender to an infamous punishment, special damage must be alleged and proved in order to maintain the action. * * * In such case it is necessary that the declaration should set forth precisely in what way the special damage resulted from the speaking of the words. It is not sufficient to allege, generally, that the plaintiff has suffered special damages, or that the party has been put to great costs and expenses. * * By special damage, in such a case, is meant pecuniary loss."

Here the plaintiff merely states that, by reason of this alleged libelous publication, he has been deprived of divers great earnings in his profession, and lost royalties on the sales of his books. This is not sufficient. He should have stated who, if any one, had refused to employ him as a lawyer, and who has refused to buy his books, so specifically that defendant may know what proof it will have to meet at the trial on the

question of damages.

It is urged in a brief filed by plaintiff that, since the assassination of President Garfield by Guiteau, the word "crank" has obtained a definite meaning in this country, and is understood to mean a crack-brained and murderously inclined person, and is so used by the public press. I do not think so short a term of use would give to such a word a libelous sense or meaning without an allegation or innuendo as to the sense in which it was used by the defendant. In Ogilvie's Imperial Dictionary, published in England in 1883, and republished in this country in 1885, the word is found in the supplement with the following definition: "'Crank.' Some strange action, caused by a twist of judgment; a caprice; a whim; a crotchet; a vagary. Violent of temper; subject to sudden cranks. Carlyle." So that by this authority, which, I think, must be deemed the latest, and probably the best, the word would seem to have no necessarily defamatory sense. It would not necessarily imply that a man had been guilty of a crime, nor tend to subject him to ridicule or contempt, to say of him that he is capricious, or subject to vagaries or whims; and such implication or intent could only be shown by an apt averment, and proof in support of such averment.

The demurrer is sustained, and the case will be dismissed at plaintiff's

cost, unless he shall amend in 20 days.

PENGRA v. MUNZ.

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(Circuit Court, D. Oregon. February 14, 1887.)

1. CERTIFICATION BY THE SECRETARY OF THE INTERIOR OF LANDS TO THE STATE UNDER SWAMP AND WAGON-BOAD GRANTS.

On March 12, 1860, (12 St. 8,) congress granted the lands that were "wet and unfit for cultivation," within the limits of Oregon, to the state, to be selected by the state from the lands thereafter surveyed, "within two years from the by the state from the lands thereafter surveyed, "within two years from the adjournment of the legislature at the next session after notice by the secretary of the interior to the governor of the state that the surveys have been completed and confirmed," and then certified by the secretary of the interior, if found to come within the operation of the act, and patented to the state, on which the fee shall vest in the state. On July 2, 1864, congress granted to the state, to aid in the construction of a military wagon road from Eugene to the eastern boundary of the state, the "alternate sections of the public lands, designated by odd numbers, for three sections in width on each side of said road," as the same may be located. On October 24, 1864, the legislature of the state transferred this grant to the Oregon Central Military Road Company, who in due time constructed the road. On December 27, 1868, the survey of section 21, in township 38, of range 14 east of the Wallamet meridian, was duly confirmed, of which fact the governor of the state had due notice before the session of the legislature held in 1868. On April 18, 1871, the secretary of the interior, on the recommendation of the commissioner of the general land-office, approved the selection of section 21, under the wagongeneral land-office, approved the selection of section 21, under the wagon-road grant, and certified the same to said road company as the grantee of the state. On September 16, 1882, said section 21 was erroneously included in a list of lands then certified by the secretary to the state under the swamp-land act, and on January 4, 1883, the commissioner, as to said section 21, recalled said certificate, as having been erroneously made, and notified the governor of the state thereof. On May 11, 1877, the defendant purchased the E. 1 and the S. W. 2 of section 21 from the state land commissioners, under the act of October 26, 1870, for the sale of swamp lands, paying \$96 down, and the balance (\$480) on December 12, 1883, when he received a deed therefor from said commissioners. Held: (1) The swamp-land act is a grant to the state on the condition precedent that the selection of lands thereunder is made within the time limited therein, and on failure to do so, the grant lapsed and became of no effect. (2) The legal title to land selected under the swamp-land act does not vest in the state until a patent is issued therefor, which patent, when issued, relates back to the date of the grant. (3) By section 2 of the act of 1860 the duty is devolved on the state to select the lands it claims under the swamp-land act, and present the same for the consideration of the secretary of the interior, whose duty it is to ascertain and determine whether the selections are "wet and unfit for cultivation," within the meaning of said act; and his determination of the question of fact cannot be impeached or questioned elsewhere except in a court of equity for fraud or mistake other than an error of judgment. (4) It was also the duty of the secretary of the interior, by virtue of his general control over the subject of the disposition of the public lands, to ascertain and determine what lands inured to the state or its grantee, the wagon-road company, under the wagon-road grant of 1864, and when he determined that said section 21 inured to the wagon-road company under said act he thereby determined that it did not inure to the state under the swamp-land grant. (5) The certification of section 21 to the state as swamp land by the secretary was a mere clerical error that the department had a right to correct as it did; but the section having already been certified to the grantee of the state under the wagon-road grant, such second certification was simply void and of no effect. (6) The state having in effect procured section 21 to be certified to the plaintiff's granter under the wagon-road grant, the defendant as the grantee of the state is estopped as against the grant, the defendant, as the grantee of the state, is estopped, as against the plaintiff, to assert or maintain that said section ever inured to the state under the swamp-land grant.

2. DAMAGES FOR WITHHOLDING REAL PROPERTY.

A cause of action for damages for withholding the possession of real property may be joined with one for the possession of such property, but it must be separately stated, and the statement must contain all the facts necessary to support a separate action thereon.

8. TENANT CANNOT DENY HIS LANDLORD'S TITLE.
A tenant cannot, during his term, nor during the possession taken or sequired under the lease, deny his landlord's title.

(Syllabus by the Court.)

Action to Recover Possession of Real Property.

George H. Williams, Cyrus Dolph, and Joseph Simon, for plaintiff.

William H. Effinger and Edward Watson, for defendant.

DEADY, J. This action is brought to recover the possession of the W. ½ of section 21, in township 36 S., of range 14 E. of the Wallamet meridian.

It is alleged in the complaint that the plaintiff is the owner in fee of the premises, and is entitled to the possession thereof, which the defendant wrongfully withholds from him, to his damage \$1,000. And, by way of giving the court jurisdiction of an action between parties who do not appear to be citizens of different states, it is further alleged that the plaintiff derives title to the premises under the act of congress of July 2, 1864, entitled "An act granting lands to the state of Oregon to aid in the construction of a military road from Eugene to the eastern boundary of said state;" that the defendant claims to hold said premises under the act of congress of March 12, 1860, entitled "An act to extend the provisions of an act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits, to Minnesota and Oregon, and for other purposes," whereby the question arises through which of these acts the title of the land passed from the United States; and that the same exceeds in value the sum of \$500.

In his answer the defendant denies the allegations of the complaint concerning the ownership and right to the possession of the premises, and alleges that he is the owner of and entitled to the possession of the same; which allegations are controverted by the replication.

The case was tried by the court without the intervention of a jury.

The evidence given on the trial consists of certain documents admitted, under stipulation, for their legal effect, and certain oral testimony concerning the value of the use and occupation of the premises, and of a certain fence and ditch which the defendant claims to have constructed on the premises, and also on the question of whether the land is in fact swamp land or not, which oral evidence was received subject to objections for incompetency.

The material facts on which the plaintiff founds his claim are these: On July 2, 1864, congress, for the purpose of aiding "in the construc-

¹A tenant cannot, during his term, nor until after he has surrendered possession, deny his landlord's title. Rector v. Gibbon, 4 Sup. Ct. Rep. 606; Killoren v. Murtaugh, (N. H.) 5 Atl. Rep. 769, and note.

tion of a military road" from Eugene to the eastern boundary of the state, granted to the state the "alternate sections of the public lands, designated by odd numbers, for three sections in width on each side of said road," to be disposed of by the legislature for such purpose. 13 St. 355. The act contains a proviso reserving from its operation "all lands heretofore reserved to the United States by act of congress or other competent authority." Provision is also made in the act for the disposition of the land when and as often as the governor of the state "shall certify to the secretary of the interior that any ten continuous miles" of the road are completed. The road was to be completed within five years, and, if not, the land then undisposed of was to revert to the United States. the act of March 3, 1869, (15 St. 338,) the time for its completion was extended to July 2, 1872. On October 24, 1864, (Sess. Laws, 37,) the state transferred the grant to the Oregon Central Military Road Company, for the purpose and "upon the conditions and limitations" contained in the act of congress making the same. On September 5, 1868, the township 36 south, range 14 east, was surveyed, and the survey approved on December 27th of the same year, of which the governor of the state had due notice before the meeting of the legislature in 1868. On February 16, 1869, the road company filed with the governor of the state a map of the location and line of the road from Eugene to the eastern boundary of the state; and on January 12, 1870, the governor certified that the road, as delineated on said map, was completed, as required by the act of congress and the state legislature, which map and certificate were filed with the secretary of the interior on or before February 28, 1870. On April 18, 1871, the commissioner of the general land-office recommended for approval a list of lands, numbered 2, and described as "lands in place, granted to the state of Oregon" by the acts of congress of 1864 and 1869 aforesaid, "to aid in the construction of a military road" from Eugene to the eastern boundary of the state, which includes the aforesaid section 21, "subject to any valid interfering rights which may have existed at the date of selection;" and on April 21st of the same year the secretary of the interior approved the selection, subject to the same qualification. On June 2, 1871, the Oregon Central Military Road Company conveyed the west half of said section 21 to B. J. Pengra, and the east half of the same to the California and Oregon Land Company. wards, and before the commencement of this action, B. J. Pengra and wife conveyed said west half to the plaintiff herein. It is also specially admitted that the plaintiff has succeeded to and now owns all the estate and interest in said west half that said company ever owned or held therein prior to the commencement of this action.

By the act of June 18, 1874, (18 St. 80,) it is, in effect, recited that congress had "granted," certain lands to the state of Oregon "to aid in the construction of certain military wagon roads" therein, and that there is no law for the issue of "formal patents" therefor; and in effect provides that whenever it appears "from the certificate of the governor" as provided in said acts, that any of said roads has been "constructed and completed," a patent shall issue to the state for said lands, or to any corpora-

tion to whom it may have transferred its interest therein, "as fast as the same shall, under said grants, be selected and certified."

The defendant claims under the act of congress of March 12, 1860, extending the swamp-land act of 1850 over Oregon; and the act of the state legislature of October 26, 1870, (Sess. Laws, 54.) providing for the selection and sale of swamp land "belonging" to the state. This act provides for the selection of such lands by the agents of the state, and the sale of the same in unlimited quantities, at not less than one dollar per acre, the purchaser to pay 20 per centum of the price within 90 days after the selection is completed, and the balance on proof that the land "has been drained, or otherwise made fit for cultivation;" and, if such payment and proof of reclamation are not made within 10 years from the time of the first payment, the land is to revert to the state. It is declared in the act "that all swamp land which has been successfully cultivated in either grass, the cereals, or vegetables for three years shall be considered as fully reclaimed."

The premises are situated east of the Cascade mountains, on Sprague river, in Lake county. In 1872 the defendant settled on the adjoining section 22, and on May 11, 1877, purchased the E. ½ and the S. W. ½ of section 21, of the state land commissioners, under the swamp-land act, paying \$96 thereon, or 20 per centum of the price; and on December 12, 1883, paid said commissioners \$480, the balance of the purchase price, and obtained a deed from them for said portions of the section. Between the date of his purchase from the state and the commencement of this action the defendant built a fence and cut a ditch across the north side of the section, in connection with section 22, and used the land for pasture, and making hay from the wild grass. The defendant testifies that a half mile of this fence is on the east half of section 21, and one-fourth of the ditch, and that they are worth \$100 each. He also testifies that section 21 is more or less overflowed and swampy.

On September 14, 1882, the commissioner of the general land-office submitted to the secretary of the interior for approval a list of lands, numbered 5, "inuring to the state of Oregon" under the swamp-land acts of 1850, and 1860, which included said section 21; and on September 16th said secretary approved the same. On January 4, 1883, said commissioner wrote to the governor of the state, informing him that said section was "erroneously" included in said list 5, the same having been theretofore "certified to the state for the Oregon Central Military Road Company, under the act of July 2, 1864, and included in list numbered 2, approved April 12, 1871." On June 25, 1880, the plaintiff took a lease of the north half of the section for one year from the California & Oregon Land Company for \$80.

By the act of March 12, 1860, (12 St. 3,) the swamp-land act of 1850 was extended over Oregon, with a proviso that the selections from the then surveyed lands shall be made within two years from the adjournment of the legislature at its next session after March 12, 1860; and, as to all lands thereafter surveyed, "within two years from such adjournment at the next session, after notice by the secretary of the interior to

the governor of the state that the surveys have been completed and confirmed."

The swamp-land act has been said to be a grant in presenti. But it does not pass the legal title. Before that vests in the state, the secretary must ascertain and determine what lands come within its operation,—are "wet and unfit for cultivation,"—and cause a patent to issue to the state therefor. This patent, when issued, may, and doubtless does, relate back to the passage of the act, and in this sense only is it a grant in presenti. Until the patent issues, the legal title is in the United States; and the determination of the question, what are and are not swamp lands within the purview of the act, rests with the secretary of the interior, and his decision, unless impeached for fraud or mistake other than an error of judgment, is final. French v. Fyan, 93 U. S. 170.

The case of Railway Co. v. Smith, 9 Wall. 95, only holds that in case the secretary fails to determine the question of whether a subdivision was swamp or not, that the state or its grantee might, when sued for the possession of the same, prove the character of the land, when material to the defense. And in that case the grant to the plaintiff expressly excluded therefrom the lands previously granted to the state by the swampland act of 1850, so that the fact of the lands being swamp was itself sufficient to defeat the plaintiff's claim, and might therefore be proven by parol, as a defense to its action to recover possession, in the absence of any determination of the question by the secretary of the interior.

But the reservation in this wagon-road grant is only of lands theretofore "reserved to the United States," which does not include lands otherwise disposed of by the United States. However, the grant for the wagon road being subsequent in point of time to that of the swamp land, the former cannot attach to any land within the operation of the latter, unless the same has reverted to the United States for want of selection within the time limited.

The provision (section 2, Act 1860) limiting the time within which the selections must be made, after notice to the governor "that the surveys have been completed and confirmed," is not in the original swampland act. It was first made a part thereof, so to speak, when the latter was extended to Oregon. In my judgment, the purport and effect of the section is to devolve on the state the duty of making the selections in the first instance; whereupon it becomes the duty of the secretary to ascertain and determine whether such selections are "wet and unfit for cultivation," within the meaning and terms of the act. But if the selection is not made within the time prescribed, the grant reverts to the United States. The selection within the time is a condition precedent.

The wagon-road grant was a grant in præsenti of all the odd-numbered sections on either side of the road, and, as soon as the line of the same was designated, it attached to such sections, and took effect from the date of the act, subject to the condition that the road was completed within the time limited. Shulenberg v. Harriman, 21 Wall. 60. This condition having been long since duly performed, the grant became absolute in favor of the road company, the grantee of the state. The approval

of the selection of section 21, under the act of 1864, by the secretary of the interior in April, 1871, gave the road company a perfect title thereto. The subsequent passage of the act of 1874, authorizing patents to issue in such cases, did not affect the title already vested. The effect of a patent, when issued under that act, is not to pass the title, but to give the patentee record evidence of an already existing one. Langdeau v. Hanes, 21 Wall. 529. Wherefore it is of no moment that it does not appear that a patent has issued to the state or its grantee for the premises. The title of the latter was complete on the approval by the secretary in 1874 of the selection of section 21 under the act of 1864.

As has been shown by the terms of the swamp-land act, the fee of any tract of land does not pass to the state until the secretary has ascertained that it comes within its operation, and causes a patent to issue therefor. The official certificate that the land is swamp only gives the state an equity or right to a patent. Such an interest cannot be set up as a defense in this action against the prima facie legal title of the plaintiff. But admitting that the listing of the land as swamp vests the fee in the state, and that the patent thereon is a mere formal matter, which follows of course, the listing of section 21 as swamp land in 1882, more than three years after the same was certified to the state under the wagon-road grant, did not change or affect the rights of the parties. Such listing, even if it had been deliberate and intentional, in the face of the fact that the land had already been duly listed to the state under the wagon-road grant, was simply void. Smith v. Ewing, 23 Fed. Rep. 741. But the truth is, it was a mere mistake,—probably a clerical misprision,—which the department corrected as soon as attention was called to it by the register and receiver of the proper land-office. The power to correct such a mistake is necessarily implied from the power to approve the selection, and is supported by authority. Carroll v. Safford, 3 How. 460; LeRoy v. Clayton, 2 Sawy. 493; Bell v. Hearne, 19 How. 252. And as the act which constituted the mistake was void, and the right to the land had already been duly ascertained and set forth, the result would be the same if it never had been corrected.

The authority to determine to which of the two grants to the state this section 21 properly belonged was vested in the secretary of the interior, generally, by section 441 of the Revised Statutes, which gave him supervision—final control—of the public business relating to the public lands, and specially and particularly as to the grant of swamp land, by the act making the same. In awarding this section to the wagon-road grant, or rather approving of its selection thereunder, the secretary must, in legal contemplation, have decided that it was not swamp. The decision, so far as it appears, was duly made, in the regular course of business, in the administration of the law relating to the subject, and with the evidence contained in the public surveys as to the character of the land belonged to the wagon-road grant was, in legal effect, also a decision that it did not belong to the swamp-land grant. The latter conclusion, under the circumstances, is a necessary element of the former. Nor can this con-

clusion be impeached or contradicted in this action by oral evidence as to the character of the land. Subject to the power of a court of equity in certain cases to correct or set aside the final action of the department for fraud or mistake, not a mere error of judgment, in disposing of the public lands, its decisions on questions of fact cannot be reviewed or called in question elsewhere. Johnson v. Towsley, 13 Wall. 72; Sharp v. Stephens, 6 Sawy. 48. Therefore the oral evidence offered by the defendant, concerning the swampy character of this land, is incompetent, and cannot be considered.

The state was the grantee in both these grants. It accepted the land as part of the wagon-road grant, or allowed its grantee or agent to do so. At least there is no evidence that it ever selected this section under the swamp-land grant, and presented it for certification as part thereof. And while this may have been done, it is morally certain that it was not done until after the premises were certified to the grantee of the state under the wagon-road grant, nor until the grant had lapsed, for want of selection, within the time prescribed. The non-action of the state in this matter probably arose from the fact that it was thought best that the land should go to the construction of the wagon road, which was then regarded as a meritorious enterprise. For long after this swampland grant was made no interest was taken in it, nor was it generally understood that there was any considerable quantity of land in the state to which it was at all applicable. For 10 years the state took no steps to secure any land under it, preferring, as it appears, to make its selections under the grants for the benefit of roads and schools. The fact that some portions of these selections were damp enough to be called swamp was no objection to them, but often a recommendation; and in my judgment, it would have been well if that policy had been continued. But, be that as it may, in the meantime this land was formally selected and certified to the state as wagon-road land, with its acquiescence, if not active concurrence, and it is now estopped, as against the plaintiff, to deny that the premises are included in such grant, or to assert that it acquired them under the swamp-land grant. And if the state is so estopped, so is its grantee, the defendant.

The defendant defends for the whole of the W. ½ of section 21, but it does not appear, from his own showing, that he has any claim to the N. ½ thereof. His purchase from the state only includes the E. ½ and the S. W. ¼ of the section. But the claim of the defendant to be the owner of any part of the premises on the facts proven must fail on either of the following grounds: (1) At and before the defendant's purchase from the state under the swamp-land grant, the right of the state thereunder had lapsed and become of no effect. (2) The land was already certified to the grantee of the state under the wagon-road grant by the secretary of the interior, which certification is a final decision of the question as to the character of the land, and the grant under which it properly belonged, by a tribunal having exclusive jurisdiction of the same. (3) The defendant, as the grantee of the state, against the plaintiff, is estopped to assert or maintain that the premises inured to the state under the

swamp-land grant, because the latter, in effect, procured the same to be

certified to the plaintiff's grantor under the wagon-road grant.

In conclusion, I find that the plaintiff is the owner of the land in fee, and entitled to the possession thereof. But no damages can be received for the occupation of the premises under the allegation in the complaint that the defendant wrongfully withholds the possession of the same from the plaintiff, to his damage \$1,000. An action to recover damages for the wrongful occupation of real property is the equivalent of the common-law of action of trespass for mesne profits. A cause of action for damages for withholding the possession of real property may be joined with one to recover such possession. But it must be separately stated, and the statement must contain facts sufficient to support a separate action thereon. Ordinarily, only nominal damages can be recovered on the ad damnum clause for an ouster, in an action to recover possession of real property. Wythe v. Myers, 3 Sawy. 598; Larned v. Hudson, 57 N. Y. 151.

The evidence as to the value of the rents and profits of the land was admitted on the trial, subject to the objection that the complaint contained no statement of a cause of action therefor. The ruling on this point makes it unnecessary to consider the character or value of the improvements put on the land by the defendant. The plaintiff can recover nothing for rents and profits, and therefore there is nothing to set off the value of the improvements against. Probably this result is not materially unjust to either party.

In support of my conclusions in this case, I refer generally to Cahn v. Barnes, 7 Sawy. 48, 5 Fed. Rep. 326. The important questions involved herein were considered in that. I have gone carefully over the ground again, in the light of the able and exhaustive argument of counsel for the defendant, but find no cause to change my opinion on the subject.

There must be a finding for the plaintiff that he is the owner of the

premises, and entitled to the possession thereof.

CALIFORNIA & OREGON LAND Co. v. MUNZ.

(Circuit Court, D. Oregon. February 14, 1887.)

DEADY, J. This action is brought by the plaintiff, a corporation duly formed under the laws of California, against the defendant, a citizen of Oregon, to recover the possession of the E. \(\frac{1}{2}\) of section 21, in township 36 S., of range 14 E. of the Willamet meridian. It was heard and submitted with the foregoing case of Pengra v. Munz. ante, 830.

The facts and circumstances of the two cases are similar, except that in this case the defendant, on June 25, 1880, took a lease for one year from the plaintiff for the north half of the section at a rent of \$80, and covenanted therein to sur-render the premises to the lessor at the end of the term. The lease was evidently intended to cover the east half instead of the north half of the section, as that was the portion belonging to the lessor. But it took effect at least as a lease of the north-east quarter, and by reason of it the defendant is estopped to deny the

plaintiff's title thereto. It is familiar learning that a tenant is estopped to deny his landlord's title, either during the term or the continuance of the possession taken under the lease. 1 Washb. Real Prop. 356; Zeller v. Eckert, 4 How. 289; Sawyer v. Sargent, 7 Pac. Rep. 120.

In his testimony, the defendant says that he was imposed upon in this matter by the agent of the plaintiff, from whom he took the lease. But the circumstances do not support the assertion. The agent simply told the defendant that the plaintiff had the title to the land, and that, if he cut hay on it, without his permission, he would be prosecuted; when the defendant, to use his own language, asked for and obtained the lease, to save trouble. Afterwards, when the mistake was made in listing the section as swamp land, the defendant undertook to take advantage of it, and buy in what he doubtless thought was a paramount title to that of his landlord, and thereby hold the possession in his own right.

There must be a finding for the plaintiff in this case as in the other.

Manning v. Norfolk Southern R. Co. 1

(Circuit Court, E. D. Virginia. January, 1887.)

 RAILROAD COMPANIES—BOND AND MORTGAGE—RIGHT OF BONDHOLDER TO SUE.
 The common-law right to sue upon a bond is not affected by the remedies
 provided in the mortgage given simultaneously, and for the better securing of the bond, unless the provisions of the mortgage exclude this right in express terms, or by necessary implication.

2. Same—Implications from Provisions of Mortgage.

The right to sue upon a written obligation admitted to be valid is of too high a character to be taken away by implication, especially if drawn from an instrument other than that which is given in direct and positive acknowledgment of the debt.

8. Same—Assumpsit by Dissenting Bondholders.

Dissenting bondholders may sue in assumpsit for the amount of their unpaid coupons, notwithstanding the fact that the majority in interest have consented to waive the rights secured by the mortgage.

Common-law action on coupons which had been cut from bonds made and issued by the defendant, and which were secured by a mortgage to Ford & Jordan, as trustees, dated September 1, 1880. The bonds were in the usual form of railroad bonds, and by each of them the railroad company promised to pay \$1,000 to the bearer on September 1, 1920, with interest at the rate of 6 per cent., on the first days of March and September in each year, upon presentation and surrender of the coupons annexed to said bonds as they should severally become due. The bonds further recited that the payment of the principal and interest was secured by the said mortgage upon the terms and conditions set forth therein, and also contained a provision to the effect that, if interest should remain in default for six months, the whole principal sum might, at the option of the bondholder, become forthwith due and payable. The mortgage contained the same provision, making it obligatory upon the trustees to exercise such option, and declare the whole amount due, upon the request of a majority in interest of the bondholders, or, upon like request,

Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

to waive their right to exercise such option. The mortgage then prescribed the proceedings to be taken by the trustees in case of default: First, to enter into possession of the mortgaged property, and to apply the net earnings to the payment of the interest coupons; or, second, to sell the property at public auction, after notice, and to apply the net proceeds to their payment; or, third, to enforce the rights of the bondholders under the mortgage by sale or entry or judicial proceedings, as it should be deemed most expedient for the bondholders' interests; but the duty of the trustees, and their power to make election, were declared to be subject to the right and power of a majority in interest of the bondholders to instruct the trustees to waive such default, or to enforce their rights.

Before maturity of the coupons, a majority of the bondholders waived the payment of interest for five years, agreeing to fund the coupons, and accept in place thereof scrip certificates; and requested the trustees to declare that the exaction of payment of interest should be waived, and that the time for the payment of such interest should be extended, and that no proceedings for the enforcement of the conditions of the mortgage should be taken. The trustees assented thereto, and so notified the company, and the coupons belonging to the bonds held by such majority were surrendered to the company, and exchanged for the certificates. The bondholders who did not assent to the funding scheme own about The question argued before the court was whether **\$40.000** of bonds. the dissenting bondholder's right to sue in covenant upon his bond, or in assumpsit upon the coupons, was lost, because a majority of the bondholders had consented to waive the enforcement of their rights under the mortgage.

Sharp & Hughes and Albert Gallup, for plaintiff. Starke & Martin and G. W. Wingate, for defendant.

HUGHES, J. The common-law right of suing to judgment upon a written obligation admitted to be valid is of too high a character to be taken away by implications, especially if these are drawn from instruments other than that which is given in direct and positive acknowledg-The suit at law is brought upon written obligations ment of the debt. in the form of coupons cut from bonds payable to the holder. In defense the defendant contends that the right of action upon them has been taken away by the provisions of a mortgage which it executed simultaneously with the execution of the bonds. The mortgage was given for the purpose of securing the payment of the bonds. It contains various provisions looking to the protection of the property of the company which it covers from undue sacrifice. It contains no provision which positively, and none, I think, which impliedly, takes away from a holder of coupons, who has taken no part in instructing the trustee as provided by the terms of the mortgage, his right of action upon them at common law. I fully concur in the views of this mortgage deed set out by Judge Hall, in the opinion filed in the case, on the true force and effect of this instrument, and I need not repeat them here. It controls the property which

it conveys, but does not, in any of its provisions, affect the common-law right of action belonging to any holder of the coupons of the Norfolk Southern Company who has not participated in the action of the majority of the creditors of the company.

Judgment may be taken for the amount claimed upon the coupons in

suit.

NELSON v. ALLEN PAPER CAR-WHEEL Co.

(Circuit Court, N. D. Illinois. December 10, 1886.)

MASTER AND SERVANT-INJURY TO SERVANT.

Plaintiff was employed in hauling heavy packages of paper from defendant's warehouse to his factory, and it appeared that, at the warehouse door, through which the truck-loads of paper passed, there was a stone sill about an inch and a half higher than the floor, and, in order to make an easy rise over the sill, a plank beveled off at one end was laid so as to surmount the sill; but the plank had become so worn as to leave a joit of half inch abrupt rise, over which the wheels of the truck had to pass. Plaintiff, being engaged in drawing the truck over it, struck the sill. He fell, and several bundles of the paper, weighing 50 pounds each, fell on and injured him. Held, in an action against his employer, if the crossing from the floor to the sill had been used in the same condition that it was in at the time plaintiff was hurt, without accident, and nothing had occurred to indicate danger to men continuing to use it with due care, then the jury should say there was no negligence in leaving such a slight obstruction to the truck-wheels unremedied. To charge the defendant, the danger should appear to be such as to suggest itself to a man of ordinary prudence.

At Law.

Dent & Black, for plaintiff.

Flower, Remy & Gregory, for defendant.

This was an action to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant, by reason of the alleged negligence of the defendant. It appeared from the proof that the defendant was engaged in the manufacture of car-wheels, in which paper was used as one of the materials of such wheels. The paper was stored in a warehouse about 60 feet from the shop where the paper was worked up, and between the warehouse and the shop was a plank platform, across which the paper was carried upon a four-wheel truck, with a frame or a platform about five and a half feet long and three feet wide, extending over the wheels. This paper came in blocks or bundles, weighing about 50 pounds each, and about 25 bundles of paper were piled upon the truck as a load. At the shop-door, through which these truck-loads of paper passed, there was a stone sill, which was about an inch an a half higher than the plank platform, and, in order to make an easy rise from the platform over the sill, a beveled plank was laid down, one edge of which was chamfered off so as to make an inclined plane to surmount the sill, and this plank had become so worn or abraded where it came against the sill as to leave a jog or jolt of not

more than a half inch abrupt rise, over which the wheels had to pass. The plaintiff had been at work for the defendant about a week prior to the accident complained of, and, on the forenoon of the day on which he was injured, he, with two other men, had been engaged in carting paper from the warehouse into the shop. The usual mode of operating the truck was to load it with 25 or 30 bundles of paper, when one of the men took hold of the tongue, and steered the truck and pulled, and the other two pushed, so as to give it the necessary motion to run it into the After dinner, the plaintiff went at some other kind of work, and three other men were set to moving the paper into the shop. For some reason, one of these men was called away from this work, and the plaintiff was directed to resume his place in operating the truck. At the time he was so called the truck had been run partly across the platform, and, from some cause, part of the load had fallen off. These bundles were replaced, and the plaintiff took hold of the tongue, a part of the work he had never before done, and the other two men pushed. As the truck mounted the beveled plank, it struck against the stone sill where the plank was partly worn away, and, either because the plaintiff stumbled, or did not strike the sill squarely with both wheels at the same time, he fell down; and, the motion of the truck being stopped, some of the bundles of paper fell off the truck, striking the plaintiff, and producing the injuries complained of.

BLODGETT, J., (charging jury.) An employer is bound to furnish his employe with safe and proper means and appliances for doing the work which such employe is set about, but he does not become a guarantor of the safety of his men. When he has made reasonable provision for their safety, such as an ordinarily prudent man would make for his own safety if he were doing the work himself, he has, as a rule, performed his duty to his employe or servant. He is not bound to anticipate and provide against accidents to his men which are not apparent, and do not become apparent until after the accident has happened. What I mean is that the condition of the implements or the premises must be such as to suggest to an ordinarily careful man that there is danger before an employer can be charged with negligence in not providing against it. If this crossing from the platform to the sill had been used in substantially the same condition that it was at the time the plaintiff was hurt without accident, and nothing had occurred to indicate that there was any peril to men in continuing, with due care, so to use it, then you can properly say that there was no negligence on the part of the defendant in leaving this slight obstruction to the truck-wheels. The danger must be such as to suggest itself to a man of ordinary prudence and care for himself and others, so that when the attempt is made to run a truck, loaded as this was, over such a route, such a man would say, "This is dangerous," before the defendants should be charged with negligence. If you find from the proof that it unnecessarily endangered the men engaged in moving these truck-loads of paper to require or allow the truck to pass over this jolt at the shop door-sill, and that an ordinarily prudent and careful man would have foreseen such danger, then you can properly find the defendant guilty of the negligence charged; while, on the contrary, if you find that the accident to the plaintiff was not such a one as a man of ordinary prudence would have foreseen and guarded against, then you can properly say that the defendent is not guilty of the negligence charged.

PERKINS v. ROBERTSON.

(Circuit Court, S. D. New York. February 11, 1887.)

Customs Duttes—Duty on Crop-Ends of Steel Rails—Unwrought Metals.

The tariff act of 1883, Schedule C, metals, (22 St. U. S. 497-501,) providing a duty on "steel not specially enumerated or provided for in this act," and on "mineral substances in the crude state, and metals unwrought, not specially enumerated or provided for in this act," the plaintiff imported the crop-ends of steel rails, being the rough, ragged, and imperfect ends of the rails when first rolled, cut off to make perfect rails, with square and even ends, and defendant, as collector, exacted duty on them as manufactures of steel not specially provided for. Which was the same as that on steel not specially provided for. Held, the rails should have been classified as metals unwrought, it appearing they were a mere surplus of metal not made into anything. The classification should be with the class which is more specific, and "unwrought steel" is more specific than "steel."

Action to Recover Duties Paid.

J. Langdon Ward, for plaintiff.

Henry C. Platt, Asst. U. S. Atty., for defendant.

WHEELER J. In Schedule C, metals, of the tariff act of 1883, there are many specific provisions for duties on steel in ingots, blooms, bars, and sheets, and many other forms ready for manufacture, and on many manufactures of steel, and partly of steel; a provision for "steel not specially enumerated or provided for in this act;" a provision for "manufactures, articles, or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, copper," etc.; and a provision for "mineral substances in a crude state, and metals unwrought, not specially enumerated or provided for in this act." 22 St. 497-501. The plaintiff imported the crop-ends of steel rails, which are the rough, ragged, and imperfect ends of the rails when first rolled, cut off to make perfect rails, with square and even ends. The defendant, as collector. exacted duty on them as manufactures of steel not specially enumerated or provided for, which was the same as that on steel not specially enumerated or provided for. The plaintiff protested that they should be classified as metals unwrought. On the trial by jury, the plaintiff's evidence tended to show that such crop-ends are principally used for remelting; the defendant's, that some of them are cut lengthwise into bars for use in making various articles. On instructions from the court, in substance, to return a verdict for the plaintiff if these crop-ends were a

mere excess of the material for steel rails left over after their manufacture, not suitable for use without being further wrought, and to return a verdict for the defendant if they were otherwise, the jury returned a verdict for the plaintiff, and the defendent moved for a new trial. On this motion the argument for the defendant, in substance, is that the crop-ends were steel, and subject as such to the duty laid upon them, without reference to their being an excess of the crude material, or their suitability for use as they were. They were in fact steel, according to all the evidence, and this argument is well founded, unless they are otherwise specially enumerated and provided for as metals unwrought. They are not, on the finding of the jury, manufactures, articles, or wares composed wholly or in part of steel; for such things would be made of steel, and these crop-ends are a mere surplus of metal not made into anything. The classification falls between steel not otherwise specially enumerated or provided for, and unwrought metals not otherwise specially enumerated or provided for. It belongs to the class which is most specially enumerated or provided for. Steel is a metal, and unwrought steel is more specific than steel; for the latter would include both that which is wrought and that which is unwrought, while the former would be confined to that which is unwrought only. And "wrought," within the meaning of the tariff laws, is understood to be applied to things made suitable for use. Downing v. Robertson, Sup. Ct. U.S. It may be suggested that unwrought metals is a term which includes the whole range of metals when unwrought, and for that reason is broader than steel; but that construction would make the statute mean as if it read, "unwrought metals other than steel," and these statutes have to be taken exactly as they are. Motion denied.

In re Adams, Bankrupt.

(District Court, D. New Jersey. January 18, 1887.)

 BANKRUPTCY — DISCHARGE — PARTNERSHIP—PROCEEDINGS TO ANNUL—JURIS-DICTION.

Three members of a copartnership, of which A. was the fourth member, were adjudged bankrupts on their own petition, as was the firm. A.'s name was signed to the petition, but without his consent, and, in composition proceedings which resulted in a resolution assented to by creditors and approved by the court, and a settlement with creditors on the basis thereof, it was expressly stated that A.'s individual assets and debts were not included in the schedules. Afterwards, in involuntary proceedings in another district, where in A. resided, he was adjudged a bankrupt, and was granted a discharge. In proceedings under Rev. St. U. S. § 5120, to annul the discharge, the jurisdiction of the court to entertain the involuntary bankruptcy proceeding, and to grant the discharge, was denied by creditors. Held that, notwithstanding irregularities in the voluntary proceeding, and in the composition effected therein, these irregularities could not be availed of at this stage of the present proceeding, and afforded no ground for annulling the discharge for want of jurisdiction to grant it.

2. SAME-ACTS OF BANKRUPT BEFORE DISCHARGE.

A discharge in bankruptcy cannot be annulled under Rev. St. U. S. § 5120, where the proofs only go to such acts of the bankrupt as were shown on his

examination previous to his discharge.

3. Same—Distribution of Assets—Partnership and Individual Creditors.

Three of the four members of a copartnership, and the copartnership itself, settled with creditors under a composition in a bankruptcy proceeding to which the fourth member, A., was not a party. Afterwards, in another proceeding, A. was adjudged a bankrupt. Held, that the firm creditors were not entitled to share with A.'s individual creditors in the distribution of the fund realized from A.'s individual estate, except the holders of certain notes made by the firm, but on which A. was liable as an indorser.

In Bankruptcy.

Eugene L. Bushe, for North River Bank and Candler, Cobb & Co. G. A. Seixas and A. R. Dyett, for Importers' & Traders' Nat. Bank. Gratz Nathan, for Irving Nat. Bank and John E. Borne & Co. Wm. Forse Scott, for bankrupt.

NIXON, J. A statement of the various proceedings heretofore had in this case will be necessary in order to intelligently consider the questions now pending. An involuntary petition in bankruptcy was filed in this court against Jay L. Adams, April 25, 1878, on which he was adjudged a bankrupt on the eleventh of June following. An application for his discharge was made on the tenth of May, 1879, notice of which was duly given to all his creditors. Eight of these, to-wit, the American Exchange National Bank, Importers' & Traders' National Bank, Mercantile National Bank, and the Irving National Bank, all of the city of New York, the Hudson County National Bank of Jersey City, the Dolphin Manufacturing Company of Paterson, Alonzo Follett, and George A. Alden & Co., appeared and filed specifications against a discharge; but none of them followed up their specifications with any evidence, and on the fifteenth of November, 1881, the discharge was duly granted. Under the provisions of section 5120 of the Revised Statutes, several of the creditors, within two years after the date of the discharge, made application to the court by petition to annul the same, as follows: The North River Bank of the city of New York, on October 31, 1883; John W. Candler, Albert A. Cobb, George C. Barrett, and Nathan A. Frye, formerly trading as Candler, Cobb & Co., on November 3, 1883; the Importers' & Traders' National Bank of New York, on November 7, 1883; John E. Borne & Co., on November 10, 1883; and the Irving National Bank, on November 14, 1883.

All the petitions alleged, generally, want of jurisdiction in the court to grant the discharge; and also specified certain fraudulent acts of the bankrupt which authorized the creditors to have the discharge vacated and set aside under the provisions of section 5110 of the Revised Statutes. The bankrupt put in a demurrer to the allegations of the want of jurisdiction in the court, and answered to the specifications of fraudulent acts. The demurrer was overruled, and a reference ordered to a commissioner to take the proofs.

Pending the reference, the assignee also filed a petition, setting forth

that the proofs of claims then filed against Jay L. Adams individually amounted to \$77,570.83, and against the firm of Jay L. Adams & Co. to the further sum of \$202,096.70; that the firm of Jay L. Adams & Co. was composed of John I. Adams, William H. Renaud, Edward C. Adams, and the said Jay L. Adams, and that said firm carried on business in the city of New Orleans under the name of John I. Adams & Co., and in the city of New York under the name of Jay L. Adams & Co.; that, prior to the institution of proceedings in this court, bankruptcy proceedings had been instituted in the district court of the United States for the district of Louisiana, at New Orleans, by three members of the firm of John I. Adams & Co., in the following method: John I. Adams, William H. Renaud, and Edward C. Adams filed a voluntary petition to have themselves and Jay L. Adams, and the copartnership estate of John I. Adams & Co., adjudicated bankrupts, and that one of the parties to the petition signed the name of Jay L. Adams thereto without any consent from him; that such proceedings were had under said laststated petition that the said firm, and the individual members thereof, except said Jay L. Adams, were adjudicated bankrupts, and a composition was entered into by the said John I. Adams, Renaud, and E. C. Adams, and the estate of the firm, and of said three members thereof, was thereafter administered, and said composition was carried into effect; that, at the time of said proceedings, Jay L. Adams was a resident of the state of New Jersey, but carried on business in the city of New York in his individual name, and also in the name of Jay L. Adams & Co., under which firm name merchandise was purchased for the firm of John I. Adams & Co., in New Orleans; that there was no adjudication against Jay L. Adams individually in New Orleans, nor against him as a member of the firm of John I. Adams & Co; that the claims filed in these proceedings as indebtedness of the firm of Jay L. Adams & Co. were not proven in the proceedings in New Orleans, except such proofs of claims as are indebtedness of John I. Adams & Co., and bear their signature indorsement; that the principal place of business of the firm of John I. Adams & Co. was in New Orleans, and the only business done by Jay L. Adams & Co. in New York was the purchase of merchandise for the New Orleans house, and also the accepting of accommodation drafts drawn by the firm of John I. Adams & Co. on Jay L. Adams & Co., which drafts were negotiated by Jay L. Adams & Co. in the city of New York, and otherwise raising money in New York city for the firm of John I. Adams & Co.; that the petitioner has now on deposit, to the credit of this proceeding, the sum of about \$41,000, which has been entirely derived from the individual estate of Jay L. Adams. The assignee then prays for instructions whether the said fund is to be distributed, without distinction, between the individual creditors of the bankrupt Jay L. Adams, and the creditors of Jay L. Adams & Co., or whether in such distribution the individual creditors of Jay L. Adams are entitled to be first paid.

To this petition the several creditors who had before petitioned the court to set aside the discharge and the adjudication in bankruptey

against Jay L. Adams filed separate answers, setting up substantially these proceedings pending before the commissioner, and asking the court to take no action upon the question of the proper distribution of the assets until after the other questions were heard and determined.

Several matters are thus presented for consideration:

1. Has this court jurisdiction over the bankrutpcy proceedings begun against Jay L. Adams individually? Whatever would have been the course if such an inquiry had been instituted when the proceedings were commenced, I am clearly of the opinion that it is now too late to allow these petitioning creditors to raise the question here. I have examined the record of the bankruptcy proceedings in the case of John I. Adams & Co. in the district court of the United States for the district of Louisi-It indicates great irregularity. The original petition for adjudication was a voluntary one, and purports to have been signed by all the members of the copartnership, to-wit, John I. Adams, William H. Renaud, Edward C. Adams, and Jay L. Adams; but the name of the lastmentioned member of the firm was not signed by himself, or, as it seems, with his knowledge and consent. It was annexed to the petition by John I. Adams, who claimed authority for so doing. The schedules at the end of the petition, marked "A," contained a statement of all the debts of the partnership, and the names and places of residence of their creditors. The Schedule B was an inventory of the estate of the firm. The remaining schedules, respectively marked "C," "D," "E," "F," "G," and "H," contained a statement of the individual debts and individual estate of the partners, John I. Adams, William H. Renaud, and Edward C. Adams. Without electing an assignee, a petition was at once filed for a meeting of creditors to consider an offer for composition, and an express statement was made therein that the individual assets and the individual debts of Jay L. Adams were not included in the schedules. The evident design of the proceeding was to secure for themselves, from their partnership and private creditors, a release, by composition, from their partnership and private debts. They were successful in this, so far as the action of the court was concerned. It approved of a resolution, signed by the requisite number of the creditors, to grant to them a release on the payment of 50 cents on the dollar for all their indebtedness, partnership and individual; they being allowed to retain the possession and exercise control of all the property. Nothing further appears to have been done, except that the court, some years afterwards, upon the application of the assignee of Jay L. Adams, appointed by this court in the bankruptcy proceedings here, dismissed all the proceedings there Whether a composition obtained under such circumstances would operate as a discharge, if the creditors of the partnership of John I. Adams & Co., and of the three individual members of the firm, should prosecute for the residue of their claims, it is unnecessary for me to determine. But the individual assets of Jay L. Adams were not in that court. nor were his individual debts in any manner paid or satisfied by the composition, and I can perceive no good reason why such irregular proceedings should be allowed to interfere, at this late day, with the jurisdiction of this court in the distribution of his individual assets and estate, in satisfaction of the claims of his private creditors.

- 2. Have the petitioning creditors made out a case to warrant the court in annulling the discharge heretofore granted to the bankrupt? Section 5120 of the Revised Statutes prescribes the manner of annulling a discharge by a creditor who takes steps to contest its validity at any time within two years after it has been granted, on the ground that it was fraudulently obtained. The application to the court shall be in writing, and shall specify which in particular, of the several acts mentioned in section 5110, it is intended to prove against the bankrupt, and shall set forth the grounds of avoidance. In his proofs the creditor is limited to the particular acts specified, and no allegation will be considered outside of the acts named in the said section. On the hearing, the court must be satisfied of two things: (1) That the fraudulent acts had been committed by the bankrupt before the date of the discharge; and (2) that the creditor had no knowledge of the same while the application for discharge was pending. After a careful consideration of the evidence to sustain the fraudulent acts alleged in the petitions, I am satisfied that the proofs in the case only go to such acts as were shown on the examination of the bankrupt previous to his discharge. All the creditors of the bankrupt are parties to the proceedings, and when an application is made for the bankrupt's discharge, and his examination takes place, the creditors must then oppose the discharge for the fraudulent acts discovered by his examination; and, if they abandon their opposition, they are afterwards estopped from attempts to annul the discharge, except upon grounds afterwards discovered, and not known or found out on the examination. I am of the opinion that the discharge ought not to be annulled upon the case presented.
- 3. What creditors are permitted to participate in the distribution of the assets? This is an individual proceeding against Jay L. Adams, and his individual creditors have the first lien upon the fund. The partnership creditors agreed to the composition, and have partaken of the fruits. However irregular those proceedings, they will not be allowed in these proceedings for the distribution of the private estate of the bankrupt, as against his individual creditors, to impeach their valid-It appears, however, that, as to several creditors, the same debt is due from the partnership and from Jay L. Adams individually. Several of them were proved on notes of the partnership for which Jay L. Adams is liable as an indorser. In such cases, the creditor has two sources to look to for the payment of his debt, and has the right to proceed against both parties until his debt is paid. These creditors are entitled, therefore, to share with the individual creditors of Jay L. Adams in the distribution of the fund in the assignee's hands.

The petitions to vacate the discharge, and annul the proceedings in this court, must be dismissed, and the assignee will proceed with the distribution of the assets according to the views above expressed.

UNITED STATES v. HACKETT and others.

(Circuit Court, N. D. California. January 31, 1887.)

1. COURTS - OF UNITED STATES - DISTRICT OF CALIFORNIA - DIVISION OF DIS-

TRICT-INDICTMENT.

Under act of congress of August 5, 1886, dividing California into two judicial districts, and providing, in section 11, that "all offenses heretofore committed in the district of California shall be prosecuted, tried, and determined in the same manner, and with the same effect, to all intents and purposes, as if this act had not been passed," the old district and circuit courts for the district of California are practically continued in existence for the purpose of prosecuting offenses antedating the passage of the act, and an indictment for such an offense found by a grand jury of the old district or circuit court, after the passage of the act, is properly found.

2. Same—QUALIFICATION OF JURGES—APPLICATION OF STATE LAW.

In appyling Code Civil Proc. Cal. § 198, establishing, as one of the qualifications of a juror, that he shall have been "assessed on the last assessment roll of the county, or city and county, on property belonging to him," to the United States courts, under the act of congress adopting as the qualification of jurors in the United States courts those prescribed by law in the courts of the state, it is sufficient that the juror pays taxes upon property assessed upon the assessment roll, although assessed in the name of another.

Motion to Quash Indictment, and Plea in Abatement.

The proceedings in this case were remitted from the district court to the circuit court for decision. The motion to quash was upon the ground that the act of congress of August 5, 1886, dividing California into two judicial districts, abolished the old district of California, and as this indictment was found by a grand jury of the old district court, after the passage of the act redistricting the state, that it was not properly found. The plea in abatement was on the ground that two of the grand jurors who found the indictment did not possess one of the qualifications for jurors required by the statutes of California, viz., that they were not on the last assessment roll for any county in the district, and therefore the finding of an indictment by the grand jury was void. The act of August 5, 1886, provides for the organization of the Northern and Southern districts, and section 11 of the act reads "that all offenses heretofore committed in the district of California shall be prosecuted, tried, and determined in the same manner, and with the same effect, to all intents and purposes, as if this act had not been passed."

The Code of Civil Procedure of California, § 198, reads as follows:

"A person is competent to act as a juror if he be (1) a citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year, and of the county, or city and county, ninety days, before being selected and returned; (2) in possession of his natural faculties, and of ordinary intelligence, and not decrepit; (3) possessed of sufficient knowledge of the English language; (4) assessed on the last assessment roll of the county, or city and county, on property belonging to him.

"Sec. 199. A person is not competent to act as a juror (1) who does not possess the qualifications prescribed by the preceding section; or (2) who has been convicted of malfeasance in office, or any felony or other high crime."

John T. Carey, U. S. Atty., for plaintiff.

Wm. Hoff Cook, for defendants.

HOFFMAN, J., (orally.) In regard to the question of the regularity of the proceedings in the case of U. S. v. Hackett, we have to accommodate ourselves to this change of district, and carry into effect the obvious provisions of the statute which was intended to secure that change of district, in criminal cases, and see that offenders shall not secure impunity by reason of the absence of any tribunal to try them. Inasmuch as every offender has a right to be tried by a jury of the district in which the crime was committed, which district shall previously have been ascertained by law, it is plain that a jury of the Northern district could not try an offender who has committed a crime while the district comprised the whole state, neither could a jury of the Southern district try him.

The matter has been more than once submitted to me, and I have gone over all the grounds and reasons which seem to render it necessary that the court should have a sort of dual aspect; that for the purposes of subsequent offenses,—that is, offenses subsequent to the passage of the act of August 5, 1886,—the court should be purely and simply a district court for the Northern district; but for the purposes of trying offenders who had been indicted, or whose offenses had been committed, before the passage of the act, it was necessary to keep alive the district court of the district of California, (the same observations apply to the circuit court,) in order that a court might be organized, and be in existence, competent to call a jury from the body of the district where the crime was committed. It is unnecessary to repeat the arguments. sufficient to say that the act in terms provides that, for offenses committed before the passage of this act, all shall be prosecuted and tried in the same manner as if this act had not been passed; making the act. as we consider, non-existent for the purpose of trying those cases. was obviously necessary to do this to effect the purpose, and the only question is, have they succeeded? Has congress carried out that plan? We are of the opinion that the language used is sufficient. more emphatic and comprehensive phraseology could have been used to carry out that object. They had it in their mind,—the danger of offenders in the category I have stated escaping punishment altogether,—and so they provided, in terms, that for such purposes it should be taken and considered that the act had not been passed. The result is that the district court for the district of California, and the circuit court for the district of California, may continue to sit, and summon jurors from the whole district, for the purpose of trying those offenders. We are therefore of opinion that the course adopted, though anomalous, and open to some inconvenience, is the only course to be adopted, unless we are willing to say that all indictments pending in either court, and all offenses committed before the passage of the act, must, the one be discontinued and fail for want of jurisdiction, and the other fail because the act secures the impunity of offenders. This should be avoided if possible, and we suppose it has been done.

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With regard to the other question. The question raised is whether a juror, either petit or grand juror, having been challenged, must be excluded if it appear that his name is not upon the assessment roll of some county in the state. The general provision of the law, from the earliest organization of the government regulating the qualifications of jurors, adopts the qualifications and exemptions of jurors in the United States courts, such as are created by the state law regulating the impaneling of juries in the highest judicial tribunals of the state. The question is whether, under that statute, it is a necessary qualification of every juror. If the grand jury be impaneled before the person has been held to answer, he might avail himself of the right, if they find an indictment, by a plea in abatement, or a motion to quash; and if it is indispensable, all indictments must fail, provided a motion to quash be made, and advantage be taken of this defect in the proper way. The law seems to be a tradition of the common law, founded upon what sense or reason I am unable now to imagine. I think an investigation of it would disclose some reason which is not very apparent; but it appears that, if one disqualified juror be included in the jury, the indictment fails, for the jury, by reason of that defect, is no jury; and though, as in this case, nineteen persons were present, and voted unanimously for an indictment, while only sixteen is necessary to constitute a quorum, and twelve to find a bill, yet, if two, or even one, juror is found to be disqualified. when it is obvious that his disqualification or participation in the vote would not have affected the result, nevertheless the indictment fails, because the jury that finds it is no jury, and the indictment is no indictment. That view of the common law seems to have been adopted by many authorities in the states, and in the federal courts by Mr. Justice Woods in the cases that have been cited.

The phraseology of the California statute establishing the qualifications is certainly very clumsily drawn, so far as it intended to effect the substantial object. No doubt the general idea was to secure that juries should be composed of substantial, tax-paying citizens, who had some stake in the community, some interest in the state, and who, from the possession of property, might be deemed sensible of their responsibilities, and qualified to discharge the duty imposed upon them. quires, however, that the juror should be assessed on the assessment roll of the county from which he is called, for property belonging to him. I am not aware that any very distinct decisions of the supreme court of this state upon the construction of that requirement has been enunciated. It would seem, however, from the phrase, "he must be on the assessment roll," that he can be on it in only one sense, and that is by name; so that his name must be on it, and he be assessed for property belonging to Of course, it must be his own property; otherwise he has not the qualification of a tax-payer; so that an executor or guardian, or a trustee without interest, would not fulfill the requirement nor answer the object of the law. But if his name is required to be on the roll, it opens the door to many evasions of jury duty, and really frustrates to a great extent the object of the act. For example, if two persons, having confi-

dence in each other, should say, "I will transfer my property to you, nominally, and you to me," and let each be assessed for the property standing in his name, he could with truth say that he is a tax-payer, because he pays his taxes, but his property would not be in his name. It would be in the name of his friend, and, vice versa, the friend's property would be in his name, and thus they would both escape. So, too, many persons with large fortunes may not have any property except property in stocks; and a man owning a large mass of stock,—gas or water stock, or mining stock,—of great value, might be, in effect, a millionaire, and yet, inasmuch as all his property is in the name of the company, his name would not be on the assessment roll, and he would escape. So, a man may be a member of a firm, owning a large amount of property, real and personal, but standing in the firm name, and yet, though he be the principal partner, his name might not appear upon the roll, but only the name of the association or joint stock company. He would be a tax-payer, having all the substantial qualifications of a juror, and yet he might be challenged because his name was not on the assessment roll: the party assessed being in the one case a corporation, and in the other case a firm. It is obvious that to adhere to a literal construction of the act, if that be the true construction, would in many cases defeat its obvious and rational purpose.

It is believed that, when congress required that jurors should have certain qualifications, they meant that they should substantially possess them. The object the act sought to attain should be attained by the adoption of such rules, and such interpretation of that statute, as will attain that object, and not a technical and literal construction, which will, in a great measure, defeat it. It is impossible for us literally to follow the statute, for the statute, as construed according to its terms, requires that every juror qualified to serve as a grand or petit juror should be assessed, on the assessment roll of the county from which he is summoned, for property belonging to him. As was admitted at the bar, and as I suppose to be the fact, he may own property in every other county in the state, to any amount, but, if he owns none in the county from which he is summoned to serve as a juror, he is disqualified. course, assuming this to be the interpretation of the statute, it would exclude the juror from serving in a court that draws its jury from the body of the district, which until recently included the whole state, and now includes a very large number of counties; and we have therefore been obliged to deviate from the literal terms of the statute from very necessity, and we have held heretofore that it was sufficient if the juror to be drawn appeared on the assessment roll of any county in the state, or in the district, for property belonging to him. It seems not a very much greater departure, to avoid the evils, anomalies, and incongruities which result from a literal adoption of the rule, to say, further, that the act of congress was intended to secure that a person should be a tax-payer for property owned by him, and that it will be sufficient if it appear that he does pay taxes, notwithstanding that his property may be in the name of another person, or in the shape of interests in a corporation or

a firm, which corporation or firm duly appears on the assessment roll. In the case submitted to us, and from the facts as developed by an examination of the juror, it appeared that by accident, or by reason of intended absence, the juror asked his brother to hand in his statement, and his brother's name appears on the assessment roll, but it is for property long since owned by the juror, and upon which he pays taxes, his brother merely appearing as his nominal representative. So, in the other case, where the juror was about to be absent, and could not hand in his statement, his wife did it, and the property was assessed to her. have therefore thought that, as we have held that it is impossible to construe the requirement of the statute literally we must adapt it to the circumstances of the case, and the circumstances of the district and circuit courts for this district; endeavoring to satisfy the requirement of the law, and pursue it substantially, to attain its great end, and to give it its practical force, by holding that it is sufficient if it appear that the juror is a tax-payer, a substantial citizen, who contributes to the support of the state,—who has a stake and an interest in its welfare that would presumably give him the qualifications necessary to discharge so high a function as that of a juror.

The view is somewhat confirmed by the idea that the state law itself does not seem to consider that, in the case of grand jurors, the qualification must necessarily exist, or its absence be made the ground of objection; for, enumerating the challenges to grand jurors, it mentions a number,—seven, I think,—and provides that these shall be the only grounds of challenge, and among those the challenge for the reason that the juror's name is not upon the assessment roll is not mentioned. legislature, therefore, have refused to extend the general terms to the case of grand jurors,—the case immediately in hand,—for it absolutely excludes that disqualification as a ground for challenge. It does retain it in the case of petit jurors, and there would be no very great inconvenience if we were to adopt it there, because the prisoner is always present, and, if he does not then make the objection, it is deemed to be waived; but with regard to grand jurors the case is different, because the grand jury often finds bills against people who are not arrested, and may not be even suspected, and certainly not held to answer, at the time the grand jury is impaneled; and to allow them, when they have been arrested and held to answer, to bring the grand jury into court, and subject them to an examination as to their qualification, is very inconvenient, and, as I believe, in the state courts, is fertile in those delays which have brought scandal upon the administration of justice. Judge Sabin and myself were of opinion—I have not had an opportunity to confer with the circuit judge—that as the act provides that the jurors in the United States courts shall have the same qualifications as those established by law in the state courts, that, if a person is a tax-payer, and possesses the qualifications of being a contributor to the support of the state, and a substantial citizen, owning property, which property is assessed upon the assessment roll, we may dispense with a literal compliance with the law that his name should appear upon the assessment roll. I think it would

be sufficient if it appears that he is so assessed; and it appears that he is so assessed, and so pays his assessment, upon property assessed practically against him, but appearing on the assessment roll in the name of a corporation, or a firm, or any other person who may hold the title nominally, and whose name is alone found on the assessment roll.

The plea in the abatement is overruled, and the motion to quash de-

nied.

Sabin, J., concurring.

SAWYER, J. I fully concur in the opinion delivered by my associate.

HOLLIDAY and others v. PICKHARDT and others.

(Circuit Court, S. D. New York. January 29, 1887.)

1. Patents for Inventions—Sulphonated Rosaniline—Letters Patent No. 250,247.

In letters patent No. 250,247, dated November 29, 1881, issued to John Holliday for a sulphonated compound of rosaniline, the process claim only advises the treatment of the anhydrous chloride of rosaniline with fuming sulphuric acid, gauging from 69 to 70 degs. Beaume, and does not make the employment of these specific kinds of rosaniline and fuming sulphuric acid essential to the process, and the claim must therefore be construed as embracing the conversion of the rosaniline by means of fuming sulphuric acid, without respect to the anhydrous condition of the rosaniline, or the peculiar strength of the fuming acid; and, in view of the state of the art of sulphonating dyestuffs, such claim is void for want of novelty.

2. Same—Letters Patent Nos. 250,247 and 250,201—Interference.

Held (1) that John Holliday was the prior inventor of the process by which the tri-sulpho compound of rosaniline is produced; (2) that the first claims (for the products) of letters patent No. 250,247, dated November 29, 1881, issued to John Holliday, and No. 250,201, of the same date, issued to Heinrich Caro, are interfering claims; (3) that the second claims (for the process) are not interfering claims; (3) that the second claims (for the process) are not interfering claims; (4) that the first element the Caro is the Caro interfering claims; (5) that the second claims (for the process) are not interfering claims; (4) that the first element the Caro is the Caro terfering claims; (4) that the first claim of the Caro patent is void as against the first claim of the Holliday patent; and (5) that the second claim of the Caro patent is invalid, because Holliday was the prior inventor of the process.

8. Same—Acids—Reference to Beaume's Hydrometer Scale—Sufficiency. A reference in letters patent to the Beaume hydrometer scale, for the purpose of determining the density of acids, alkalies, and many other liquids, is

sufficiently accurate as a gauge of their strength.

4. SAME—ESTOPPEL—INTERFERENCE—PRIORITY OF INVENTION—WANT OF NOV-

Where two applications are made for letters patent for the same process, and interference is declared by the primary examiner, and one of the claimants declared to be the prior inventor, but notwithstanding letters patent issue to each claimant, in a suit by the claimant who was declared to be the prior inventor to vacate the patent granted to the other claimant, the defendant is not, by attempting to defeat the plaintiff's application for letters patent on the ground that he was the prior inventor, estopped from assailing the validity of the patent for want of novelty.

In Equity.

E. N. Dickerson and E. N. Dickerson, Jr., for plaintiffs.

B. F. Thurston, Livingston Gifford, and J. Van Santvoord, for defendants.

Wallace, J. This suit is brought to restrain infringement of letters patent No. 250,247, dated November 29, 1881, issued to John Holliday, assignor, etc., and also to vacate letters patent No. 250,201, of the same date, now owned by the defendants, issued to Heinrich Caro, assignor, etc. Both patents claim a chemical product as a new article of manufacture, and the process by which it is produced. The product claimed in each is a coloring matter having specified properties or characteristics, and the process claimed in each relates to the conversion of rosaniline into a sulpho-acid, which is capable of being used in an acid-dye bath, and, when so used, will retain the original rosaniline or magenta color.

The application for the Holliday patent was filed in the patent-office, December 24, 1877, and the application for the Caro patent was filed March 28, 1878. Interference between the two applications was declared July 2, 1878, and, after the taking of proofs, priority was awarded, by the primary examiner, to Holliday, February 11, 1881. Subsequent proceedings took place in the patent-office to ascertain, among other things, whether the specimen product filed by Holliday at the time of his application was the dye-stuff in controversy, and whether such dyestuff could be produced by following the process of the Holliday application; and a decision resulted in favor of Holliday. An appeal was taken from the decision of the primary examiner, by Caro, but this was withdrawn before the decision of the appeal to the commissioner of patents. No material amendment was subsequently made in the Caro application; and the action of the patent-office in issuing a patent to each applicant is denounced by the plaintiffs as unwarranted, and is justified by the defendants upon the hypothesis that the applications were, in fact. for different inventions.

The proofs sustain the findings of the patent-office that Holliday was the prior inventor of the process and product of his patent. They also sustain the decision of the patent-office that a dye-stuff having the properties specified in the Holliday patent can be produced by following the

description of the process in the patent.

The primary question in the case is whether the product claim of the Caro patent is for the same new article of manufacture embraced in the product claim of the Holliday patent, and whether the process claim in each patent is for the same invention. The material parts of the Holliday patent are as follows:

"The coloring matter which I operate upon is known commercially as 'rosaniline,' 'fuchsine,' 'magenta,' or 'aniline red,' these being classed as aniline reds. It is well known that, owing to the character of rosaniline, the coloring matter thereof cannot be employed, either alone, or mixed with other coloring matters, where the process of dyeing or printing requires the employment of an acid or acid mordant. I have discovered that the aniline reds, before referred to, may be converted into new coloring matters, still retaining the same color, possessing acid properties, and thus be rendered capable of being employed in the presence of acids or acid mordants. I submit the before-

mentioned rosaniline, separately or conjointly, to the action of sulphuric acid in such a manner as to convert it into a sulpho-conjugated rosaniline, the same being a new article possessing properties different from any rosaniline ever produced before my invention. In order to make the desired conversion, I use about ten pounds of rosaniline, or its salts, (by preference anhydrous chloride of rosaniline,) and dissolve it in about fifty pounds of fuming sulphuric acid. I operate, either at the ordinary or at a moderate temperature, until the conversion into the new coloring matter or compound is complete. The desired result may be ascertained by testing a portion of the mixture, and, when the coloring-matter contained therein is found to be soluble in caustic alkali, the operation may be considered at an end. * * I have found that in making combinations such as described it is well to employ fuming sulphuric acid, gauging from 69 to 70 degrees Beaume.

"I claim as my invention (1) the sulpho-conjugated compound of rosaniline, possessing the properties specified, as a new article of manufacture; (2) the method herein specified of manufacturing the within-described sulpho-

conjugated compound of rosaniline, substantially as set forth."

The material parts of the Caro patent are as follows:

"This invention relates to a dye-stuff or red coloring matter, which is obtained by acting upon fuchsine with crystalizable sulphuric acid, commonly called 'anhydrous sulphuric acid,' by which is formed a tri-sulpho compound of rosaniline. The dye-stuff called 'fuchsine' is also known under the names of 'roseine,' 'magenta,' and 'ruby.' In carrying out my invention, I take ten kilograms of fuchsine, which has been dried at 110 degrees centigrade, and add thereto, little by little, forty kilograms of crystalizable sulphuric acid, commonly called 'anhydrous sulphuric acid,' under constant agitation, while the temperature of the mixture must not be allowed to sink below 120 degrees centigrade, nor to rise above 170 degrees centigrade. A sample of the mass is supersaturated, from time to time, with an alkali, such as sodallye, and, if a clear yellowish solution is produced without a precipitate, the conversion is completed. The thick fluid mass which is obtained by this conversion is easily soluble in water, and, after it has been dissolved, it is treated with milk of lime. * * *

"The characteristics of the new dye-stuff or coloring matter prepared from fuchsine, in the manner above described, are as follows: First, by a surplus of alkali, its aqueous solution is changed from a fuchsine red to a light yellow; second, the dyeing on wool is done in a boiling dye-bath, with the addition of mineral acids, or with acid mordants, such as are commonly used in dyeing or printing; third, it produces on wool nearly the same shades of color which are produced with ordinary fuchsine, from which it is derived; fourth, the color obtained on wool is only changed with great difficulty by strong acids; fifth, this product is the compound whose name, in strict chemical language, is 'tri-sulpho acid of rosaniline.'

"What I claim as new, and desire to secure by letters patent, is, (1) as a new article of manufacture, the dye-stuff or red coloring matter having the characteristics above set forth; (2) the within-described process for producing a new dye-stuff or red coloring matter, by the action of crystallizable sulphuric acid, commonly called anhydrous sulphuric acid, on fuchsine, substan-

tially in the manner set forth."

The testimony of the experts for the plaintiffs, to the effect that, although the descriptions of the process differ in the respective patents somewhat, those skilled in the art cannot fail to recognize their essential identity, and that both processes will produce a tri-sulpho acid of rosaniline, is accepted as established by the proofs; and the proofs demon-

strate, beyond a fair doubt, that this is so, unless an hypercritical and irrational meaning is applied to the descriptive terms of the process of the Holliday patent, and the process is practiced in accordance with such an interpretation.

According to the process of the Holliday patent, the material to be treated is rosaniline or it salts, by preference anhydrous chloride of rosaniline; and this material is to be dissolved in fuming sulphuric acid, preferably gauging from 69 to 70 degs. Beaume, in the proportion of 10 pounds of rosaniline to 50 pounds of sulphuric acid. If the description denotes that the rosaniline to be employed is to be in fact anhydrous, or practically so, and that the fuming sulphuric acid to be employed is to be of such a degree of strength as may be ascertained with practical precision by the reference to the degrees Beaume, it is conceded, substantially, by the expert witnesses for the defendant, that the process is in essentials the process of the Caro patent, and will produce the coloring matter specified in the claim of that patent. As is stated in the original application for the Caro patent, the proportions of the ingredients used, and the temperatures of the operation, admit of a wide range, and depend in a great measure upon the degree of concentration of the acid employed. The final treatment of the sulpho-acid, in accordance with the processes of the patents, which consists in reducing it to the condition of a lime soda or potash salt, and diluting it with a foreign material, for convenience for commercial purposes, is not of the essence of the invention, and does not require consideration. The acid solution of the sulpho compound can be used directly in the dye bath, either alone, or mixed with other colors which will dye in an acid bath.

It seems entirely clear that the rosaniline preferably to be employed is, according to the specification, to be practically anhydrous, when used in the process of conversion. There is no commercial article known as "anhydrous chloride of rosaniline." The language is addressed to those who understand that crystalline substances, like rosaniline, absorb moisture, and must be dried to a proper degree before the residuum will become anhydrous. The term used has no meaning, unless it implies that the rosaniline is to be subjected to the ordinary treatment required to render the article an anhydrous chloride. And it is significant that, when the experts for the defendants undertook to follow the process of the patent to ascertain whether Holliday's process would produce the tri-sulpho acid of rosaniline, they first dried the requisite quantity of fuchsine until it became anhydrous.

It is also plain that, according to the specification of the Holliday patent, the fuming sulphuric acid preferably to be employed is to be of a strength which those skilled in the art can readily determine by the reference to the degrees Beaume, with sufficient accuracy for the practical purposes of the process.

Sulphuric acid, to fume, must contain sulphur tri-oxyde in admixture with the mono-hydrate, and the tri-oxyde is found only in a sulphuric acid of a strength indicated by a specific gravity of 1.835, or above. The strength of fuming sulphuric acid is usually gauged by the weight

or specific gravity of the liquid, and by this test varies, according to the proofs, from about 1.85 to 1.97. One variety of the commercial article was known at the date of Holliday's invention as Nordhausen acid; and this was the article purchased, on different occasions, of dealers, by the experts for the defendants, for the purpose of following the specification of the Holliday patent, and it had a specific gravity of 1.89. The reference to the degrees Beaume is intended to designate the density of the fuming acid according to the Beaume hydrometer scale. Although the original Beaume scale has long been obsolete, reference to that scale, as one for determining the density of acids, alkalies, and many other liquids, are not only common, but are generally employed, in patents and industrial publications; and various tables, based upon the Beaume scale, notably those of Mr. Pemberton and Mr. Elliott, translating the degrees Beaume into corresponding values of specific gravity, are found in the works of especial authority in this country. According to the estimates approved in the "United States Dispensatory," the specific gravity value of 69 degrees Beaume ranges from 1.9031, the lowest, to 1.921, the highest; and the specific gravity value for 70 degrees Beaume, from 1.9291, the lowest, to 1.946, the highest. In view of these facts, which are substantiated by the proofs, the reference to the degrees Beaume denotes, not with precision, but with reasonable accuracy, that the sulphuric acid preferably to be employed is to be of a strength ranging from 1.9 to about 1.95 specific gravity; and the very elaborate arguments made by the experts for the defendants, based upon the facts they adduce, to show that the hydrometer test, according to the degrees Beaume, is not scientific or exact, as a gauge of the strength of acids, and that the reference in the specification has no definite meaning, have no merit but ingenuity.

The first claim of each patent being for a coloring matter having specified characteristics, these claims interfere, whether the sulphonated compound of Rosaniline of the Holliday patent is a tri-sulpho acid, or a tetra-sulpho acid. Each dyes in an acid bath, and produces the same shade of color as the original fuchsine, and thus enables the dyer to apply to fabrics in an acid bath the exact shade of color which had been previously obtained by the use of fuchsine in neutral or alkaline baths. and accomplish what was never before done. If, in the process of the Holliday patent, furning sulphuric acid of a strength less than 1.89 specific gravity is used, the proofs indicate that the product will be a mono or di-sulpho acid, although evidence is produced for the plaintiffs to show that an acid having a specific gravity of 1.88 is of sufficient strength to produce the tri-sulpho acid. Such a product does not have the properties which are required to identify the new article of the claims of the It does not dye the original fuchsine color, but tinges that color with a purplish shade.

The specification of the Holliday patent advises the treatment of the anhydrous chloride of rosaniline with fuming sulphuric acid, gauging from 69 to 70 degs. Beaume, but does not make the employment of these specific kinds of rosaniline and fuming sulphuric acid essential to

It describes the ingredients and the process in terms sufthe process. ficiently full, clear, and exact to enable those skilled in the art to which the invention appertains to make and compound a coloring matter which will possess the characteristics specified in the first claim. But the specification authorizes a claim for the process of sulphonating rosaniline with fuming sulphuric acid in given proportions, without regard to the anhydrous condition of the rosaniline or the density of the sulphuric acid employed, and the terms of the process claim are commensurate with such a process. The process claim must therefore be construed as embracing the conversion of the rosaniline by means of fuming sulphuric acid, without respect to the anhydrous condition of the rosaniline, or the

peculiar strength of the fuming acid.

Thus construed, the process claim is void for want of novelty. The art of sulphonating dye-stuffs by combining them with the elements of sulphuric acid, and converting them into sulpho-acids, is very old. The proofs show that prior to the date of the invention of Holliday it was well known in the art that, owing to the character of unsulphonated indigo, the coloring matter thereof could not be employed, either alone or mixed with other coloring matters, where the process of dveing or printing required the employment of an acid or acid mordant; and that the indigo, by being sulphonated, could be converted into new coloring matter, possessing acid properties, and retaining substantially its original color when used in an acid bath. The proofs also show that the process for sulphonating indigo was substantially the same as the process of the Holliday patent, disregarding the reference to the degrees Beaume; and the treatment of the rosaniline to render it anhydrous. The treatment of the indigo subsequent to that part of the process which produced the acid solution was different, but probably not substantially so, and that part of the process, as has been already stated, is not of the essence of the Holliday invention.

It is unnecessary to consider the sulphonation of aniline blue by Nicholson, in 1862, or the other cognate instances of the sulphonation of coloring matters. Enough has been shown to indicate that Holliday was not entitled to make a broad claim for a process of sulphonation which had been applied before the date of his invention to other coloring matters, to convert them into sulpho-acids. The use of these processes with rosaniline would have produced a sulpho conjugated compound, which might have been a mono or di-sulpho acid, or an unchanged rosaniline, mixed with traces of the tri-sulpho acid, but would not have produced a coloring matter which would retain the original fuchsine shade and quality, when used in an acid bath. His real invention consisted in discovering and adopting such modifications of the old process of sulphonation as would produce something more than a mere mono or di-sulpho acid of rosaniline.

It is unfortunate that the claim cannot be limited without violence to its language, and without disregarding well-settled rules of construction, to one for the efficient process which is described as preferably to be employed. But a method or feature which is mentioned only by way of

recommendation, in describing an invention, must generally be considered as a subordinate or secondary, and not an essential, part of the invention, and, in the absence of apt language in the claim, it cannot be read into the claim, even to limit the claim to the real invention of the patentee.

It is obvious, from an examination of the file-wrapper, that, during the pendency of the application in the patent-office, Holliday did not regard the employment of acid of the density indicated by the degrees Beaume as essential. He intended to patent both the process in which the acid of high density is used and that in which an acid of a lower density is used. In his letter to the commissioner of patents of the date of May 11,1878, he admitted that the process of his treatment had been applied to Nicholson blues, and he insisted that his process was novel, because he applied it to rose colors, and, when applied to rose colors, they would possess new properties. The language of the claim is appropriate to include any process which, when applied to rosaniline, will produce a sulpho-acid, and cannot be limited to the narrower process which produces the peculiar sulpho-acid which is the new article of manufacture of the second claim.

It has been urged that the defendants are estopped from contesting the validity of the claims of the patent in consequence of their action in the patent-office, and cannot recede from the position they then took, that the subject-matter was patentable, and that they were entitled to a patent because of priority of invention by Caro. If the plaintiffs had been misled, or induced to take action or incur expense, in consequence of representations or conduct on the part of the defendants which authorized them to suppose that they would obtain a valid patent if they succeeded upon the issue of priority, the doctrine of estoppel might be invoked. But the case would be an exceptional one where a party who has prevailed upon one issue or defense in a litigation is estopped from setting up a different defense in a subsequent suit brought by his adversary. Such a case might exist where the defense in the second suit is so inconsistent with that asserted in the first that both could not be true, or where the defense in the first suit was of a character to induce the plaintiff to change his ground of action, and bring a second suit. An interesting example of the latter class is found in the case of Philadelphia, W. & B. R. Co. v. Howard, 13 How. 307, where the defendant, having defeated the plaintiff in a prior action by asserting and maintaining that a paper in its possession was sealed with the corporate seal of the defendant, was not permitted, in a second action brought against it by the plaintiff, to defeat the action by proof that the seal was not affixed by the authority of the corporation. But it is not true, as a general proposition, that a party, by putting forward one defense in a litigation, is precluded from asserting another against his adversary in a subsequent suit between them; nor can the general proposition be maintained that a contest in the patent-office upon the question of priority of invention will forever foreclose the defeated applicant for a patent from assailing the validity of the patent upon other grounds. In the present case there is no foundation for an estoppel, because both parties were fully aware of the prior state of the art before the interference was declared. The plaintiffs could not, therefore, have been misled or prejudiced by the conduct of the defendants in attempting to defeat their application for a patent upon the ground that Caro was a prior inventor.

The first claim of the Holliday patent is not limited to one for the new compound or article of manufacture produced by the process of the second claim. It is a valid claim for the real invention of Holliday. In the language of the court in *Cochrane* v. *Badische Co.*, 111 U. S. 294, 4 Sup. Ct. Rep. 455:

"Every patent for a product or composition of matter must identify it so that it can be recognized aside from the description of the process for making it, or else nothing can be held to infringe the patent which is not made by that process."

This claim fulfills that condition. The product can be identified by the characteristics specified. It dyes by the addition of acid to the bath, and retains the original fuchsine color. The description of the process informs those skilled in the art how to make the product without making any experiments of their own, because it points out the best means for producing the desired result. Tilghman v. Proctor, 102 U. S. 707. The patent does not fall within the category of those in which the claim is limited by its terms to a product produced by a specified process, (Pickhardt v. Packard, 23 Blatchf. 24, 22 Fed. Rep. 530; Smith v. Dental Vulcanite Co., 93 U. S. 486;) nor of those in which the article is old, but is made by a new process, or made by machinery, instead of by hand, (Wooster v. Calhoun, 11 Blatchf. 215; Rubber Co. v. Goodyear, 9 Wall. 788.)

Although the specification of each patent describes the same process, the description in the Caro patent is more specific, and has the effect to confine the claim of that patent to a process which will produce the trisulpho acid, as distinguished from a mono or di-sulpho acid. It requires the fuchsine to be dried at a given temperature, and requires the treatment with crystallizable sulphuric acid, commonly called anhydrous sulphuric acid, maintaining a given temperature during the operation. Exactly what degree of density of the sulphuric acid is indicated by the term "crystallizable sulphuric acid," commonly called "anhydrous sulphuric acid," as used in the Caro patent, is not clear. In his English patent, Caro treats the term "anhydrous sulphuric acid" as synonymous with "fuming sulphuric acid." In the original application for the present patent he states that, if anhydrous sulphuric acid is used, the reaction of fuchsine takes place in a short time, and without requiring any external heat; but, if fuming sulphuric acid is used, the reaction requires more time and external application. Thus it is evident that he considers them as equivalents in a process in which proportions and temperatures admit of a wide range, and depend upon the degree of concentration of the acid. But the specification requires a much higher temperature to be maintained during the operation than is required by the Holliday specification, and there is no reason to doubt that the process described

is substantially identical with that of the Holliday patent, when fuming acid of the density of 69 to 70 degs. Beaume is used, and an ordinary or moderate temperature is maintained. In other words, if, in the process of the Holliday patent, the use of fuming acid of the density of 69 to 70 degs. Beaume were essential, instead of optional, the second claim of each patent would be for the same process.

These views lead to the conclusions (1) that Holliday was the prior inventor of the process by which the tri-sulpho compound of rosaniline is produced; (2) that the first claims of the patents are interfering claims; (3) that the second claims are not interfering claims; (4) that the first claim of the defendants' patent is void as against the first claim of the plaintiffs' patent; and (5) that the second claim of the defendants' patent

is invalid because Holliday was the prior inventor of the process.

If the action were not brought to restrain infringement, but only for the purpose of declaring the patent of the defendants void as against the patent of the plaintiffs, it is not entirely clear whether the defense of want of novelty as to either claim of the plaintiffs' patent would be pertinent to the issue. Such a defense was allowed in Foster v. Lindsay, 3 Dill. 126, where the point was considered, and the court made a decree declaring both patents void, upon the consideration that a court of equity should not grant relief to a plaintiff who has no equity, and the statute authorizes the court to adjudge either of the patents void, in whole or ir part. But in the present case it is unnecessary to decide the question.

The first claim of the Holliday patent being valid, the plaintiffs are entitled to a decree annulling the interfering claim of the Caro patent, with costs. Upon filing a disclaimer respecting the second claim, they will be entitled to an injunction against infringement of the first claim,

and an accounting.

A decree is ordered accordingly.

TENNINGS and others v. Dolan.

SAME v. KIBBE and others.

(Circuit Court, S. D. New York. February 9, 1887.)

1. EQUITY—MASTER—EXCEPTIONS—FINDING—WAIVER.

Exception to a principal finding of a master, based on all the evidence in his report, is not waived by refraining from making the exception before the master, and subsequently making it before the court, since all that the parties could do would be to request the master to change his finding, a thing which they were under no obligation to do.

3. PATENTS FOR INVENTIONS—SEVERAL INFRINGERS—DAMAGES.

Where several parties infringe a patent, one by manufacturing and the others by selling the goods so manufactured, the torts are both joint and several, and there may be several judgments, though but one satisfaction; and it is not necessary that the fact that the same damages are included in two decrees should appear in the decrees, to limit the plaintiffs to one satisfaction.

3. SAME-MASTER'S REPORT.

The want of a statement in the master's report that the same damages were included in two suits is no ground for setting aside and recommitting the reports, the fact being conceded.

In Equity.

Arthur v. Briesen, for plaintiffs.

John R. Bennett, for defendants.

WHEELER, J. The master has reported that the defendant Dolan has made and sold 3,075 9-12 dozen nubias, in infringement of the plaintiffs' patent No. 218,032, and that the defendants in the other of these cases have sold 2,785 9-12 dozen, in like infringement, and that the plaintiffs have an established license fee of 50 cents per dozen nubias manufactured under that patent. It is conceded that those sold by the defendants in the latter case were sold for the defendant in the former, and are included in those reported as made and sold by him. The defendants in both cases except to the finding of the master that there was an established license fee, and object to a decree for anything beyond a merely nominal sum in the latter case. The master submitted a draft report to the counsel of the respective parties, and defendants' counsel deferred his objections, and made no further question to the master. The plaintiffs insist that he thereby waived all ground of exception to the report. But this exception is to a principal finding, upon all the evidence in the case, about which nothing could be done before the master except to request him to change his finding. The defendants were under no obligation to make that request after he had announced his conclusion upon that point, but could raise the question before the court as to whether the finding was warranted by the proofs, by filing his exception in court according to the rules of the court. Hatch v. Railroad Co., 9 Fed. Rep. The exceptions to that finding raise that question. There was evidence, however, tending to show that the plaintiffs had established that license fee under this patent for such nubias as Dolan made infringing upon it. The weight of the evidence was for the master, and his conclusion upon it should not be disturbed unless he has gone contrary It was not contradicted in this respect, and his conclusion appears to be well warranted by it. The master does not report any profits made by the defendants, but damages suffered by the plaintiffs in consequence of the infringement. The established license fee is resorted to as a measure of such damages. All the defendants in both cases participated in the tort constituting the infringement so far as Dolan made and the others sold the same infringing articles. Such torts are both joint and several, and those who commit them are liable jointly or severally. There may be several judgments, but only one satisfaction. Lovejoy v. Murray, 3 Wall. 1; Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct. Rep. The plaintiffs are therefore entitled to a decree against Dolan for the whole damages for making and selling all the infringing articles that he made and had sold for him; and against the defendants in the other case for the damages resulting from what of those articles they sold for

Satisfaction of these damages by any of the defendants in either case will, however, be satisfaction of that amount in both cases. It is not necessary that the fact that the same damages are included in both decrees should appear either in the reports or decrees in order to limit the plaintiffs to one satisfaction. If they should attempt to enforce collection of that amount a second time, they would be restrained by proper proceedings. It would be well, nevertheless, that this fact should appear. The master would doubtless have stated it in the reports if the defendants had so requested. As they did not so request, the want of the statement is no ground for setting aside or recommitting the reports. As the fact is conceded, it may be stated in the decrees.

Exceptions overruled, reports accepted and confirmed, and decrees to

be entered accordingly.

IOWA BARB STEEL-WIRE Co. v. SOUTHERN BARBED-WIRE Co. and others.1

(Circuit Court, E. D. Missouri. February 7, 1887.)

PATENTS FOR INVENTIONS—BARBED-WIRE FENCES.

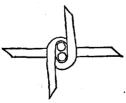
Letters patent No. 192,225, granted to Arthur S. Burnell, June 19, 1877, for an "improvement in barbed-wire fences," held valid, and infringed by wire fencing in which each prong passes between the strands, and is wound tightly around one of them, but not around the other prong.

In Equity.

Suit for the infringement of letters patent No. 192,225, granted to Arthur S. Burnell, June 19, 1877, for an "improvement in barbed-wire fences." The claim of the patent is as follows:

"A barb for double-strand cable-wire fences, composed of two pointed pieces of wire, each of which passes over a strand of the cable, thence between its strands, and reciprocally binds the other wire to the strand of the cable, wherefrom the points of the wires project as from a center, substantially as set forth."

The following drawing, which is a copy of fig. 3 of the drawings accompanying the specification, shows the prongs in position:



Each of the prongs of defendant's barb, which passes between the strands, is wound tightly around one of the strands, but does not pass

¹Edited by Benj. F. Rex, Esq., of the St. Louis bar.

around the other prong. The bights of the Burnell prongs each incloses the other prong and one of the strands.

John R. Bennett, for complainant.

J. M. Holmes and Walker & Walker, for defendants.

TREAT, J. As to patent No. 192,225, issued to A. S. Burnell, dated June 19, 1877, and which is the patent sued on, the court holds the same to be valid; also that defendant infringes the same.

Usual decree for perpetual injunction, and the case is referred to Hon. T. C. Reynolds, master in chancery, to ascertain and report profits and

damages.

PAILLARD and others v. Bruno.

(Circuit Court, S. D. New York. December 26, 1886.)

PATENTS FOR INVENTIONS—EXPIRATION—FOREIGN PATENT—REV. St. U. S. § 4887.

Under section 4887, Rev. St. U. S., a patent for an invention which had been previously patented in England for the term of 14 years does not expire until 14 years from date of the English patent, notwithstanding the grant of the English patent has terminated by the failure of the patentee to pay the stamp duty required to be paid as a condition of the continuance of the grant beyond the term of three years.

In Equity.

Goepel & Raegener, for plaintiffs.

John R. Bennett, (Richard M. Bruno, of counsel,) for defendant.

The bill of complaint alleges infringement by the de-WALLACE, J. fendant of letters patent of the United States of the date of March 23, 1875, granted to Charles Paillard for an improvement in music-boxes. The plea of the defendant alleges, in substance, that, prior to the grant of the patent in suit, the invention which is the subject of the patent had been patented by Paillard, in England, by letters patent of the date of October 26, 1874, for the term of 14 years, which grant determined before the commission of the acts of infringement complained of, to-wit, October 26, 1877, by the failure of the patentee to pay the stamp duty required to be paid by the terms of the English patent as a condition of the continuance of the grant beyond the term of three years from its date. The plea presents the question whether the patent in suit expired upon the failure of the patentee to pay the stamp duty which he was required to pay in order to prolong the existence of the English patent, or whether it does not expire until the expiration of the original term of the English patent. This question depends upon the meaning of that part of section 4887 of the United States Revised Statutes which provides that "every patent for an invention, which has been previously patented in a foreign country, shall be so limited as to expire at the same time with

the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years." The defendant contends that congress intended to declare that the patent shall not remain in force beyond the time when the foreign patent ceases to be in force, and that the right to the monopoly in the United States shall cease with the right to it in the country

of the foreign patent.

The precise question has been considered and decided adversely to the defendant in this court by Judge Wheeler, in the case of Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co., 21 Fed. Rep. 458. That decision was upon a motion for a preliminary injunction, and should not necessarily preclude further consideration upon a more deliberate hearing: but it is supported by the decisions in Henry v. Providence Tool Co., 3 Ban. & A. 501, and Reissner v. Sharp, 16 Blatchf. 383. Both of these were cases in which the original term of the foreign patent had been extended subsequently to the grant of the United States patent, and it was contended that the prolongation of the term of the foreign patent, by an extension, prolonged correspondingly the term of the United States pat-It was held in both cases that the section in question should be construed to mean that the United States patent is to expire at the time of the original term of a foreign patent for the same invention. In Henry v. Providence Tool Co., Justice CLIFFORD said: "Congress employs the words 'the foreign' patent, evidently referring to the term of the foreign patent to define the term of the domestic patent;" and his conclusion was reached upon the consideration that congress could not have intended to grant a patent for an indefinite term, or for an uncertain and undefined duration, which would be the case if its duration could not be ascertained by referring to the foreign patent, or were to depend upon any events occurring subsequently to the issue of the foreign patent. He also considered that the use of the word "term," in reference to a foreign patent, when there is more than one, indicates that the time of expiration is to be ascertained by the term of the patent, and because the use of the word "term," in reference to a foreign patent, when more than one such patent exists, indicates what was meant as the time of duration. In Reissner v. Sharp, the force of these considerations was recognized by Judge Blatchford in reaching the same conclusion. According to the construction thus placed upon the section, it should be read as though it declared that the United States patent is to expire at the same time with the term of the foreign patent previously obtained for the same invention, or, if there be more than one, at the same time with one having the shortest term. Upon this construction the duration of the term of the United States patent is fixed when the patent issues, according to the maxim id certum est quod certum reddi potest. Upon any other construction, neither the commissioner of patents, nor the patentee, nor the public, would know the duration of the grant. The term of a patent is the period of duration expressed in the grant. It may be terminated by operation of law, or by the act of the parties, at an earlier time; and consequently it might happen that of two patents the one having the v.29f.no.16-55

shortest term may have the longest life. Unless the true meaning of the section is as indicated, the patent might expire, if there were two foreign patents, at the same time with the one having the longest term; and, in a case like the present, by the non-payment of a stamp duty, notwithstanding the language of the section that in such case it is to expire with the one having the shortest term.

The prior legislation of congress does not throw any light upon the question of legislative intent, and the argument that it was the intention of congress to provide that the exclusive right to the invention here should cease with the exclusive right of the patentee in any foreign country rests solely upon the language of the section. Such was not the purpose of the act of July 4, 1836, or the act of March 3, 1839, both of which enabled a patentee to enjoy a monopoly here when his invention had become public property abroad. Supposed considerations of policy are a very unreliable guide in the interpretation of statutory law, when they are not derived from the law itself, or acts in pari materia; and the argument in the present case would tend to a construction of the section which would fix the duration of a United States patent by the extension of a foreign patent, or the renewal of one capable of prolongation, like an Austrian patent.

The plea is overruled.

SHICKLE, HARRISON & HOWARD IRON Co. v. SOUTH St. LOUIS FOUNDRY Co. and others.

(Circuit Court, E. D. Missouri. February 7, 1887.)

1. PATENTS FOR INVENTIONS—BROADENED REISSUES—DELAY.

A broadened reissue should not be granted after a delay of four years in making application therefor.

2. SAME—INFRINGEMENT.

Letters patent No. 209,428, granted to Frederick Shickle for an improvement in pipe-moulding machines, held not infringed by a yoke having its arms connected at their lower ends by means of a rod, and provided at their extreme ends with clips to connect them to the ends of the patterns.

Same—Invention.
 Letters patent No. 295,205, granted to Frederick Shickle for an improvement in pipe-moulding apparatus, are void for want of patentability.

In Equity.

This is a suit for the infringement of three letters patent granted to Frederick Shickle, viz.: (1) Reissued letters patent No. 8,562, granted January 28, 1879, for an Improvement in Moulding Pipes; (2) letters patent No. 209,428, granted October 29, 1878, for an "Improvement in Pipe-moulding Machines;" (3) letters patent No. 295,205, granted March 18, 1884, for an "Improvement in Pipe-moulding Apparatus."

¹Edited by Benj. F. Rex, Esq., of the St. Louis bar.

The claims of letters patent No. 209,428 are as follows:

"(1) The combination of the flask, B, having the compartments, B', B', and the pattern, D, having the parts, d, d, united at or near their tops by a yoke, d', consisting of two rings and a connecting bar, substantially as described. "(2) The combination of the flask, B, having the compartments, B, B, and the pattern, D, having the parts, d, d, and the yoke, d', substantially, as described."

The yoke which the complainants contended infringed letters patent No. 209,428 is a bar, bent somewhat in the shape of an inverted "U," strengthened by a cross-bar, and having the ends of its arms provided with clips, to connect each of them with the ends of a pattern to be lifted.

Robert H. Parkinson, E. J. O'Brien, and T. A. Post, for complainant. Geo. H. Knight and H. D. Wood, for defendants.

TREAT, J. Reissue patent No. 8,562, dated January 28, 1879, of patent No. 148,094, dated March 3, 1874, being more than four years thereafter, said reissue, under the recent decisions of United States supreme court, is null and void. As to patent No. 209,428, dated October 29, 1878, there is no infringement. As to patent No. 295,205, dated March 18,1884, said patent is null and void for want of patentability.

Bill dismissed, with costs.

THE BRISTOL.

WOOLONGHAN, Master, etc., v. THE BRISTOL.

NABRAGANSETT S. S. Co. v. CONNOLLY, Owner, and another.

(District Court, S. D. New York. January 26, 1887.)

1. COLLISION-MARITIME LIEN-CARGO.

For damages by collision, there is no maritime lien upon the cargo, except to the extent of freight due, though the cargo belong to the owner of the vessel in fault.

2. Same—Limitation of Liability—Rev. St. U. S. § 4283—Mutual Fault—Hull and Cargo—Same Owner—Offset, how Made.

Under the general maritime law and section 4283 of the Revised Statutes, which limit the liability of ship-owners to the value of the vessel and freight, where there is a loss to both vessels and cargoes in a collision by mutual fault, the cargo, though belonging to the owner of one of the vessels, cannot be appropriated to help equalize the loss between the two vessels; and, for the same reason, the owner's claim for damages for the loss of his cargo cannot be offset for a similar purpose. No abandonment of the cargo, or of the claim for damages thereto, is required by law as a condition of limiting the ship-owner's liability. The damage which the maritime law requires to be massed, for the purpose of equal division, is the damage "to the ships," not including damage to cargo that the ship or her owner is not legally bound to pay.

3. Same—Insurers—Subrogation.

Upon a collision near Newport, between the bark B. R. and the steamer B., by mutual fault, whereby the bark and her cargo, both belonging to C., were sunk, and mostly lost, and the B. and her cargo were also injured, it was found, upon the report on damages, that the damage to the steamer, including the damage to her cargo, which she had paid, amounted to \$45,696.74; the damage to the B. R. was \$84,807.35, less \$1,671.05, the proceeds of the wreck; and the net damage to the cargo of the B. R. was \$42,175.07. The cargo, being insured, was paid for by the insurance company, who intervened in the suit for a recovery for the damage to cargo. Held, (1) that C., as owner of both ship and cargo, was affected by the fault of his master, and could recover but half the damage to the cargo; (2) that the insurers could recover only what C. could recover; (3) that, under the law limiting ship-owners' liability, C. was not liable for any part of the excess (about \$11,000) of the Bristol's loss over the whole value of the bark and freight,—the latter being, in this case, nothing; (4) that no part of the claim for the loss of C.'s cargo could be offset or applied against the amount (about \$11,000) of the Bristol's loss in excess of the damage to the bark, excluding cargo; (5) that the value of the wreck, \$1,671.05, for which C. was obliged to account as a condition of the limitation of his liability, was applicable as an offset to the liability of the Bristol for half of the damage to the bark's cargo; (6) that the insurers were entitled to this balance, amounting to \$19,416.48, to the exclusion of C.

The cross-libels in this case grew out of a collision between the bark Bessie Rogers and the steam-boat Bristol, which occurred near Newport, Rhode Island, during a dense fog, on the night of August 9, 1872. Upon a trial before BLATCHFORD, J., in April, 1873, both vessels were held in 6 Ben. 477. The bark was sunk by the collision, and was a total Her cargo of iron was owned by the respondent Connolly, who was also sole owner of the bark, and was fully insured by the Great Western Insurance Company, to which company the cargo was abandoned by the owner upon payment to him of its full value. Up to the time of the decision of the cause the counsel of the insurance company had not appeared separately, but had acted in concert with the owner of the bark, in seeking to charge the whole loss upon the Bristol; and no suggestion upon the record was made of the interests of the insurers. cision of the court that both vessels were in fault, the insurers intervened, by petition, for leave to prosecute the suit for the protection of their own interests. Leave was granted, with the direction that they file their allegations, and that the other parties answer the same, or be held in default. The petitioners thereupon filed their allegations, setting forth their interest in the cargo, its abandonment to them, their payment of the loss, the assignment to the insurers by the owner of all claims by way of damages in respect to the cargo, as well as a transfer of the bill of lading, the total loss of the bark, and the claim of the insurance company against the Bristol to be paid the whole value of the cargo, namely, \$25-000 in gold, with interest from August 10, 1872. The owners of the Bristol filed their answer to these allegations. Thereupon an interlocutory decree was entered, by which it was referred to Commissioner Betts to ascertain and compute the amount of damage caused by the collision, reserving until the coming in of his report the further trial of the cause upon the issues raised by the answer of the Bristol to the averments of the insurance company as respects the amount of damage recoverable for loss of the cargo, and to whom payment therefor should be made.

Many difficulties attended the completion of the proofs before the commissioner. Part of the cargo was recovered by the insurers. By the report, filed June 22, 1886, it appears that the insurers, on December 17, 1872, paid to the libelant, as owner of the cargo, \$24,500 in gold, then at a premium of 112, which, with interest from that time, makes \$49,689.26. The value of the cargo was found to be \$26,776.60, which, with interest, makes \$49,053.88	
Less net salvage on cargo, and interest, -	6,878 81
Or net damage to the cargo of the bark,	\$ 42,175 07
The walve of the hard at the time of loss was \$10,000 or	
The value of the bark at the time of loss was \$19,000, or, with interest,	\$ 34,807 35
Less net salvage, and interest,	1,671 05
2000 200 002 080, 0020 20000,	
Making the net damage to the bark, with interest,	\$ 33,136 30
The demons to the Printel with interest was	\$ 28,569 22
The damage to the Bristol, with interest, was - To her cargo, for which the Bristol has paid, -	17,127 52
To her cargo, for which the bristor has paid,	
Total loss by Bristol,	\$ 45,696 74
The damage to bark and cargo,	75,311 37
Total loss of both vessels and cargoes,	\$121,008 11
Them to all a maintain line and an in-	4 00 014 00
Difference in the whole loss on each side, One half this difference	\$ 29,614 62
One-half this difference,	14,807 31

The Bristol, upon her arrest at the time of filing the libel, was released, on giving stipulation for her value in the sum of \$173,000.

The insurance company claimed from the Bristol the whole value of the Bessie Rogers' cargo, namely, \$42,175.07, or at least a moiety of

the cargo damage.

Counsel for the Bristol contended that, as Connolly was owner of the Bessie Rogers and her cargo, the whole damage is to be added in one mass, and that the Bristol, after offsetting her whole loss, is liable only for half the excess, or \$14,807.31. The owner of the bark claimed a proportionate share of this sum.

Henry Thompson, for the Bristol.

D. D. Lord, for the Bark.

Jos. H. Choate and Prescott Hall Butler, for Western Ins. Co.

Brown, J. Upon the facts appearing in the commissioner's report, the matters reserved for further hearing present some novel questions. These relate chiefly to the application of the law of limited liability, the extent to which the damages are to be offset, and the mode in which the balance is to be struck, in a case of mutual fault, where there is severe

damage to both vessels, and to their cargoes, and where the owner of one of the vessels is also the owner of her cargo. The latter circumstance is the peculiar feature that distinguishes the present case from any known adjudication.

The petitioners, insurers of the cargo of the Bessie Rogers, having paid the sum of \$24,500 as for a total loss, claim that the Bristol must pay to them, as innocent third persons, the whole value of that cargo, amounting now, with interest, to \$42,175.07; and that, in ascertaining the balance payable by the Bristol, no part of this loss on the cargo of the Bessie Rogers can be offset against the loss of \$45,696.74 incurred by the Bristol. The owners of the two vessels contend that in no event can the insurers recover more than one-half the loss on Connolly's cargo; and they further claim that the true rule requires that the whole losses on each side, without making any distinction between the Bessie Rogers and her cargo, should be offset against each other, so far as they go, and the Bristol held for only one-half of the excess on the side of the Bessie Rogers and her cargo. The latter mode of adjustment would make the insurer's claim about \$7,000 less than the recovery of half the loss on cargo. Connolly, as owner of the Bessie Rogers, claims that the balance payable by the Bristol should be apportioned ratably between him and the insurers, as subrogated owners of her cargo, according to the respective values of vessel and cargo, viz., in about the ratio of three to four.

Before considering this question, however, the relations of the insurance company, as a claimant against the Bristol, should be defined.

1. Under the adjudication of the supreme court in the case of *Phænix Ins. Co.* v. *Erie Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. Rep. 750, 1176, as well as under other decisions there cited, I find it impossible to hold that the insurance company stands in any superior or essentially different relation to the Bristol from that of Connolly, the insured owner of the cargo. It was there determined that, in cases of this kind, the right of the insurer is a right of subrogation only to the claims of the assured; and that this right is affected by all the limitations and restrictions that attach to the claim for damages in his hands.

The case of Simpson v. Thomson, 3 App. Cas. 279, is cited with apparent approval, where all remedy was denied to the insurer because the assured, owning both vessels, could not have maintained any action against himself. The scope of the decision in the case of the Phœnix Insurance Company, and of other decisions of the supreme court, is such as to limit the insurers, in a case like the present, to what Connolly himself could have recovered.

2. The decision of the supreme court, also, in the case of *The Juniata*, 93 U. S. 337, in effect, determines that Connolly, and therefore the insurers of his cargo, could recover only one-half of the damage to the cargo, where both vessels are in fault. In that case the owner of one of the two vessels was on board his own ship at the time of the collision, and received severe personal injuries. He was held entitled to recover but half his damages. The principle there involved is equally applicable here, even though Connolly's interests as owner of the ship and as owner

of the cargo are treated as quite distinct; for that decision necessarily involved the principle that the owner's pecuniary claims against the other vessel, for personal injuries even, was affected by the faults of his own master and seamen, as his agents in the navigation of his own ship. The same faults must equally affect his claim for injury to his cargo; and, as the insurers are limited to Connolly's rights, they cannot recover, in any event, beyond half the loss on Connolly's cargo, viz., \$21,087.53. A somewhat similar application of the same principle was made by this court in the case of *The City of New York*, 25 Fed. Rep. 149.

In contending that Connolly's entire damages to ship and cargo must be consolidated, and then offset against the Bristol's whole loss in hull and cargo, so far as the latter go, and that the Bristol is to be held liable for one-half the excess only, the counsel for the claimants cite, in the absence of any adjudications, the language of Mr. Justice Bradley in the case of *The Alabama*, 92 U. S. 696, where he says, in regard to the rule that each must bear half the damages:

"The rule has been thus applied when the ship and her cargo constituted one opposing force, and a single ship the other; the entire damage to ships and cargo being equally divided between the two ships. Where both ship and cargo on one side belong to the same owners, the case is no way different from that of the two ships alone being injured."

Repeated perusal of this passage, with its context, persuades me that no case like the present was in contemplation of the court. No question in respect to the cargo was involved, nor any question as to the application of the statutes limiting the liability of ship-owners; whereas these are the distinguishing features of the present case. Where no question of limited liability arises, the language quoted is, doubtless, an exact In this case Connolly, the owner of the Bessie statement of the law. Rogers, by an amendment of his answer to the libel against him in personam, has pleaded the statutes in limitation of liability, and has invoked Though a foreigner, he is entitled to the their benefit in his defense. The Scotland, 105 U.S. 24. I do not think the pasbenefit of them. sage above quoted was designed as any expression of opinion on the question here involved.

The importance of the mode of offsetting the damages arises wholly from the limitation of the liability of ship-owners for losses without their personal fault. Aside from this limitation, it would be immaterial what method were applied, because the damages in the end must be equally divided. It is still of no consequence what method is pursued, if each vessel, with her pending freight, is of sufficient value to respond for her one-half of the whole loss. But whenever one of the two vessels is sufficient, and the other is insufficient, the loss, under the law of limited liability, is not borne equally; and the method of offsetting damages may then become material, making in this case a difference of nearly \$5,500.

Our statute declares, in terms, that "the liability of the owner of any vessel for any loss, damage, or injury by collision, incurred without the privity or knowledge of such owner, shall in no case exceed the amount

or value of the interest of such owner of such vessel, and her freight then pending." Rev. St. U. S. § 4283. This is the general maritime law. Nothing could be more explicit than this language. It makes no distinction between a ship-owner carrying his own cargo and one carrying another's cargo. So far as respects a discharge from liability, the shipowner in each case is entitled to that relief on the same terms. neither case is he required to abandon his cargo, or any other property, save the vessel and pending freight only. Abandonment of the vessel includes abandonment of the claim for damages for the injury to the vessel, though it does not include the claim for insurance. Place v. Norwich & N. Y. T. Co., 118 U. S. 468, 6 Sup. Ct. Rep. 1150. Under this limitation, therefore, the value of the Bessie Rogers before collision, and her freight, viz., \$34,807.25, or, what is the same thing, the value of her wreck after collision, together with the amount of her claim for damages, are the utmost limit to which the Bristol is entitled to have Connolly, as owner of the Bessie Rogers, contribute to the common loss. owners of the Bristol are entitled to have the whole value of the Bessie Rogers, including the claim for the loss of the ship and her pending freight, specifically applied and offset against their own larger loss. This was the very point of the adjudication in the case of The North Star, 106 U.S. 22, 1 Sup. Ct. Rep. 41. This specific application, by way of offset, of the loss arising to the ship Bessie Rogers, extinguishes all claim for that item of damage, amounting, according to the report, to \$33,136.30, and leaves \$1,671.05, the net salvage from the wreck, still to be accounted for by Connelly in reduction of the Bristol's loss. Beyond this, the owners of the Bristol have no claim against Connolly, because the statute sets that limit to Connolly's liability.

The Bristol, being worth \$173,000, was legally bound to pay the losses of her cargo owners in full; so that, as respects her, it was immaterial, in this case, whether the damage was to her hull or to her cargo. damages to both amounted to \$45,696.74, or nearly \$11,000 in excess of the whole value of the Bessie Rogers before the collision. whole loss of the Bessie Rogers and of her cargo into one mass, and then to charge the Bristol for only one-half the excess of that sum over the Bristol's loss, would, in effect, be appropriating \$11,000 of Connolly's cargo to offset the Bristol's loss of \$11,000 in excess of the prior value of the Bessie Rogers. But this further offset of \$11,000, in favor of the Bristol, cannot be legally had against Connolly, or his property, because, under the statute, that excess of \$11,000 in the Bristol's loss over the damage to the Bessie Rogers, and her strippings and freight, constitutes no legal claim against Connolly. The statute, as I have said, does not require the owner to surrender his cargo, or any other property, but the vessel and her pending freight only. When that has been surrendered, and the damages to the vessel offset, the owner's legal responsibility is at an end. Hence no further appropriation of his cargo, or of his claim for damages to his cargo, can be made, in order to offset any excess of damage to the Bristol, any more than other property of his could be seized and appropriated or offset for a similar purpose. To mass the whole loss

on each side, and give to Connolly, or the petitioners, only half the difference, would be to abrogate the law of limited liability, as applied to this case.

Again, to allow the offset of cargo as claimed, would be, in effect, not only to require Connolly to abandon to the Bristol's use \$11,000 of his cargo, but also to enforce a lien in the Bristol's favor upon the Bessie Rogers' cargo pro tanto, i. e., to the extent of \$11,000. But no such lien on cargo for the torts of the ship is known to the maritime law, whether the cargo belong to the ship-owner or not. Such a lien finds no support in the text-books of English or Continental authors, and it is opposed to the ordinary practice of the admiralty. By this practice, the cargo, except for the collection of the freight due, cannot be held for the faults of the ship. There being no lien beyond freight due, no proceeding in rem lies against the cargo for damages by collision, if the freight be paid, whether the cargo belongs to the owner of the offending vessel or not; and, if arrested, the cargo must be released upon the payment of the freight due.

This rule was clearly stated by Dr. Lushington in the case of *The Victor*, 1 Lush. 72; and it was applied by Sir Robert Phillimore in the subsequent case of *The Roecliff*, L. R. 2 Adm. & Ecc. 363, where the offending vessel was owned by the owner of the cargo, and the case was free from any complicating circumstances. The cargo, having been arrested, was ordered released on the payment of the whole freight, on the ground

that "the cargo is not responsible for the damage."

Parsons, in his work on Shipping and Admiralty, (volume 1, p. 531,) says: "There is no lien, in favor of an injured vessel, on the cargo laden on board of the offending ship, although it belongs to the owner of such ship." English text-books state the same. 2 Kay, Shipm. 918; 1 Maude & P. Shipp. 619, note; Mars. Coll. (2d Ed.) 78; Scrutton, Char-

ter-parties, 199.

Article 216 of the French Commercial Code declares, in effect, the same limitation of liability with our own statutes. Commenting upon this article, Boistel says (Precis de Droit, Comm. § 1189:) "If the owner is his own freighter, he must abandon the amount of the freight which he would have paid upon another vessel, according to the prices current; but he is never obliged to abandon the cargo belonging to himself." To the same effect see 1 Laurin's Cresp Cours de Droit Mar. 632; Valroger, Droit Maritime, § 264; Desjardines, Comm. Mar. § 289, p. 93.

As respects freight, the rule just stated was applied in a case of collision by Sprague, J., in *Allen* v. *Mackay*, 1 Spr. 219, 224; and by the supreme court of Massachusetts in a case of adjustment of general aver-

age in Spafford v. Dodge, 14 Mass. 66, 81.

I find nothing in the case of *The North Star*, 106 U. S. 22, and 1 Sup. Ct. Rep. 41, affirming 16 Blatchf. 80, conflicting with the above view, or requiring the value of Connolly's cargo to be offset before striking the balance due from the Bristol. On the contrary, the language, as well as the principles of the decision, tends to the opposite view. In that case, the Ella Warley having been sunk and totally lost, and having obtained a

decree against the North Star for half the difference in their respective losses, the owners made the extreme claim that, upon her surrender as she lay at the bottom of the sea, they became entitled to recover half her full value as against the North Star, although the latter had sustained considerable, though less, damage. The court rejected this contention, and held that the statute limiting the liability of ship-owners did not apply until after the loss "of the two ships" had been added together, and offset; and that the statute then became applicable to the excess of the one against the other, as the case might be. But no question as re-

spects the cargo of the Ella Warley was before the court.

The language of the supreme court shows that the damage that is to be offset before the statute limiting liability is applicable is not the damage to cargo, but the damage "to both vessels" only. The French authorities cited by the court are very clear upon this point; they indicate what the court intended. The passage from Boulay-Paty is in reference "to the damaged parts of each ship," (page 22;) and Valin says, (volume 1, p. 179:) "The damage of which our article treats is to be understood only of the damage which happens to the two ships, excluding that done to the merchandise." Emerigon (chapter 13, § 14) says: "The kind of division provided for by article 10 is an exception, which is applicable to the ships only, without embracing the merchandise." Article 407 of the Code de Commerce, using substantially the same language as article 10 of the ordinance of 1681, declares, in terms, that the damage shall be paid by the ships that have caused and suffered it, (par les navires qui l'auront fait et souffert.) Livre 3, tit. 7, art. 10. And Valroger, in his recent work, (1886.) states it to be, without question, the French law, that only the damage to the ship, i. e., not including merchandise, is massed for divis-For cargo, each is liable in solido. 5 Droit Maritime, 109-135, §§ 2115, 2118, 2122.

By the German and Italian Codes, though there is no division of damages in case of mutual fault, each ship and each owner, to the extent of the value of the ship and freight, is answerable in solido for injury to the cargo; and the cargo owner does not contribute to indemnity for the loss. German Code, §§ 736, 737, 452; Italian Code, §§ 662, 491. The Code of the Netherlands is similar. Sections 321, 536.

By the Middle Age codes it would seem that the damage to merchandise, if the collision was not willful, was a common average between the merchants themselves. Oleron, § 13; Wisbey, 67; Mars. Coll. 128.

In the case of *The North Star*, supra, the loss of the Ella Warley, it is said, "discharged her portion of the common burden." The court further say, (page 29:)

"Her delivery to the waves was tantamount to her surrender into court, in case she had survived. It extinguished the personal liability of her owners by the mere operation of the maritime rule itself. As there was no decree against her owners for the payment of money, there was no room for the application in their favor of the statute of limited liability."

The liability, and consequent loss to either vessel, doubtless includes what that vessel has paid, or is legally bound to pay, for loss of cargo.

It makes no difference on board which vessel the cargo happens to be-Leonard v. Whitwill, 10 Ben. 638, 658; The Canima, 17 Fed. Rep. 271, But the loss "to the ship" does not include what the vessel has not paid, and what neither she nor her owner is bound to pay. Had the cargo of the Bessie Rogers belonged to a third person, neither the vessel nor her owner would here have been bound to pay for it; nor could it have been offset against the Bristol's damage, in order to limit the amount that the Bristol should pay. The language used in the case of The North Star has no more application to the present case than it would have if the cargo had been owned by a third person. The damage to the Bristol is greater than that "to the ship" Bessie Rogers. having surrendered his vessel and her strippings, and having suffered an offset of all his claims for damage on her account, is under no further responsibility for the Bristol's excess of loss. He stands, therefore, as respects the residue of his claim, i. e., for his loss of cargo, as any other cargo owner would stand who was nevertheless affected with fault, and was, for that reason, entitled to recover but half his damages.

This construction of the law of limited liability works no hardship to the Bristol. She has all the benefit of the responsibility of the other vessel, and of her owners, that the law of limited liability is designed to allow her; and in affecting the claim of the cargo owner, as owner of the vessel, with the faults of his master and crew, and thereby reducing the claim for loss of her cargo by one-half, the Bristol is charged with but half the sum she would have been obliged to pay to any innocent

shipper of the same cargo, for the same loss.

In what has been said above it has been assumed that Connolly must be held to contribute to the common loss, irrespective of his cargo, all of his claim for damages for the loss of the ship, and any proceeds of the

wreck, as a condition of the limitation of his liability.

The commissioner's report shows a net salvage upon the hull amounting, with interest, to \$1,671.05, of which Connolly has had the benefit. This sum is, in effect, the value of the strippings of the wreck. As more than this amount is necessary to make up Connolly's one-half of the gross loss, irrespective of the cargo of the Bessie Rogers, the owners of the Bristol would be entitled to a decree for this sum of \$1,671.05 in their suit against Connolly in personam; and this sum, as between the same parties. would be applied as an offset or part payment of the amount chargeable against the Bristol in the suit in rem. And, as the insurance company stands only in Connolly's shoes, the same application and offset must be made upon their intervention in the suit against the Bristol; because the owners of the Bristol are entitled to the benefit of that offset against Con-The City of Norwich, 118 U.S. 468, 502, 6 Sup. Ct. Rep. 1150; The Great Western, 118 U. S. 520, 524, 526, 6 Sup. Ct. Rep. 1172; The Eleanora, 17 Blatchf. 105; Atlantic Mut. Ins. Co. v. Alexandre, 16 Fed. Rep. 279, 282.

As respects freight, the commissioner's report shows nothing; apparently none was earned, as in the case of *The Great Western*, supra. The value of the cargo, it must be assumed from the evidence, was taken ac-

cording to the rules of the admiralty in collision causes, viz.: Its value at the time and place of shipment, as stated in the written admissions on which the value was found, which excludes any further question of freight.

My conclusions, therefore, are:

1. That the cargo of the Bessie Rogers, though belonging to the owner of that vessel, is not subject to any lien in favor of the Bristol, and not liable to contribute anything to make good any part of the Bristol's loss; that Connolly's claim for damages for the loss of his cargo is not liable to any offset on account of the excess of the loss of the Bristol in her hull and cargo over the loss of the Bessie Rogers, i. e., to the bark herself; but that Connolly must contribute the value of the wreck and freight,—the latter here being nothing.

2. That the insurance company is subrogated to the rights of Connolly as cargo owner, and entitled to recover of the Bristol one-half of the actual loss on the cargo. It is entitled to no more, because the faults of Connolly's master, as his agent, affect his claim as cargo owner.

3. That the owners of the Bristol are entitled to offset, as against her whole loss, the whole claim of Connolly for the loss of the Bessie Rogers herself; and to have further applied and offset, for their benefit, the value of her strippings, viz., \$1,671.05; and to nothing more.

4. That Connolly has no claim to any part of the balance herein found due from the Bristol, because this balance arises wholly from the loss of

cargo, all of which belongs, by subrogation, to the petitioners.

5. Woolangham, the master, who was made defendant in the process, would have been liable, if served, to have made good to the Bristol the amount she will be obliged to pay above one-half of the aggregate loss. As he was not served, there can be no decree against him.

Upon the commissioner's report, the sum due the petitioners, after the

offsets allowed, will be as follows:

Loss on cargo of Bessie Rogers,	-	\$42,175 07
One-half same, (decree in rem,)		21,087 53
Less net salvage on vessel, chargeable against Connolly,	•	1,671 05

Balance of amount due petitioners, - - \$19,416 48

—With interest on the principal from the date of commissioner's report.

Decrees may be entered accordingly, and the costs are divided.

THE TONAWANDA.1

JARVIS and others v. THE TONAWANDA.

(Circuit Court, E. D. Pennsylvania. January 17, 1887.)

MARITIME LIEN-LACHES.

Unregistered and secret maritime liens may be enforced against a vessel in the hands of bona fide purchasers, unless the holders of such liens have been guilty of negligence or laches. See the same case, reported at length, in 27 Fed. Rep. 575.

In Admiralty.

Appeal from district court. See 27 Fed. Rep. 575.

Etting & Williams, for libelants.

Henry R. Edmunds, for respondents.

McKennan, J. The defense of the respondents in this case is apparently so equitable, and therefore meritorious, that I have examined and considered the whole case with an earnest desire to make that defense effective against the claim of the libelants. They have done nothing, and have not forborne to do anything, in my judgment, which precludes the assertion by them of any just or legal reason for denying their liability. They were bona fide purchasers of the vessel from its real as well as ostensible owners. They received assurances of the freedom of the vessel from all liens and charges, and they took from their vendor a conveyance, with his personal warranty, which was rendered ineffective by subsequent insolvency. Hence they had a right to believe that they had paid the full consideration for their purchase for which they were, in any wise, bound. But the libelants held an unregistered and secret lien upon the vessel, which they had an undoubted right to enforce, unless they have lost it by their own negligence. Greater promptitude on their part in tracing the ownership of the vessel, and in demanding payment for their debt from the purchasers of it, might have enabled the latter to protect themselves by a resort to their vendor; but I am constrained to the conclusion, by the pressure of decided cases, that they are not chargeable with such laches as will subject them to the loss of their remedy against This is fully and satisfactorily described in the opinion of the learned judge who decided the case in the district court. I therefore adopt his views, and now order that a decree be prepared and entered in this court for the same sum decreed by the district court, in favor of the libelants, and against the respondents, with costs.

Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

THE BRANDOW.

THE BESSARABIA.

Boyle, Master, etc., v. The Bessarabia, etc.

(District Court, E. D. South Carolina. February 8, 1887.)

1. SALVAGE UNNECESSARY ASSISTANCE.

One who voluntarily goes to the assistance of a vessel in distress, with the intent and hope of aiding her, but who fails to arrive until his assistance has ceased to be necessary, is not entitled to compensation as a salvor, nor is his status altered by reason of the circumstance that he participated in the efforts to save the vessel, if at the time of arrival his assistance was not required.

2. Same—Costs—Unnecessary Assistance—Intent—Effect of.

While one who goes to the assistance of a vessel in distress, but who fails to arrive until the necessity for his aid has ceased to exist, cannot claim as a salvor, the court will, in considering the question of costs, have a due regard for the intent and hope of the libelant, and, if it appears that the efforts of the libelant, were made with the intent and hope of rendering assistance, the costs will be divided.

In Admiralty. Libel for salvage.

A. G. Magrath, for libelant.

Mitchell & Smith, for claimant.

Simonton, J. On the morning of the eighteenth January, 1887, about half past 12 A. M., a fire broke out in the Bessarabia, then loading with cotton in the port of Charleston, at Atlantic Wharves. The steam-ship was built in compartments. One of these forward was divided into two parts by wooden bulk-heads. There were in the ship, when the fire broke out, some 1,100 bales of cotton. About 400 of these bales were in the compartment aft, the remainder were in the compartment forward. Smoke was seen coming out of the forward hatch, and the fire was evidently in the forward compartment. The alarm of fire was first given by the watch on the ship. The master of the steam-ship, coming on deck, set his pump going, and sent a stream of water down the forward hatch with the ship's hose. He sounded no alarm from his vessel, but he requested the watchman on the wharf to sound the city fire alarm, and thus to summon the city fire department. In five minutes this was done. The fire department responded at once, and were on the scene of action in five or six minutes after the alarm was sounded, with five steam fire-engines, having four others in reserve. As soon as the fire department arrived, its chief took charge of the fire, with the full concurrence of the master of the steam-ship, and in a short time had 4, and soon afterwards had 10, streams of water pouring into the forward hatch, from hose discharging each about 800 gallons of water a minute. This steady stream of water produced its natural result. The fire was at once under control, and after some time was subdued. After the fire was out, and

Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

the city fire department had left the steam-ship, some fire appeared on several bales of cotton in the second division of this forward compartment. This was extinguished easily, the hold being full of water.

When the first alarm calling out the fire department was sounded, the libelant was at home in bed, about two squares from his tug, which was lying at Adgers' wharf. He was roused at once, dressed, went to the tug, and, her fires being lit, got up steam, and proceeded to the Bessa-He fixes the time at which he reached the steam-ship at a quarrabia. It is immaterial to fix the exact minute. All of the witnesses agree that the tug reached the steam-ship just about or just after the pinnace had been let down into the water. The pinnace was lowered in order that it should go to the bow of the steam-ship, and carry a line from her to the next dock. This was done under the direction of the chief of the fire department, for the purpose of preventing the steam-ship from listing, because of the quantity of water which was pouring into her. Its purpose was to keep the steamship on an even keel. This was done to facilitate the extinguishment of the fire. The tug, on coming alongside of the steam-ship, waited until the pinnace was clear of her, and then called to some one on the deck of the steam-ship to take her lines. This was done by the carpenter, in the presence of the second mate. The latter hailed the tug, and asked why she came alongside, and if she had orders to tow the ship from the dock? No reply was heard to this query. As soon as libelant had made his tug fast, he went on board the Bessarabia, and soon had the hose of the tug passed into the steamship. He did not ask for nor report himself to any officer of the ship or of the fire department. There is, again, some conflict of testimony upon the point whether the tug pumped any water into the ship or not. I find that the hose of the tug, with or without a nozzle. was passed into the forward hatch, and did pour a stream of water for some minutes, between five minutes and a half hour, and that, as soon as this was observed, the hose of the tug was taken away by the concurrent action of the master of the steam-ship and the chief of the fire department; that there was no resistance to this on the part of the libelant. He remained alongside of the steam-ship in his tug a short time afterwards, when he was ordered away. The tug was provided with hose about two to two and a half inches in diameter.

The value of the The cargo,	snip is	, -	•	•	•	•	-	•	\$75 000 45 000
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Of the cargo then By fire, - By water, slight,	•	damag	•	water,	bales	of cot	•	•	535 119 35

This cotton has all been sold for \$21,056 gross.

Is this a salvage service? "The relief of property from an impending peril of the sea, by the exertion of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property, constitute a case of salvage. It may be a case of more or less merit,

according to the degree of peril in which the property was, and the danger and difficulty of relieving it. But these circumstances affect the degree of the service, not its nature." The Alphonso, 1 Curt. 376. One essential element in estimating the compensation for salvage is the degree of the danger from which the property was rescued. The Blackwall, 10 Wall. 1; The Sandringham, 10 Fed. Rep. 573.

In order then to constitute a salvage service, the property must have been in peril, and must have been relieved by the services of the person claiming salvage, either rendered alone, or in combination with others; and the safety of the property must have been consequent on—that is to say, a consequence of—such services, in whole or in part. The fact has been found that the tug came alongside of the steam-ship after the latter had been placed, with full concurrence of her master, in the charge of the city fire department; that this department was fully equipped for such service, having five steam fire-engines on duty actively, and four increserve; that the fire department had the fire under control, and extinguished it; that the ship was in no danger, and that the fire could not spread in her cargo: that the fire itself was diminishing, and the vessel was being filled with water at the rate of from 5,000 to 8,000 gallons per minute. When the tug arrived the ship and cargo, to all intents and purposes, were already saved. Under these circumstances, the libelant could give no assistance. None was needed. He could not have contributed towards the safety of the ship and cargo, for when he reached the steamship she was under the control of the department, and her safety thus insured. There can be no doubt, however, that the libelant went to the Bessarabia with the intent and hope of aiding her. Courts always favor intent of this kind. If, when he reached the steamer, he had communicated with her officers, or any one of them, or with the fire department tendering his aid, and if, when ordered away, he had remonstrated, a different result might have been reached. At all events, he should not be punished.

I am of the opinion that he is not entitled to salvage, and that the libel

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should be dismissed, the costs to be divided.

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HOLDEN and others v. WHITING.

(Circuit Court, D. Massachusetts. February 18, 1887.)

ESTOPPEL — OF BANK BY RECORD OF VOTE — FRAUDULENT ALTERATION—SALE OF MORTGAGE.

The secretary and treasurer of a savings bank fraudulently altered the record of a vote of the trustees authorizing him to discharge and release all mortgages belonging to the bank, by interpolating the word "assign," and then assigned one of the mortgages for full value to A. Held, that the evidence showed that the transaction was a sale, and not a pledge; that the purchase was made on A.'s own account, and not on account of a national bank, as claimed, and that the purchaser acted in good faith and without notice of any fraud; that it was immaterial whether the signature to a certified copy of the record received by the purchaser through the mail (sent, as he supposed, by the secretary in fulfillment of his promise to that effect) was a forgery of the secretary's name or not; and that the purchaser obtained a good title by estoppel against the bank; following certain cases involving similar fraudulent transactions of the same official.

In Equity.

Benj. F. Butler and Solon Bancroft, for complainants.

J. G. Abbott, for defendant.

COLT, J. This is a bill in equity brought by the receivers of the Reading Savings Bank against the defendant, to obtain the reconveyance of a number of mortgages claimed to belong to them as receivers of the bank. On March 22, 1879, the bank failed. It was discovered about this time that N. P. Pratt, the secretary and treasurer of the bank, had fraudulently disposed of a large part of the assets. By a vote of the trustees, passed in 1876, the treasurer was authorized to discharge and release all mortgages belonging to the bank. This record was altered by Pratt so as to read "discharge, assign, and release." By means of this fraudulent interpolation Pratt succeeded in disposing of a large number of mortgages. The rights of purchasers of these securities have several times been before the courts for adjudication. In Whiting v. Wellington, 10 Fed. Rep. 810, Judge Lowell held that a purchaser in good faith without notice obtained a title by estoppel against the savings bank by virtue of the certificate of its recording officer that a certain vote was found upon its record. This decision was followed in Com. v. Reading Sav. Bank, 137 Mass. 431, and in Holden v. Phelps, 141 Mass. 456, 5 N. E. Rep. 815.

The defendant derived title to the notes and mortgages in controversy through John F. Kimball, president of the Appleton National Bank, and those for whom Kimball acted, and it is admitted that if Kimball,

and those for whom he acted, had no title, the defense fails.

The position is taken by the plaintiffs that Kimball had notice that these securities were taken contrary to law, and that he is guilty of fraud. Assuming that notice and fraud on the part of Kimball are charged in the bill, which the defendant denies, I can find no sufficient proof to sustain these allegations. It is in evidence that during the years 1878

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and 1879, owing to a feeling of insecurity on the part of depositors towards savings banks, it was customary for the banks to raise money by assignment of their securities or otherwise to meet demands. It is shown that Kimball purchased mortgages from other savings banks in Massachusetts. The fact, therefore, that the Reading Savings Bank wanted to dispose of some securities to raise money was not exceptional in its character. There was nothing in it unusual, or calculated to excite surprise or to put a person upon his guard. Nor, upon the evidence, was there anything unusual, or calculated to arouse the suspicion of a person of Kimball's banking experience, in permitting the treasurer of a savings bank to assign securities. A strong fact going to prove Kimball's good faith is that he paid full face value, including interest, for these mortgages. There is no evidence to show that Kimball had any such relations with Sidney P. Pratt, the son of the treasurer, and engaged with him in defrauding the bank, as go to prove any knowledge on his part of anything irregular. I have carefully examined the transactions with which the son was connected, and which it is claimed are calculated to throw suspicion, at least, upon Kimball, and, in my opinion, the facts do not warrant any such inference. I have no reason to doubt Kimball's statement that he never saw Sidney P. Pratt but once to recognize him, and never had any conversation with him. The plaintiffs' charge of fraud or notice is not sustained by proof.

Another ground relied upon in this case is that the certificate received by Kimball was not a copy of the record of the bank with its fraudulent interpolation, but was a forgery of such record. The copy received by Kimball has the word "assign" placed before "discharge," while the fraudulent record places it after. The copy Kimball produces is the same as the copy found in Thompson's diary, (see Holden v. Phelps, 141 Mass. 456, 5 Nr. E. Rep. 815,) which was made by Thompson at least several months before the first purchase by Kimball. It also appears that the body of Kimball's copy is probably not in the handwriting of N. P. Pratt, but of his son, Sidney. As to the signature of this certificate, another son of Pratt testifies that he does not think his father wrote it; and Solon Bancroft, one of the receivers of the bank, testifies that he is familiar with Pratt's writing, and that he is quite confident it was not written by him.

By this means the plaintiffs undertake to establish that Kimball's certificate was not sent to him by N. P. Pratt, the treasurer and secretary, but that it came from Thompson, and was a forgery. Kimball swears that he asked Pratt if he had authority to assign mortgages; that he said he had, and would furnish a copy of the vote; and that, immediately after, he sent him the certificate, which he produces, by mail. This evidence stands uncontradicted. I think the defendant has fairly made out that the certificate, which is, in substance, a copy of the record of the bank, was received by Kimball from N. P. Pratt, secretary and treasurer, in the course of negotiating the sale of the first mortgages purchased, and it follows that, whether forged or nct, it binds the bank as against an innocent party acting in good faith and without notice.

The point is taken by the plaintiffs that the receipt given by Kimball or the Appleton Bank shows, as to the secureties it covers, that the transaction was a pledge, and not a sale. This question has already been carefully considered in Whiting v. Wellington and Com. v. Reading Sav. Bank. In the conclusion there reached, which is adverse to the plaintiffs' contention, I concur. There is no force in the objection that these purchases were on account of the Appleton National Bank, and that, therefore, no title passed because national banks are prohibited from taking mortgages. The evidence is far from supporting the proposition that these purchases were made on account of the Appleton Bank; but, even if they were, it could not avail these plaintiffs. National Bank v. Matthews, 98 U. S. 621; National Bank v. Whitney, 103 U. S. 99; Fortier v. National Bank, 112 U. S. 439, 5 Sup. Ct. Rep. 234; Reynolds v. National Bank, 112 U. S. 405, 5 Sup. Ct. Rep. 213.

I find nothing to take this case out from the decisions in Whiting v. Wellington, Com. v. Reading Sav. Bank, and Holden v. Phelps, and there-

fore the bill should be dismissed, with costs.

Tuck v. Olds and others.

(Circuit Court, W. D. Michigan, S. D. October Term, 1886.)

1. Costs—Witness Making Examination of Dock.

A fee to witness for his services in making a preliminary examination of the locus in quo, a certain dock, the exact location of which was in question, cannot be allowed to be taxed as costs being the creature of statute, and the statute not authorizing such an allowance; and it is immaterial that the survey was made in order that intelligent testimony might be given upon the question of location.

2. Same—Solicitor's Fee for Taking Depositions.

Rev. St. U. S. § 824, allowing an attorney's or solicitor's fee of \$2.50 for each deposition taken and admitted in evidence in a cause, does not apply to depositions taken before any of the regular examining officers of the court, in the ordinary way of taking depositions, or before some person agreed on by the parties to act as examiner, but applies only to depositions taken de bene esse, and in such other cases, not within the scope of the ordinary method of taking testimony in causes pending in the federal courts, as may arise.

8. Same—Witness Fee to Party to Action.

A witness fee to a party to the action is taxable in the federal court as costs, provided the party causes it to appear by his affidavit, annexed to his bill of costs, that his attendance was solely for the purpose of giving his evidence in the action, and not to assist in its management. Although these facts do not appear by the affidavit in a cause, yet, where the omission is not excepted to, the fee will be allowed as already taxed, upon the party filing an affidavit stating the facts. No allowance of traveling fees can be made where the party does not appeal from the disallowance thereof by the clerk.

In Equity. On motion for retaxation of costs.

Taggart, Wolcott & Ganson, for complainant.

Dart & Call and G. A. Wolf, for defendants.

SEVERENS, J. The complainant's costs in this cause having been taxed, a motion for retaxation thereof is now made, presenting three points for determination:

First. Exception is taken to the allowance by the taxing officer of nine dollars for a survey made by one of the witnesses of the locus in quo, a certain dock, the exact location of which was somewhat in controversy in The regular fees of this witness in the case appear to have been duly taxed according to the provisions of law, and this item of nine dollars is not for his fees as a witness, but for his services in making a preliminary survey of the dock for the purpose of qualifying him to testify with precision as to its situation. However desirable it may have been in the interest of the complainant that such survey should be made. in order that intelligent testimony upon that subject might be presented, and reasonable as it might seem, as an abstract proposition, that he should be compensated for the expenditure thereby incurred, as a question of law I have no doubt that the item must be disallowed. Costs are the creature of statute law, and there is nothing in the statutes regulating the taxation of costs which would justify the allowance of this item.

Second. Exception is also taken to the allowance of \$10 as solicitor's fees for the taking of four depositions in the cause, which were taken at Petoskey, before John G. Hill, Esq., pursuant to an order of this court, based upon the stipulation of the solicitors in the cause, constituting him a special examiner for that purpose. It will be seen, therefore, that these depositions, although not taken before a regular examiner of this court, were taken in strict analogy to the ordinary practice of the court regulating the taking of testimony in causes, and that the authority to take them was conferred by the court in compliance with the stipulation of the parties. I do not think that the statute providing for the taxation of attorney's or solicitor's fees for taking depositions covers, either by its express terms or by any fair interpretation thereof, depositions taken before any of the regular examining officers of the court in the ordinary way of taking testimony in equity causes, or, as these were, before some person who, pursuant to the stipulation of the parties, is empowered to act in lieu of such an examiner. It is probable that the statutory provision was intended to provide for compensation in cases where depositions are taken de bene esse, and in such other cases, not within the scope of the ordinary method of taking testimony in causes pending in the federal courts, as may arise. The exception to this item must also be sustained.

The third exception relates to the allowance of an item of three dollars to the complainant for his attendance as a witness. The bill, as presented to the taxing officer, contained a charge also for complainant's traveling fees as a witness, but that charge was disallowed by the clerk. The objection to the allowance for his attendance as a witness is put upon the broad ground that witness fees for a party are not taxable at all in this court. I cannot assent to that proposition, but shall hold that in this court, as is held in the courts of the state, a party is entitled to

witness fees for his own attendance and travel, provided he causes it to appear by his affidavit attached to the bill of costs that his attendance was solely for the purpose of giving his evidence in the cause, and not to assist in its management, and that the travel was solely for the purpose of giving his evidence therein. These facts do not appear by the affidavit filed in this cause, nor is the want of such showing excepted to specifically on this ground by the defendants. Under these circumstances, the complainant's fees for attendance as a witness will be allowed as already taxed, upon his filing a supplemental affidavit in conformity to this opinion, but he cannot now be allowed his traveling fees, as he did not appeal from the disallowance thereof by the clerk.

CHENEY, Ex'r, etc., v. Stone and others.

(Circuit Court, D. Nebraska, 1886.)

1. LIMITATIONS—Note—Mortgage Foreclosure—Purchase for Value.

In a suit to foreclose a mortgage brought within the 10 years limited for such suit by the statutes of Nebraska, the plaintiff is not deprived of the benefit of the fact that he is a purchaser for value, and before maturity, of the notes and mortgage, by the fact that the statute of limitations has run on the

2. NEGOTIABLE PAPER—Possession—Presumption.

Possession of negotiable paper duly indorsed is prima facie evidence of bona fide purchase for value before maturity.²

3. Mortgage Foreclosure—Claim of Bona Fide Purchaser—Evidence.

In an action brought in Nebraska by one claiming to be the executor of a former resident of New York to foreclose a mortgage of which it was claimed that the testator was a bona fide purchaser before maturity, it appeared that a former action to foreclose had been brought by the testator in his life-time, but was dismissed on account of the failure of the plaintiff to submit to examination; that in that action defendant took out an order for plaintiff's examination, and at the appointed time and place, the place being an office in New York city, a man presented himself claiming to be the plaintiff, but, when questioned about his name, seemed embarrassed, and immediately left the room, and did not reappear for examination. It was also shown that the executor, who claimed to have himself sold the mortgage to the testator, wrote letters to the mortgagor urging payment of the interest due on the mortgage after the date of the alleged sale. Held, that these circumstances were not sufficient to justify a conclusion that there was no such person as the alleged testator, and that the pretended sale was fictitious, as against the positive testimony of several witnesses to their acquaintance with the testator, and their knowledge of the circumstances of the sale.

4. Foreign Executor—Action by—Right to Maintain.

In a state where an executor appointed in another state is allowed to sue like any other non-resident, the right of one to maintain an action as such an executor, on securities in his hands, is sufficiently shown by the production of letters testamentary issued by a county court of another state having general jurisdiction of the settlement of estates, although the testator was a resident

¹See Cheney v. Janssen, (Neb.) 29 N. W. Rep. 289, and note; Cheney v. Woodruff, Id. 275, and note.

²See Manistee Nat. Bank v. Seymour, (Mich.) 31 N. W. Rep. 140, and note.

of a third state when he died, and the recitals of the letters only show that he had property in the state, and not in the county where the letters were issued, and there is no evidence of the will being probated there.

5. JUDGMENT—OF DISMISSAL—WHEN A BAR.

If a suit is dismissed on account of the failure of plaintiff to submit himself to examination, the judgment is not a bar to a subsequent suit.

Action begun July 12, 1884, to foreclose a mortgage given to secure a loan of \$1,000 and interest. There were two notes, and ten interest coupon notes, which, with the mortgage, were dated July 16, 1872. The principal notes were payable in five years; the coupons, in one, two, three, four, and five years, respectively. Usury, statute of limitations, and former adjudication, among other defenses, were set up.

Among other evidence the defendant introduced a deposition of P. D. Cheney, taken in another suit, to which were attached letters written by Cheney, dated in July and August, 1876, urging payment of the interest coupons. Cheney testified, in the present case, that he sold the notes and mortgage sued on in April, 1875, to the testator, William G. Davis.

C. E. Magoon, (O. P. Mason, of counsel,) for complainant.

S. P. Davidson and T. Appleget, for defendants, claimed, among other things, that the defense of usury was not avoided by the fact, if shown, that plaintiff's testator was a bona fide purchaser of the notes for value, and before maturity, as the five-years statute of limitations had run on the notes; citing Cheney v. Cooper, 14 Neb. 419, 16 N. W. Rep. 471.

Brewer, J. This is an action to foreclose a mortgage. Several defenses, such as usury and the statute of limitations, are interposed. Many of the questions presented by the pleadings have been already considered by me in prior cases in this district of a like nature, and further reference to them is unnecessary. Some of them have also been considered by the supreme court of this state, and my conclusions, I am happy to state, were fully in accord with those of that learned court. Chency v. Cooper, 14 Neb. 415, 16 N. W. Rep. 471; Chency v. Woodruff, 29 N. W. Rep. 275; Mundy v. Whittemore, 15 Neb. 647, 19 N. W. Rep. 694.

Two matters are, however, presented which require notice.

1. Complainant claims that his testator was a bona fide purchaser before maturity. Defendants insist that the testimony fails to establish this fact. It must be borne in mind that the possession of negotiable paper, duly indorsed, is prima facie evidence of a bona fide purchase before maturity. Concede, for the purpose of this argument, that usury in the inception of the paper, which in this case is abundantly proved, does away with the prima facie evidence from such possession. We have the positive testimony of two witnesses, complainant and his brother, to the purchase, its time, amount paid, and by one, at least, the information given to the purchaser. The circumstances thus disclosed show a purchase before maturity, payment of full value, and indicate entire igno-

⁸ See Lewis v. Adams, (Cal.) 11 Pac. Rep. 833, and note; Moore v. Jordan, (Kan.) 13 Pac. Rep. —.

rance on the part of the purchaser of the matter attending the giving of the notes and mortgage. As against this, there is no direct testimony. That which is relied upon is this: Testator in his life-time brought an action in this court to foreclose this mortgage. Defendant sought to take his testimony, and obtained an order for his examination. Failing to submit himself to such examination, the court dismissed the action. course, such dismissal is no bar,—presents no case of res adjudicata. Cheney v. Cooper, 14 Neb. 415, 16 N. W. Rep. 471. Further, there is the testimony of one witness that he attended at an office in New York city, in behalf of defendants, at a time fixed for the examination of the complainant; that a gentleman appeared and was sworn, gave his name as William G. Davis, the complainant, but, when asked what the initial "G" stood for, seemed confused, and repeated the letter "G" three times. said "George," and immediately thereafter excused himself on the plea of a prior engagement, and never reappeared for examination. In addition, two letters of Cheney, the complainant, are produced, written after the time of the sale testified to by him, urging, in behalf of the lender, the payment of the overdue interest. The inference sought to be drawn from this is that there was no such person as William G. Davis, the alleged testator; that he was a myth; that the pretended sale was fictitious; and that Cheney was all the while the real owner. The inference is far-fetched. Several witnesses testify to an acquaintance with and knowledge of William G. Davis. The reality of such a person is established. His conduct at the examination may create a suspicion. but that is all. Chenev's letter, even if evidence against the defendant's estate, contains no assertion of title or denial of sale. It is such a letter as might well come from the original negotiator of the loan, still the owner of a small note unpaid, and recognizing the duty of doing what he can to obtain payment of the interest on the principal notes. of these matters are sufficient to overthrow the positive testimony as to the bona fides of testator's purchase.

2. The other matter is this: Complainant sues as executor. bill he alleges the death of Davis, and his appointment as executor by the court of Christian county, Illinois. He produces his letters testamentary, but no copy of the will. The letters recite the death of Davis, "late of the county of New York and state of New York." The answer denies that there was any such person as William G. Davis, that Cheney was executor, or that the Christian county court ever had jurisdiction to appoint Cheney executor. That there was such a person as Davis, is, as I have said, clearly established. He was domiciled in New York at the time of his death. There is no testimony showing that his will was probated in that state, or that he had any property in Christian county. Illinois, at the time of his death, and nothing except the recitals in the letters to show that he had any property in the state of Illinois. Now, upon these facts, it is contended that, in the absence of the will. it cannot be presumed that the executor has authority to collect these notes, because that will may have provided some other disposition of them; that as the testator was, at the time of his death, domiciled in New York, the primary jurisdiction for the settlement of his estate is vested in the courts of that state; that there the will must first be probated; and that in Illinois there can be only ancillary administration, and that limited to property in that state; and, finally, that, as it is not shown that testator left any property in Christian county, the courts of the county had no jurisdiction of the estate even for purposes of ancillary administration.

Neither of these propositions can, I think, be sustained. The county courts of Illinois have general jurisdiction of the settlement of estates of deceased persons, with power of appointment of executors and administrators. Rev. St. Ill. c. 37, § 69. The presumption as to their actions is that they are rightly done, and that the authority conferred upon an executor to act within their jurisdiction was lawfully granted. Grignon v. Astor, 2 How. 319. The letters testamentary prove the authority of the executor to act for the estate. He has possession of these securities. Prima facie it is his right and duty to collect them. This is not a case in which the securities are in the possession of another representative of the estate appointed by the courts of the state in which the property is situate, as in Noonan v. Bradley, 9 Wall. 394, or where full authority to sue is not given by the statutes of the state in which the action is The statute of Nebraska is general and full in its terms: "An executor or administrator, duly appointed in any other state or county, may commence and prosecute any action or suit in any court in the state, in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may be permitted to sue." Comp. St. Neb. 1885, p. 324, c. 24. If the will contains any restrictions upon the power of the executor to collect or make any other disposition of these securities, the defendants should have proved the fact; otherwise the debt which they owe the estate they should pay to the proper representative. These are the only questions presented which I deem it necessary to notice.

A decree will be entered in favor of the complainant as prayed for. It is admitted that the case of Cheney v. Brown is similar, and a like decree will be there entered.

Branch v. Davis and others.

(Circuit Court, M. D. Alabama. November Term, 1886.)

1. Bond of Probate Judge - Liability on - Failure to Make Tax-Roll -

CODE ALA. \$\$ 435, 689.

The duty imposed by Code Ala. \$ 485 upon the probate judge to make and deliver a tax-roll to the tax collector, upon the levy of a tax by the county commissioners, is a duty incident to his office as judge, and not as commissioner, and for neglect of it an action can be maintained upon his bond by a judgment creditor of the county, to pay whose judgment the tax was levied, under section 689 of the Code, providing that a bond of a probate judge may be sued by any one sustaining an injury by the failure of the judge to perform certain specified duties, or "any other official duty." 2. SAME-MEASURE OF DAMAGES-JUDGMENT CREDITOR OF COUNTY.

The measure of liability of a probate judge, or his sureties, to a judgment creditor of the county, for his failure to make and deliver the tax roll to the tax collector, after a special levy to pay the judgment, is the actual loss and trouble caused to plaintiff by the delay and the failure of the proper officer to collect the levy, but not the amount of the judgment, nor the amount which the levy would have yielded, if collected, although the levy has become functus by the delay, unless it is shown that, in consequence of the delay, it has become impossible to collect the judgment.

8. Taxation—Collection after the Year.

If the probate judge fails to make and deliver a tax-roll to the tax collector upon a levy being made by the county commissioners, and the tax-year passes without his having done so, the power to collect the tax by the ordinary statutory mode is gone.

Heard upon the Trial of the Cause. Jury, by agreement of parties, was discharged.

D. S. Troy and A. T. Landon, for plaintiff.

Walter L. Bragg and Wm. H. Smith, for defendants.

Bruce, J. This is an action brought by plaintiff against the defendant David L. Davis and the sureties on his official bond for damages for an alleged failure on the part of Davis to perform a duty required of him by law as the probate judge of Randolph county, state of Alabama. On the ninth day of December, 1876, the plaintiff recovered a judgment in this court against the county of Randolph, Alabama, for the sum of \$3,691.44, and costs; and thereafter, on the tenth day of August, 1878, at the instance of plaintiff, a writ of mandamus was issued from this court to the commissioner's court of said county requiring that court to levy, assess, and cause to be collected, a tax upon the taxable property of the county to pay said judgment; and thereafter, on the twenty-first day of October, the court of county commissioners of said county, in obedience to said writ, did levy and assess a tax of three-fourths of 1 per cent. upon the taxable property of said county, and made return thereof to this court. By section 435 of the Code of Alabama it is made the duty of the probate judge to "make a book containing, in concise form, the amount of taxes due by each tax-payer, which book shall show the amount of tax on real estate and personal property separately, which book must be turned over by the judge to the tax collector on or before the day when the tax becomes due.

This book, so made and delivered to the tax collector, is the warrant of authority to the collector for the collection of the taxes. There is really no controversy as to the facts in the case. It is in proof, and is admitted, that the probate judge did not make or deliver the book described in section 435 of the Code to the tax collector; that the tax levy was never collected; and that plaintiff's judgment remains wholly unpaid.

The questions which now arise are: First, is there any liability at all on the official bond of the probate judge? And, second, if so, what is the measure of damages which may be recovered?

First, then, as to liability. It is fundamental that injury to a party which is the direct and proximate result of a breach of duty on the part

of another carries with it liability to compensation for such injury; and this is surely not less so where persons occupy places of official trust and responsibility. In these cases statutes are passed which have for their purpose and object the security of persons to whom injury may come by reason of the neglect and refusal of officers to perform the duties required of them by law.

By section 689 of the Code of Alabama it is provided: "All bonds given by judges of probate may be sued by any one sustaining an injury by reason of any neglect or omission of such officer" to perform certain duties therein specified; and the concluding words of the section are, "or by the failure of such judge to perform any other official duty." The words of the law would seem to be a full answer to the question of liability.

It is said that the omission of the duty complained of is not a duty required of the defendant Davis when acting as a probate judge, but one which he could only perform while acting as a commissioner and chairman of the board of equalization of taxes; but this is not the correct reading of the law.

The case of Ex parte Rowland, 104 U. S.613, is cited, where the court say: "The court of county commissioners, while called a 'court,' is in fact the board of officers through whom the affairs of the county are managed. The duties of this board * * are administrative, not judicial."

The statute, however, as we have seen, imposes the duty, the failure to perform which is complained of here, upon the probate judge, eo nomine, and not upon him as a commissioner or member of the commissioners' court. And the fact that duties of this character are administrative, and not judicial, is the ground upon which such officers may be required, by proper proceeding, to perform those duties, and, failing, may be held responsible to parties injured in damages resulting to them for such failure.

Another suggestion is that the law in reference to the official bond of a probate judge was not intended to cover such a failure of duty as is here complained of, and that, while the probate judge might himself be held liable, his sureties on his bond cannot be so held liable. The case of Jones v. Biggs, 1 Jones, (N. C.) 364, is cited in support of that view. In that case the court bases its judgment on the statute of North Carolina which required guardians to renew their bonds every three years, and provides: "It shall be the duty of the clerks of the several county courts to issue an ex officio summons against each guardian who shall fail," etc. The court holds that this duty imposed upon the clerk was not one of the duties appertaining to the office of clerk, as to keep safely the records, issue writs, etc. In the case at bar, however, the duty is specifically enjoined by the statute, and is in its nature and effect so much like the duty of issuing writs in the ordinary course of the business of the office that the case is not within the rule of the case cited.

The question, however, which gives rise to the most serious contention is, conceding the liability of the probate judge and the sureties on his

official bond, what is the measure of such damages? It is claimed, on the one hand, that it can be no more than nominal damages. other, that it is the amount of the plaintiff's judgment in this court; or, if not, the amount that the levy of October 21st would have yielded if it had been collected according to law and the right of this plaintiff.

It is not shown that the plaintiff's debt, now in judgment, has been lost, or that the taxable property of the county is less in value now than it was when the judgment was rendered. On that point the presumption is that the land, and even the personal property in the county liable to taxation, is still there; but the plaintiff's debt has not been paid, either in whole or in part, and the question arises whether the failure of the probate judge to comply with the law as before stated renders him and his bondsmen liable for the judgment, or whether the debt, interest, and costs are to be taken as an element of damages in such a case.

Authorities are cited to show that, "in absence of averment and proof of actual injury, there can be only nominal damages recovered." Marcum v. Burgess, 67 Ala. 556. This was an action on a sheriff's bond for damages for failure to return an execution according to its mandate.

In the case of Dow v. Humbert, 91 U.S. 294, which was a suit by a judgment creditor of the town of Waldwick against the supervisors of the town for refusing to place upon the tax-list thereof the amount of his judgments as provided by the statutes of Wisconsin, it was held that the plaintiff was entitled to recover only nominal damages. case the point was squarely made by the plaintiff that the measure of his damages was the amount of his judgment against the town; but the court held otherwise, and in its opinion announced the principle upon which damages in such cases should be awarded. This case is decisive of the question that the measure of damages in such cases is not the amount of the debt of the plaintiff, but that, in the absence of any proof of actual damage, the plaintiff is entitled to nominal damages only, and costs; and it would seem to follow from the reasoning of the court that in no case of the kind is the plaintiff entitled to any judgment that would operate a credit on the debt or judgment, to pay which the levy had been The theory is that interest is the equivalent for delay in the collection of a debt, and, unless the debt is lost, either in whole or in part, the recovery in a suit against the delinquent officers is not for the debt, or any part thereof, but only for the injury actually sustained by the plaintiff.

It is claimed, however, that the case at bar is distinguishable from the case of Dow v. Humbert, and there are points of difference. In the latter case there was no levy, as in this case. There the delinquent officers failed to place the judgments on the tax-list of the town, and it does not appear that in that case there had been any mandamus proceeding, as in this case. It is not clear, however, that the mandamus proceeding in the case at bar, in obedience to which it is alleged the court of county commissioners made the levy of the tax to pay the judgment in question, either increased or diminished the statutory liability of the probate judge

upon his bond.

Considerable stress was laid in argument upon the idea that the record showed that a false return had been made in answer to the peremptory writ of mandamus from this court, in this: that the return showed that a suit had been instituted upon the bond of the collector of taxes of the county to make him liable for a failure to perform his duty in the collection of this levy, while in fact the members of the court of county commissioners knew that he never had incurred any liability in the matter, for that the book or tax-roll which was his authority to collect the tax had never been made and delivered to him by the probate judge, as required by law, and therefore the duty to collect had never been devolved upon him. But, whatever bad faith, if any, may be chargeable against the members of the court of county commissioners in the return which they made to the writ of mandamus, that cannot be considered as an element of liability in this suit, which is a suit against the probate judge, not as a member of the court of county commissioners, but against him as probate judge, and the sureties upon his official bond.

In the case of Dow v. Humbert the suit was not, as in the case at bar, upon an official bond, but against the delinquent supervisors, and certainly the rule of liability involving sureties would not be held more

strictly than in a case against the official alone.

But it is claimed that, although the plaintiff may not be entitled to measure his damages in this case by the amount of his judgment, still he is entitled to the fruit of the levy which was actually made, and which yielded nothing to him by reason of the failure of the probate judge to perform his duty as charged. A question has been made in the argument as to whether, in legal contemplation, the damage which the plaintiff claims was the direct and proximate result of the failure of the probate judge to perform his duty as charged,—for that non constat the judge might have made and delivered the book to the tax collector, and he been unable to collect the tax; but it is not deemed necessary to discuss this question of cause and effect in this case.

It is said the levy is functus, and the plaintiff has lost the fruit of that levy, and therefore the amount that the levy would have yielded, if collected, is the measure of damages to which the plaintiff is entitled here. Argument is made to show that the levy is not dead or lost, but that it remains as a charge upon the taxable property of the county; citing Perry Co. v. Selma M. & M. R. Co., 65 Ala. 401; Winter v. City Council of Mont-

gomery, Sup. Ct. Ala. MS.

These cases show that a levy of tax, made regularly by the proper authority, remains a charge upon the property, subject to the levy, which a court of equity will recognize; but, after the tax-year passes, where, then, is the authority for the probate judge to make and deliver the tax-warrant to the collector, and where is the authority of the collector to enforce the collection of such levy? The collection of taxes is matter of strict law, and governed by the statute; and, if special taxes to pay a judgment are not collected in the same manner as are other taxes, then the question arises, under what law can the tax collector proceed to collect such tax?

In the case of Winter v. City Council of Montgomery, cited supra, which was a bill in equity to enforce the collection of delinquent taxes, the court say: "The remedy given by statute is gone with the lapse of years because of the failure of the proper officer to enforce it at the authorized time;" so that the levy of October 21st, whatever right it may give the plaintiff, the ordinary means of collecting it is gone.

The plaintiff insists that the levy made by the court of county commissioners has been impaired, and that this case is not, therefore, like the case of *Dow* v. *Humbert*, cited *supra*; but, if it has been impaired, it is only by the fact that it has not been collected, and may not now be collected in the ordinary way; and in *Dow* v. *Humbert*, at page 299, the

court say:

"The expense and cost of the vain effort to have the judgment placed on the tax-list; the loss of the debt, if it had been lost; any impairment of the efficiency of the tax levy, if such there had been; in short, any conceivable actual damage,—the court would have allowed, if proved. But plaintiff, resting solely on his proposition that defendants by failing to make the levy had become his debtors for the amount of his judgment, asked for that, and would accept no less."

Plaintiff in the case at bar presents this view of the subject: that, if not entitled to the amount of the judgment, he is entitled to the amount the levy would have yielded had it been collected, for that the levy has It has happened in this instance that the levy of threebeen impaired. fourths of 1 per cent. upon the taxable property of the county as returned for that year will not yield the full amount of this judgment, and the plaintiff claims judgment for the amount the levy, if collected, would have yielded, on the ground that that levy has been impaired. seen that the right to have the levy collected in the ordinary way is gone: but is that what the supreme court in the case of Dow v. Humbert, cited supra, means by an "impairment" of the efficiency of the levy? It may not be entirely clear what the court meant by the words just quoted, but from the connection in which they are found it is clear that the court meant any impairment of the efficiency of the levy, the direct result of which would be actual injury to the plaintiff in the ultimate collection of his debt,—for instance, the loss of property available for taxation in any future effort to levy and collect taxes to pay the debt,—but certainly not such loss as merely results in the postponement of the day of the payment of the plaintiff's judgment. Doubtless, the failure of the probate judge to do his duty caused delay in the collection of the plaintiff's debt, and repeated delinquencies of this kind on the part of officers whose duty it is to provide for the payment of judgments of this character would tend very much to lessen the present value of the debt, and, by postponing the day of payment, might almost render it valueless; but the supreme court in the case we are considering has in effect said that interest on the judgment is an answer to that objection.

The distinction insisted upon by plaintiff cannot be maintained. If, in a suit for damages against officers of a municipality for a failure on their part to place certain judgments on the tax-list as required by law.

the measure of damages is limited to the actual loss to the plaintiff, how can it be that in a suit against a probate judge, under the law of Alabama, for a failure to make and deliver the tax-roll to the tax collector, as he is required to do, the measure of damages can be other or greater than in the former case? Whether the delinquency complained of was in the first or subsequent steps required by law of the various officers charged with duties in the matter of the assessment and collection of taxes to pay judgments, it is not important to inquire, except so far as it may be shown that such delinquency results in actual loss to the plaintiff; nor is it the presumption in such cases that the debt is lost, and the burden thrown upon the defendants to show the contrary. The presumption is that the taxable property of the municipality remains liable to taxation for the payment of the judgment of the plaintiff, and that, if the levy already made cannot be collected, a new levy may be made, and its collection enforced by a proper proceeding.

A question is made in reference to the effect of certain legislation of the state since the judgment in this case was obtained, in reference to what are known as the "Strangulated Counties," of which Randolph county is one; but it is not deemed necessary to enter upon an examination of that legislation, for, whatever it may have been, even if it embarrassed the plaintiff in the enforcement of his remedy in this case, and whether constitutional or otherwise, it could not affect the question of the liability of the probate judge of Randolph county upon his official

bond in this suit.

The principles announced in the case of Dow v. Humbert, cited supra, are conclusive of the present case, and go fully to the proposition that actions of this character against officials for a failure on their part to perform the duties required of them by law are not to be made the means of collecting the debt of the plaintiff, but the recovery is to be compensation to him for the injury and loss actually suffered by him, and resulting from the failure of the defendant to perform the duty required of him by law. In that case, however, the court says: "The expense and cost of the vain effort to have the judgment placed on the tax-list," and "any conceivable actual damage, the court would have allowed, if proved."

In the case of Newark Sav. Inst. v. Panhorst, 7 Biss. 100, the court, Drummond, J., commenting on the case of Dow v. Humbert, says: "It has been decided, substantially, that the officers of such corporations are not liable for more than nominal damages if they refuse to perform the duties which the law imposes upon them;" and then goes on to say: "We will give the plaintiff some compensation for the trouble to which it has been put in consequence of the non-performance of a duty by the defendants, in the employment of counsel, and for the labor and expense, without defining it in any precise form or language;" and names \$585 as the sum for which judgment is given.

It is manifest that the courts in these cases feel that mere nominal damages and costs furnish a scant vindication of the law, and this case illustrates that view of the subject. Here the plaintiff had to resort to a suit in mandamus to compel the levy of a tax to pay his judgment; and when

the members of the commissioners' court, under the coercive power of this court, made the levy which they did make, the probate judge, a member of that court, failed to deliver the tax-roll to the tax collector of the county so that the levy was not collected, and practically became valueless to the plaintiff. Such conduct on the part of an official suggests that there should be some spur and incentive to the performance of legal duty beyond a judgment of one cent and costs; and following the case last cited, supra, (the parties having agreed in open court, the question being one of law, and the jury having been discharged, that the court should determine the matter, and the entry be made as upon a verdict of a jury,) the court finds for the plaintiff in the sum of \$500 as compensation for trouble and attorneys' fees in this cause, and costs of this suit.

SEMM v. SUPREME LODGE KNIGHTS OF HONOR.

(Circuit Court, S. D. New York. February 14, 1887.)

LAPE INSURANCE—Answers of Applicant not Warranties.

An applicant for life insurance, under the contract in this case, undertakes to answer the questions put to him according to his knowledge or reasonable belief, and not to misrepresent or suppress known facts, but does not warrant the absolute truth of his answers.

At Law.

Charles Steckler, for plaintiff.

Morris Goodhart, for defendant.

SHIPMAN, J. The question of law is whether, under Semm's application to Humboldt Lodge for membership therein, and the certificate which he received from said lodge, he warranted the truth of the answer which he gave to the question, "Have you been rejected by the medical examiner of any lodge or society?" In my opinion, he was required, under the contract, to answer the question according to his knowledge or reasonable means of belief, and not to misrepresent or suppress known facts, but that he did not warrant the absolute truth of his answers. The reason of the opinion is contained in the applicant's agreement in his printed application for membership.

As stated when the motion for a new trial was made, I have no objection to the verdict on the ground that it is against the weight of the evi-

dence.

The motion for a new trial is denied.

MARCK v. SUPREME LODGE KNIGHTS OF HONOR.

(Circuit Court, S. D. New York. February 14, 1887.)

BENEFIT ASSOCIATION — KNIGHTS OF HONOR—EXPULSION—DEATH PENDING APPEAL—REVERSAL.

A member of a lodge of the Knights of Honor was expelled by his lodge, and appealed to the grand dictator. Pending the appeal he died. Subsequently the judgment of expulsion was reversed by the grand dictator, he was reinstated by vote of the lodge, and his assessments due up to the time of his death were received. Held, following the analogy of the common law and of the law of the order, as held by its supreme dictator, that the appeal did not abate by the death of the member, and his benefit should be paid.

At Law.

Charles Steckler, for plaintiff.

Morris Goodhart, for defendant.

Shipman, J. Gisbert W. Marck, a member of German Oak Lodge Knights of Honor, was expelled from the lodge on April 8, 1884, appealed to the grand dictator from said sentence, of which appeal said lodge had notice, and died on April 25, 1884, pending said appeal. Subsequently the grand dictator set aside the judgment of expulsion. Marck was reinstated by vote of the lodge, and the dues and assessments which were due up to the date of his death were received. No appeal was ever taken from the vote of reinstatement.

If the analogies of the common law are to be regarded, the appeal did not abate by the death of Marck. Green v. Watkins, 6 Wheat. 260. By the reversal of the sentence of expulsion, and by the action of the lodge, he was reinstated as at the date of his expulsion, and was entitled to his benefit. It may be added that such was, at the time, the law of the order, which had held, by its supreme dictator, that if a decision of expulsion was reversed on final appeal, the appellant stands a member as if there had been no such judgment, and he must pay all back dues and assessments; and if, pending the appeal, he dies, has regularly tendered his dues and assessments, and, after death, the appeal is decided in his favor, his benefit will be paid as one who died in good standing, less the amount of his tendered and unpaid dues and assessments.

The motion for a new trial is denied.

United States v. McBosley. Same v. Moore. Same v. Pierce, (Two Cases.) Same v. Ritter. Same v. Stout. Same v. Stout and another.

(District Court, D. Indiana. December 28, 1886.)

ELECTIONS—ILLEGAL VOTING—STATE AND NATIONAL ELECTIONS—INDICTMENT
—REV. St. U. S. § 5511.

An indictment under Rev. St. U. S. § 5511, for illegal voting or for bribery at an election for representative in congress, voted for at same time and places and upon same tickets with candidates for local or state officers, need not charge that the ballot cast contained the name of a person voted for for representative in congress, nor that the bribe was given with intent to influence the voter in respect to the congressional election.

Indictments under Rev. St. U. S. § 5511; on Motion to Quash. David Turpie and Jas. G. McNutt, for the United States. Charles L. Holstein, for defendant.

Woods, J. The venue in each case is laid in Orange county, in the second congressional district of Indiana, and the several charges are predicated upon section 5511 of the Federal Revised Statutes; the section, so far as relevant, reading as follows:

"If, at any election for representative or delegate in congress, any person knowingly personates and votes, or attempts to vote, in the name of any other person, whether living, dead, or fictitious, or votes at a place where he may not be lawfully entitled to vote, or votes without having a lawful right to vote, or does any unlawful act to secure an opportunity to vote for himself, or any other person, or by force, threat, intimidation, bribery, reward, or offer thereof, unlawfully prevents any qualified voter of any state, or of any territory, from freely exercising the right of suffrage, or by any such meanished by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or by both, and shall pay the costs of the prosecution."

The substance of the charge against McBosley is that at the election for representative in congress held on the second day of November, 1886, he voted unlawfully in a township and precinct in which he had not resided long enough to be entitled to vote. Moore is charged with having unlawfully procured and advised McBosley to vote illegally. It is charged against Pierce that he prevented a voter from voting freely, in one case by paying him five dollars, and in the other case by giving him a quart of whisky, "to vote a ballot at said precinct at said election aforesaid, then and there containing the names of certain candidates for certain offices therein named, among which was the name of said Pierce, as a candidate for the office of sheriff of said county, the description of said ballot, and the names thereon, except the name of Pierce as aforesaid, being unknown to the grand jury." Ritter is charged with counseling and assisting Pierce to bribe a witness with money, as charged in the first indictment against Pierce. John Stout is charged with bribing a

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voter named Edmund Hammond, by paying him five dollars to cast a ballot containing the name of said Stout as a candidate for auditor of Orange county, the grand jury being uninformed in respect to other names upon the ballot. It is charged that Holliday and Amos Stout counseled and assisted John Stout to bribe Hammond.

The objection is made to each of these indictments that it does not show that the unlawful or tainted ballot contained the name of any candidate or person voted for for representative in congress, nor that the voter, by reason of the bribe, voted, or refrained from voting, or voted otherwise than without the bribe he would have voted, in respect to that office. This objection is predicated upon, but in my judgment not supported by, the proposition, if it be conceded, that the power of congress, under the fourth clause of the first article of the federal constitution, to make regulations and to declare offenses in respect to elections at which representatives in congress are voted for, is limited to such matters, acts, and conduct as do or may affect, or are designed to affect, the election of such representative, and does not extend to matters or conduct having exclusive reference to the choice of local or state officers.

When congressional and local elections are held at the same times and places, and mixed ballots are cast, as is the practice in Indiana, it is a misleading refinement, I think, to say that there are two elections—a national and a state—held at the same time. It is one election, for the conduct of which the two sovereignties have a common concern, though interested in several results, (Ex parte Siebold, 100 U.S. 371;) and congress having unquestionably the paramount and, when it sees fit to assert it, the exclusive power to regulate such elections, must, in the first instance at least, determine for itself what regulations are necessary or expedient; and it is not the province of the courts to restrict or annul any enactment on the subject, on the ground that it is not within the powers of congress, unless it be demonstrable that in no event, and under no circumstances, the offense defined, and coming within the letter and spirit of the enactment, could affect the election for representative in congress.

The offenses of voting illegally, and of bribery at elections, as denounced in section 5511, consist in the doing of things which are forbidden without reference to the intention of the offender; and by section 5514 it is expressly provided that, if the offense have reference to a ballot cast in a state where the names of candidates for congress and of candidates for local offices are or may be placed upon the same ticket or ballot, the proof in respect to the ballot will be prima facie sufficient to convict, if it be shown that the ballot was one on which the name of the candidate for congress might have been put.

It may readily be shown that illegal ballots in the boxes, even though they contain the name of no one voted for for representative in congress, especially where, as in this state, there is, and under the constitution can be, no certain means of knowing by whom a particular ballot was cast, might seriously complicate, and afford the means and opportunity for contesting, the result of a congressional election which otherwise would be undisputed. The indictment may or may not charge that the voter cast a ballot with the name of a candidate for congress upon it; but, in case of a contested election, it would be open to question and dis-

pute whether that ballot was cast by one person or another.

In respect to the charges of bribery, in addition to the considerations already advanced, it must be evident, on general principles, that congress has the right to forbid the presence at any federal election of all forms of force, threats, intimidation, or bribery used to prevent any qualified voter from freely exercising the right of suffrage; and where congressional elections, and elections for state and local officers, are held at the same time and places, and especially where the names of candidates for congress and candidates for local offices are put upon the same ticket, it is manifest that regulations and restrictions which permitted inquiry whether the offender in such respects intended to intimidate or influence the conduct of voters in respect to one office or candidate or another, would be inefficient, because easily evaded. Once concede that the indictment for bribery of a voter, in order to be good under the federal statute, must charge an intent to affect the congressional election. and the speedy result will be, not less bribery in respect to that election. but more likely a large increase, contrived and conducted in such way as to prevent proof of the real purpose, by pretenses of different pur-

It may be said, however, that this is only a question of proof, and that, if the government cannot prove its case, it ought not to have it. But the point is that the law need not be—the constitution does not require it to be—so framed as to demand difficult or impossible proofs of the offense. Indeed, the definition of bribery, as contained in this statute, shows an evident design to escape such difficulties. The offense does not consist in inducing the voter, by a bribe, to vote a particular ticket, or to vote for or refrain from voting for or against a particular person or candidate; but, like force, threats, and intimidation, bribery is treated as preventing the voter from exercising freely his right of suffrage, and in this view it is evidently immaterial whether the bribe was paid for one particular purpose or another; because, on the theory of law, as well as of reason and experience, the voter who has accepted a bribe for one purpose is unfitted for, and is likely to be thereby diverted from,

the right exercise of the elective franchise for every purpose.

In my judgment, therefore, it was not necessary that the indictment for illegal voting should have charged that the ballot cast contained the name of any person voted for for representative in congress; nor was it necessary that in the bribery cases it should be charged that a candidate for congress was voted for, or not voted for, nor that the bribe was given with intent to influence the voter's action in respect to congressman; and, if I am right in this, it follows that the indictment is not made bad by reason of the averments in respect to one name which the ballots are shown to have contained. Except as descriptive of the ballot, these averments would seem to be immaterial, even conceding that they warrant an inference that the alleged bribe was given for the vote for the person named.

What force the provision of section 5514 as rule of evidence at the trial may have in the way of indicating that the government's prima facie case may be met by countervailing evidence, and what should be deemed competent evidence in that direction, are questions not now up. The indictments I think good; and, if any of the matters urged against them are available to the defendants, it must be by way of defense, which they must bring forward. Motions overruled.

Ex parte Perkins.1

(Circuit Court, D. Indiana. March, 1887.)

1. CONSTITUTIONAL LAW—AUTHORITY OF CONGRESS TO REGULATE ELECTIONS.

The mere fact that a representative in congress is voted for at an election of state and county officers does not authorize congress to regulate such election in matters which in nowise relate to or affect the result so far as concerns the United States.

2. Elections—United States Statute Regulating—Rev. St. U. S. §§ 5511-

.5515—ALTERATION OF VOTE FOR STATE OFFICER.

Rev. St. U. S. §§ 5511-5515, making it an offense against the United States, among other things, for any officer, state or national, of an election at which a representative or delegate to congress is voted for, to violate any duty in regard to such election imposed on him by state or federal law, does not embrace any act which has exclusive reference to the election of state or county officers, and the alteration, by officers of such an election, of the statement upon the tally-sheets of the vote for certain local officers, in pursuance of a conspiracy, is not an offense against the United States.

8. United States Commissioner—Jurisdiction.

A United States commissioner has no jurisdiction to examine a person arrested and brought before him upon an affidavit alleging facts which are claimed to constitute an offense against the United States, but which in fact do not; it being admitted that there are no other facts in the case than those contained in the affidavit.

4. Same—Power to Punish for Contempt—Rev. St. U. S. § 1014.

The provision of Rev. St. U. S. § 1014, that offenders against the United States may be arrested, imprisoned, or bailed by certain officers named, including United States commissioners, "agreeably to the usual mode of process against offenders" in the particular state. does not conferupon commissioners the power to punish for contempt possessed by state officers, and they have

no power to punish for contempt.

5. HABEAS CORPUS-CONTEMPT. If a court, in a case in which it has no jurisdiction over the parties or subject-matter, sentences a person for contempt, such person may be released by any court having authority to issue writs of habeas corpus.

Appeal from District Court. Upon habeas corpus.

Petitioner was committed by a United States commissioner for contempt in refusing to be sworn as a witness, in an examination, before the commissioner, of certain persons charged with violation of the United States election laws. The affidavit upon which the examination was based was as follows:

"Before me, William A. Van Buren, a United States commissioner, appointed by the circuit court of the United States for the district of Indiana,

¹Reversing decision of district court, appended hereto.

in the Seventh circuit, to take acknowledgments of bail, etc., according to the acts of congress in that behalf provided, personally appeared this day Theodore A. Wagner, who, being first duly sworn, deposes and says that he has good reason to believe, and does verily believe, that on the second day of November, in the year of our Lord, 1886, at the district aforesaid, an election being then and there holden for the choosing of a representative in the congress of the United States from the Seventh congressional district of the state of Indiana, said election being holden on the same day and year last aforesaid, certain persons, to-wit, William F. A. Bernhamer, Simeon Coy, Henry D. Spaan, and John Counselman, and others to this affiant unknown, did conspire together, and with each other, to commit an offense against the United States; that is to say, the said persons, to-wit, William F. A. Bernhamer and John Counselman, being then and there officers of said election aforesaid, and members of the board to can vass the returns thereof, that is to say, being then and there inspectors, and said William F. A. Bernhamer, being the duly-elected chairman of said canvassing board, respectively, and the said Simeon Coy and Henry D. Spaan, being citizens and voters present at said election and said canvass of the returns thereof, at said election duly appointed and sworn to discharge his and their duties as such officer and officers, at said election for the Second precinct of the Fourth ward of the city of Indianapolis, in the county of Marion, in the state of Indiana, and district aforesaid, did then and there unlawfully, fraudulently, knowingly, and feloniously do a certain act in pursuance of said conspiracy, to effect the object thereof, which object was then and there to falsely, unlawfully, and feloniously change the tallies, tally-sheets, and the returns thereon, of and at said election, at the precincts hereinafter named, so as to show, by false, fraudulent, forged, and substituted returns of said tallies and upon said tally-sheets, that one Frank A. Morrison was then and there chosen and elected at said election to the office of coroner of the said county of Marion, whereas in truth and in fact he was not so chosen and elected; and also to show, by said false, fraudulent, forged, and substituted returns, that one Albert F. Ayres was then and there chosen and elected to the office of judge of the criminal court of said county of Marion, whereas in truth and in fact the said Ayres was not so chosen and elected; and otherwise to change, alter, and forge said tallysheets and said returns thereon at said election aforesaid."

Here follows a detailed statement of the erasures and alterations made in a number of tally-papers and poll-books, but all in reference to the offices of criminal judge and coroner.

David Turpie, Dist. Atty., Ritter & Ritter and Harrison, Miller & Elam, for the United States.

Baker, Hord & Hendricks, Harris & Culkins, and Duncan, Smith & Wilson, for petitioner.

GRESHAM, J. The statutes of Indiana provide that when the votes at any election are counted, the board of judges shall make out a certificate stating in words the number each person has received for any office; and such certificate, with one of the lists of voters and one of the tally-papers, shall be deposited with the inspector, or one of the judges selected by the board. Section 4712. Before this certificate is made out, the ballots, with one of the lists of voters and one of the tally-papers, are, in presence of the judges and clerks, placed by the inspector in a paper envelope or bag, which is closed, sealed, and delivered by him to the county clerk as soon as possible, on or before the Thursday next

succeeding the election. Section 4713. The inspectors of each township or precinct, or the judges to whom the certificates, poll-books, and tally-papers are delivered, constitute a board of canvassers, whose duty it is to canvass and estimate them, and to assemble at the court-house, on the Thursday next succeeding the election, for that purpose. tion 4715. The board of canvassers is required to compare and examine the papers intrusted to it, and to aggregate and tabulate from them the vote of the county. A statement thereof is drawn up by the clerk of the circuit court showing the votes for each person in each township and precinct, and the aggregate of such votes, which is signed by each member of the board, and delivered to the clerk, with the certificates, poll-books, and tally-papers so used by it. Section 4717. board declares and certifies the highest number of votes given for each office, (section 4718,) and 10 days after its return is made the clerk issues certificates of election to persons entitled thereto, on their demand, except where they are commissioned by the governor. In such cases, the clerk, within 10 days after the receipt by him of the return of the board, forwards a statement of the votes and the persons who have been declared elected, by mail, to the secretary of state. Section 4721. The secretary of state immediately compares and estimates the votes given for representatives in congress, and certifies to the governor the persons having the highest number of votes as duly elected, and the governor issues to each of them a certificate of his election. Section 4728.

On the seventh day of December, an affidavit was made and filed by Theodore Wagner before William A. Van Buren, one of the commissioners of this court, charging William F. A. Bernhamer and John H. Counselman, who were officers of an election which was held on November 2, 1886, for the purpose of choosing state and county officers and a representative in congress from the Seventh congressional district of Indiana, with having conspired with Simeon Coy and Henry D. Spaan to commit an offense against the United States by changing the tally-papers that were prepared at several precincts, and designed for the use of the board of canvassers, so as to show and have it declared that Frank A. Morrison was elected coroner, and Albert F. Ayers was elected criminal judge, of Marion county, when they were not so elected; and that, in furtherance of this conspiracy, they did so change such tally-papers. The defendants were arrested, and brought before the commissioner for examination, and in the course thereof Samuel E. Perkins was subpænaed, and called as a witness for the government, and declined to be sworn or testify, claiming that the commissioner had no jurisdiction of the offense charged in the affidavit. He was thereupon committed to the jail of Marion county for the term of three months by the commissioner as for a contempt of court. Perkins applied for release upon a writ of habeas corpus, which was denied by the district court, and his application is now before this court on appeal.

The provisions of the federal statutes which are cited as applicable to the offenses charged in the affidavit are sections 5511, 5512, 5514, and 5515. So much of section 5511 as need be referred to provides that if

at any election for representative in congress, any person knowingly personates and votes, or attempts to vote, in the name of another, or votes more than once at the same election, for any candidate for the same office, or by threat, intimidation, bribery, reward, or offer thereof, unlawfully interferes in any manner with any officer of such election in the discharge of his duties, or by any such means, or any other unlawful means, induces any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate or evidence in relation thereto, to violate or refuse to comply with his duty, or knowingly aids, counsels, or advises any such voter or officer to do any act thereby made a crime, or omits to do any duty the omission of which is thereby made a crime, shall be punished as therein specified.

The greater portion of section 5512 relates to fraud in registration of voters at elections for representatives in congress, and concludes by declaring that if any such officer or other person who has any duty to perform in relation to such registration or election, in ascertaining, announcing, or declaring the result thereof, or in giving or making any certificate, or evidence in relation thereto, knowingly neglects or refuses to perform any duty required by law, or violates any duty imposed by law, or does any act unauthorized by law, relating to or affecting such registration or election, or the result thereof, or any certificate or evidence in relation thereto, or if any person aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime, every such person shall be punishable as in the last section.

Section 5514 declares that whenever the laws of any state or territory require that the name of a candidate or person to be voted for as representative or delegate in congress shall be printed, written, or contained on any ticket or ballot with the names of other candidates or persons to be voted for at the same election, as state, territorial, municipal, or local officers, it shall be deemed prima facie evidence to convict any person charged with voting, or offering to vote, unlawfully, under the provisions of this chapter, to prove that the person so charged east or offered to cast such a ticket or ballot whereon the name of such representative or delegate might by law be printed, written, or contained, or that the person so charged committed any of the offenses denounced in this chapter with reference to such ticket or ballot.

Section 5515, which is chiefly relied upon as authorizing the examination before the commissioner, is as follows:

"Every officer of an election at which any representative or delegate in congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any state, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any state or territory thereof, or who violates any duty so imposed, or who knowingly does any act thereby unauthorized, or who fraudulently makes any false certificate of the result of such election in regard to such representative or delegate, or who withholds, conceals, or destroys any certificate or record so required by law respecting the election of

such representative or delegate, or who neglects or refuses to make and return such certificates as required by law, or who aids, counsels, procures, or advises any voter, person, or officer to do any act by this or any of the preceding sections made a crime, or to omit to do any duty the omission of which is by this or any of such sections made a crime, or attempts to do so, shall be punished as prescribed in section 5511."

Section 4, art. 1, of the constitution of the United States provides "that the time, place, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but congress may, at any time, by law, make or alter such regulations, except as to the place of choosing senators." The constitution confers upon congress ample power to legislate for the protection and purity of elections for representatives in congress, whether such elections be for representatives alone, or in conjunction with the selection of state and county officers. It is to be steadily borne in mind that the purpose of all such legislation is the securing of an honest result so far as the election of members of congress is concerned. Congress may enact statutes containing specific regulations to accomplish this end, or it may adopt the laws of the states so far as they relate to congressional representatives, and thus and to that extent make the state election officers federal officers. but it can go no further. It does not follow because congress can legislate for the protection and purity of elections for representatives in congress, that it may assume full control of all elections at which such representatives are chosen in conjunction with state and county officers. mere fact that a representative in congress is voted for at an election of state and county officers, does not authorize congress to regulate such election in matters which in nowise relate to or affect the result so far as it concerns the United States. It has no more right to regulate the election of state and county officers under those circumstances, than it would have if no representative in congress were voted for; and it has not attempted to do so.

The jurisdiction of the federal courts in the enforcement of these statutes depends altogether upon something having been done or omitted which has affected or might affect the result of an election for a representative in congress. The facts stated in the affidavit, in connection with the admissions of counsel in the course of the argument, show that the result of the election was not affected, unless it was by the mutilation of the tally-papers solely and exclusively in the statements of the vote for coroner and criminal judge. It is not pretended that the tally-papers were mutilated, changed, or forged in any other respect, or that any of the tally-papers, poll-books, or ballots were removed from their proper place of custody. The alleged offense against the United States consists wholly in the alteration of the statements of the votes for coroner and criminal judge, as contained in the tally-papers.

It is claimed by counsel for the government that the jurisdiction of the federal courts is complete if anything is done or omitted which amounts to an offense against the state; that it is sufficient to give jurisdiction that a representative in congress was voted for at the election where it is done or omitted; and that it is not necessary to show that the act done or omitted had any influence whatever on the election of a representative in congress, or the result thereof. It is not claimed that congress has authority to interfere with a state election at which no representative in congress is voted for; and yet it is said the mere fact that such representative is voted for at an election of state and county officers makes all offenses against the state, in connection with such election, offenses against the United States, although the acts constituting the offense have in nowise influenced the result of the election of such representative, and could have no influence on it. If this view be correct, and one personates another in voting for coroner only, at any election where a representative in congress is voted for, his doing so becomes an offense against the United States which is punishable in its courts. Nay, more, if the federal government has jurisdiction in such cases, its jurisdiction is paramount and exclusive, if congress sees fit to assert it; and it may therefore assume the exclusive control of the election of state and county officers where they are held at the same time and in conjunction with the election of a representative in congress, and oust the state courts of their jurisdiction. It was said on the argument that the only way for the states to avoid such a condition of things is to hold its elections at a separate time and place.

It was broadly stated that every act of fraud and corruption in any such election must necessarily have some influence on the election of a representative in congress, although the precise influence which the alteration of this vote for coroner and criminal judge has actually had upon the election of such representative in this case was not indicated. But it was asserted to be the object of the federal legislation to banish all demoralizing influences, actual or potential, from elections where representatives in congress are voted for. This reasoning would apply as well to those elections where separate ballots and ballot-boxes, tally-papers and poll-books are provided for the state and federal offices that are voted for, and to the fraudulent conduct of the officers of elections and voters with reference to either. The effect of such fraud and corruption is too remote to affect the election of a representative in congress within the meaning of the statute.

In discussing and construing the sections now under consideration, the supreme court of the United States in Ex parte Siebold, 100 U.S. 371, say:

"In what we have said it must be remembered that we are dealing only with the subject of elections of representatives to congress. If, for its own convenience, a state sees fit to elect state and county officers at the same time, and in conjunction with the election of representatives, congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of state or county officers, they will be amenable to federal jurisdiction; nor do we understand that the enactments of congress now under consideration have any application to such acts."

Under the construction given the statutes by counsel for the government, it is plain that at such an election there could be no "acts of the

officers of election having exclusive reference to the election of state or county officers," and the exemption of them from any amenability to the federal jurisdiction for such acts, in the language just quoted, would have no meaning. If every act in violation of the state laws is equally a violation of the federal laws, it would be impossible to commit any illegal act "having exclusive reference to the election of state and county officers," which is not "amenable to federal jurisdiction." U. S. v. Reese, 92 U. S. 215; U. S. v. Campbell, 16 Fed. Rep. 233; U. S. v. Munford, Id. 223; U. S. v. Wright, Id. 112; Brown v. Munford, Id. 175; U. S. v. Cahill, 9 Fed. Rep. 80; U. S. v. Seaman, 23 Fed. Rep. 882; U. S. v. Nicholson, 3 Woods, 215.

An examination of section 5514 shows that the position of counsel for the government is untenable. It provides that whenever under the laws of any state, the name of a candidate for representative in congress might be printed on the same ticket or ballot with the names of state and county officers, "it shall be deemed sufficient prima facie evidence to convict any person charged with voting, or offering to vote, unlawfully, under the provisions of this chapter, to prove that the persons so charged cast, or offered to cast, such ticket or ballot," or to prove that "the person so charged committed any of the offenses denounced in this chapter with reference to such ticket or ballot." Now, if the words "so charged," in the last clause, refer back to the offense of illegal voting only, it would have no meaning whatever, and is mere surplusage. In order to give any effect to that clause it must be read as if the word "so" were omitted from it. Being so read, the intention of congress to make the section applicable as a rule of evidence to all offenses becomes more apparent. As thus interpreted, it means that it is only prima facie evidence of any offense against the United States to prove that the act charged was committed with reference to such ticket or ballot, which may be rebutted by proof that the act was not committed with reference to the election of a representative in congress. This construction is supported, if not justified, by the language of section 21 of the act of 1870, (16 St. at Large, 145.) from which section 5514 was condensed by the revisers. Section 21 reads:

"And be it further enacted, that whenever, by the laws of any state or territory, the name of any candidate or person to be voted for as representative or delegate in congress shall be required to be printed, written, or contained in any ticket or ballot with other candidates or persons to be voted for at the same election for state, territorial, municipal, or local officers, it shall be sufficient prima facte evidence, either for the purpose of indicting or convicting any person charged with voting, or attempting or offering to vote, unlawfully, under the provisions of the preceding sections, or for committing either of the offenses thereby created, to prove that the person so charged or indicted, voted, or attempted or offered to vote, such ballot or ticket, or committed either of the offenses named in the preceding sections of this act with reference to such ballot. And the proof and establishment of such facts shall be taken, held, and deemed to be presumptive evidence that such persons voted, or attempted or offered to vote, for such representative or delegate, as the case may be, or that such offense was committed with reference to the election of such representative or delegate, and shall be sufficient to warrant his conviction, unless it shall be shown that such ballot, when east, or attempted or offered to be cast, by him, did not contain the name of any candidate for the office of representative or delegate in the congress of the United States, or that such offense was not committed with reference to the election of such representative or delegate." U. S. v. Bowen, 100 U. S. 508.

It remains to be considered whether the acts charged in the affidavit might naturally and reasonably, and within the meaning of the statute, affect the election of a representative in congress; and it is said that they might do so by destroying or impairing the value of the tally-papers as evidence before the board of canvassers, or in any contest of the election of such representative. It is claimed that on account of erasures and changes apparent on the tally-paper in the vote for coroner and criminal judge, it might be wholly rejected, or accepted only upon evidence aliunde that the vote for representative in congress, in which there are no erasures or changes, was correctly stated, and that the person elected as such representative might thereby lose, or be put to great trouble and expense in proving, his election. The legal presumption as to such erasures and changes is that they were made before the paper was signed, and the presumption is not to be overthrown by mere suspicion. But, if there is reason to believe that the erasures and changes in the statements of the vote for coroner and criminal judge were fraudulently made. it is not a sufficient reason for declining to accept the statements of the votes for other officers in which there are no erasures or changes. Little v. Herndon, 10 Wall. 26; Greenl. Ev. § 566; Lewis v. Commissioners, etc., Marshall Co., 16 Kan. 102; Cochran v. Nebeker, 48 Ind. 459.

A tally-paper contains a separate statement of the votes cast for each candidate for every office, and, although it is one in form, it is several in its essence and character. The choice of a majority of the voters in a county or district or state, as to other offices, about which there is no reasonable question or doubt, ought not to be reversed by the rejection of the whole tally-paper, and the vote evidenced thereby, or held in abeyance, because there is some question or doubt as to the vote for coroner or criminal judge. It would be unreasonable to presume, if the election of governor hinged upon the vote of any of the precincts named in the affidavit, that any honest or intelligent man, or body of men, would reject its vote, and give the office to the candidate of the minority of the voters of the state, on account of these erasures and changes, and it would be impossible to justify such an act. It was to prevent such acts of ignorance or perversity that the legislature of Indiana inserted the following sections in the statute governing elections:

"Sec. 4720. No tally-paper, poll-book, or certificate returned from any election by the board of judges thereof, shall be rejected for want of form, nor for lack of being strictly in accordance with the directions herein contained, if the same can be satisfactorily understood; and such board of canvassers shall in no case reject the returns from any precinct if the same be certified by the board of election of that precinct as required by law, and presented to them by the inspector or one of the judges of said board."

"Sec. 4722. No commission shall be withheld by the governor on account of any defect or informality in the return of any election to the office of the

secretary of the state, if it can, with reasonable certainty, be ascertained from such returns what office is intended, and who is entitled to such commission.

The acts of the defendants had "exclusive reference to the election of state and county officers," and for such acts they are not and cannot be made "amenable to federal jurisdiction," because others might improperly or wrongfully make them a pretext for refusing to count the vote for representative in congress. The specific facts stated in the affidavit, which were admitted on the argument to be all the facts in the case, do not constitute an offense against the United States, and the commissioner was therefore without jurisdiction to conduct the examination, and Perkins was guilty of no contempt in refusing to be sworn and testify as a witness.

An order or judgment of a court, acting within its jurisdiction, punishing a party or other person for contempt of its authority, cannot be reviewed or annulled by another court; but if a court, having no jurisdiction over the parties or the subject-matter before it, sentences a party, a witness or any other person to imprisonment for contempt of its authority, the person thus illegally deprived of his liberty may be released by any court authorized to issue writs of habeas corpus. Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. Rep. 724; In re Morton, 10 Mich. 208; In re Hall, Id. 210; Holman v. Mayor, etc., 34 Tex. 668; People v. Cassels, 5 Hill, 164; Rutherford v. Holmes, 5 Hun, 317; Ex parte Burford, 3 Cranch, 448; Ex parte Bollman, 4 Cranch, 75; In re Buell, 3 Dill. 116; In re Henrich, 5 Blatchf. 414; In re Stupp, 12 Blatchf. 501; In re MacDonnell, 11 Blatchf. 170.

But, even if the facts charged gave the commissioner jurisdiction to proceed with the examination, the question whether he was authorized to sentence Perkins to imprisonment in the county jail for the period of three months remains to be considered. Section 627 of the Revised Statutes of the United States, which provides for the appointment of commissioners, is as follows:

"Each circuit court may appoint, in different parts of the district for which it is held, so many discreet persons as it may deem necessary, who shall be called 'commissioners of the circuit courts,' and shall exercise the powers which are or may be expressly conferred by law upon commissioners of circuit courts."

The power to punish for contempt is nowhere expressly conferred on commissioners. It is claimed, however, by counsel for the government, that the provisions in section 1014, that offenders against the United States may be arrested, imprisoned, or bailed by the officers therein named, (among whom are commissioners,) "agreeably to the usual mode of process against offenders" in the state where they are found, confers on these officers all the powers of a justice of the peace, sitting as an examining magistrate under the laws of Indiana, among which is the power to punish for contempt. Article 35 of the Statutes of Indiana, defining contempts of court, and authorizing a maximum fine of \$500 and a maximum imprisonment of three months, is cited as applicable to justices of the peace in such cases. But its provisions for a statement

by the "judge" of the acts or words constituting the contempt, for exceptions and bills of exceptions, as in other criminal actions, and direct appeals to the supreme court, show that article 35 does not apply to justices of the peace, and I do not understand that counsel now seriously insist that it does. McDon. Treatise, (Ed. 1871,) 106, 375; Id. (Schrader's Ed.) 388, 390; Green v. Aker, 11 Ind. 223; Garrigus v. State, 93

Ind. 239; State v. Commissioners Vanderburgh Co., 49 Ind. 457.

Under section 1477 of the Statutes of Indiana, justices of the peace undoubtedly have power to enforce the attendance of witnesses, and to preserve order in judicial proceedings before them, by fine not exceeding \$5 and imprisonment not exceeding three hours; but further consideration of their powers is unnecessary, because we look to the statutes of Indiana only to ascertain the mode in which powers that are expressly conferred on commissioners by the federal statutes shall be exercised. Section 1014 of the federal statutes expressly confers on commissioners the power to arrest, imprison, or bail offenders against the United States, and it also prescribes the manner in which this power shall be exercised, which is agreeably to the usual mode of process against offenders" in the states. It is not essential to the due exercise of this power that commissioners should have authority to punish for contempt; for they can refer the contumacy of witnesses to the court, as they do in taking depositions, and as masters in chancery and registers in bankruptcy are required to do. It is just as important to have the answers of witnesses enforced in civil as in criminal proceedings, and there is no reason why the power to enforce such answers should be denied to officers having charge of the one, and conceded to those having charge of the other. was the intention of congress to assimilate the proceedings before commissioners and other officers mentioned in section 1014, for holding accused persons to answer before the courts of the United States, to the proceedings for similar purposes in the states where such proceedings are U. S. v. Rundlett, 2 Curt. 41. But it is a stretch of language to say that the punishment of a witness for contempt by a commissioner is a necessary part of the "usual mode of process against offenders," or essential to the exercise of any power that is expressly conferred on him by the federal law. Much of the fallacy in the reasoning on this subject is founded on the assumption that a commissioner holds a court. The assumption is unsound and misleading. In U.S. v. Case, 8 Blatchf. 250, Woodruff, J., said: "The commissioner holds no court. He acts as an arresting, examining, and committing magistrate." He is designated as an "examining and committing magistrate" by Mr. Justice FIELD in U.S. v. Schuman, 2 Abb. U.S. Pr. 523, and in other cases cited by the government. It was held by Justice Story (U.S. v. Clark, in 1 Gall. 497) that a district judge sitting as an examining and committing magistrate under section 33 of the judiciary act of 1789, which has been carried forward into the Revised Statutes as section 1014, was not a court; and that an indictment for perjury founded upon a statute requiring the offense to have been committed in a "court of the United States" was bad because it charged the act of perjury to have been committed in an examination before a district judge under that section. In delivering his opinion, Justice Story characterized the argument that a judge, under these circumstances, was a court, as "utterly

insupportable."

The Ser March 1 Company It is not necessary to decide whether a justice of the supreme court of the United States, or a circuit or district judge, sitting as an examining magistrate, may punish a contumacious witness or other person guilty of misconduct before him. It is sufficient in this case to hold that commissioners exercise such powers as are expressly conferred on them by congress, and that neither section 1014, nor any other federal statute, authorizes them to punish for contempt. If, under section 1014, the commissioners have power to punish for contempt as an incident to their power to act as examining magistrates, it follows that officers of this inferior grade may exercise the power without restriction, although congress has deemed it necessary, in section 725, to restrict the supreme court of the United States and the circuit and district courts in the exercise of the same power.

It has been the practice throughout the country for commissioners to refer to the circuit courts, whose officers they are, parties, witnesses, and others guilty of contumacious conduct before them for punishment, and the action of Commissioner Van Buren is certainly unsupported by any

precedent in this circuit.

The judgment of the district court denying the application of the petitioner to be discharged, and remanding him to the county jail, must be reversed, and the petitioner discharged from custody. Discount <mark>de mét l'ense</mark>, de les perde<mark>nsents de l'ense de l'élément de l'ense de l'élément de l'ense de l'élément de l'ense de l'élément de l'ense de l'ens</mark>

The opinion rendered in the district court in the preceding case is as follows: bestore; and the control of (December 28, 1886.)

Woods, J. The petitioner was committed by a United States commissioner for contempt in refusing to be sworn as a witness in an examination pending before the commissioner upon an affidavit charging, or purporting to charge, certain persons named, and who had been arrested and brought before the commissioner, with a violation, in pursuance of a criminal conspiracy, of the federal criminal statutes in respect to the elective franchise. The reason given by the petitioner for refusing to be sworn was that the commissioner was acting without jurisdiction, and his counsel here insist upon the same proposition.

In respect to the nature of the office, powers, and duties of United States commissioners, I duote from an opinion of Justice Pielo of the supreme court, delivered on the circuit in California, in the case of U.S. v. Schumann, 2 Abb. U. S. Pr. 523, on the question of the district attorney's right to dismiss a case before a commissioner over the latter's objection; "The office of commissioner was created by the act of February 20, 1812, and his duties were at first limited to taking acknowledgments of bail and affidavits. By several subsequent acts his powers have been greatly enlarged. Among other things, he is invested with all the authority to arrest, imprison, or bail offenders against the laws of the United States which any justice of the peace or other magistrate of any of the United States can exercise under the thirty-third section of the judiciary act of 1789. That section provides that for any crime or offense against the United States the offender may, by any justice or judge of the United States, or any justice of the peace or other magistrate of any of the United States where he may be found, agreeable to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, imprisoned, or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense.' The same act also authorizes the commissioner, upon any hearing before him when the offense is charged to have been committed on the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States, in his discretion to require a recognizance from witnesses for their appearance at the trial. He is thus a magistrate of the government, exercising functions of the highest importance to the administration of justice. He is an examining and committing magistrate, bound to hear all complaints of the commission of any public offense against the laws of the United States in his district, to cause the offender to be arrested, to examine into the matters charged, and summon witnesses for the government and for the accused, and to commit for trial according to whether the evidence tends or fails to support the accusation. For the faithful discharge of his duty in these particulars he alone is accountable. He has no divided responsibility with any other officer of the government, nor is he subject to any other's control."

This view is fully sustained in the case of *U.S.* v. *Scroggins*, 3 Woods, 529, where it is held, in effect, that a commissioner, as an examining magistrate, has the powers, and derives them from the same source, as the chief justice or other justices or judges of the United States would have when acting in

the same capacity.

Clothed with such powers, the commissioner must in every instance determine judicially whether a charge laid before him is sufficient in form and substance to justify an arrest and investigation. This power and duty to decide, when invoked, is jurisdiction; and, if the commissioner determines to proceed and does proceed with the hearing, I have no doubt of the rule, and believe no authority has been cited to the contrary, that no witness or person having only a collateral or indirect interest can question the jurisdiction, unless the affidavit on which the proceeding is based is so wanting in substance and in relevancy to any form of crime denounced by the statutes as to afford no reasonable color for an investigation. On this subject see Ex parte Wathins, 3 Pet. 193; Ex parte Parks, 93 U.S. 18; Ex parte Yarbrough, 110 U.S. 651, 4 Sup. Ct. Rep. 152; Lange v. Benedict, 73 N. Y. 12; Dequindre v. Williams, 31 Ind. 456; Williamson's Case, 26 Pa. St. 9.

Especially must this be the rule in respect to examinations held in Indiana, and governed, as examinations by United States commissioners sitting here are, by the statutes of the state in respect to such proceedings. By section 1639 of the Indiana Revised Statutes of 1881, if, "while a preliminary examination is had before a justice of the peace of any person upon a charge of felony or any other public offense, it appears to such justice that a mistake has been made in charging the proper offense, or that he is guilty of an offense not charged, the justice shall not discharge the defendant, if there appears to him to be good cause to detain him in custody; but he must cause an affidavit charging the proper offense to be made against the defendant, and recognize him to answer the same, and, if necessary, also recognize the witnesses to appear and testify." These provisions are futile if, while the examining officer turns his investigation from the insufficient and ill-conceived charge to the proper and well-drawn affidavit, prepared under his direction, witnesses may withdraw, or refuse to be sworn, on the pretense that jurisdiction had not been obtained under the first charge, or had been lost in the course of the charge to the second; it has the second; it has been suffered as it would be and it and yet mount

But it is claimed that the alterations and erasures of tally-sheets and pollbooks shown by the affidavit in question cannot support a charge of crime under any provision of the federal statutes, because it is affirmatively shown in the affidavit that the alleged changes, erasures, and everything done, and that the accused are charged with having conspired to do, did not, could not, and were not intended to affect the election of representative in congress, but only the election of certain local officers,—criminal judge and coroner of Marion county, and perhaps a member of the state legislature. If this proposition be completely true, it follows that the affidavit charges, and, consistently with the facts stated in it, could not have been so amended as to charge a violation of federal law, and possibly the commissioner was acting without jurisdiction or color thereof; though that does not seem to me to follow necessarily, because, doubtless, amendments relevant to the general subject, though inconsistent with the facts as first stated, might be made, if justified or required by the proof; as, for instance, the evidence before the commissioner in this case shows a removal of the tally-papers from lawful custody, and an omission of duty by the official custodians warranting an amendment which would bring the charge into substantial conformity with charges which were upheld in Ex parte Clarks, 100 U.S. 399. But, assuming the proposition as advanced to be true, we come, upon the theory of counsel, to the pivotal point of the argument: Do alterations of tally-sheets and poll-books, such as are here charged, affect, or, under possible and reasonably supposable states of fact, could they affect, the election of representative in congress?

The only instance within my knowledge in which this question has been presented to a court for decision was in the case of *Mackin v. U. S.*, tried two years ago in the United States district court for the Northern district of Illinois. For the judge's charge to the jury at the trial, see Chicago Legal News of February 28, 1885; and see 23 Fed. Rep. 334. The criminative acts charged to have been committed in that case in pursuance of the alleged conspiracy consisted in the change of a tally-sheet and appended certificate, after deposit in the clerk's office, and before the official count, in respect to the number of votes cast for opposed candidates for state senator, and in the substitution of forged ballots corresponding to the changed tally-sheet, instead of a like number of the true ballots returned therewith. The ruling of Judge Bloogert, as I understand his charge, was that, under the circumstances alleged in the information before him, such an alteration or forgery of a tally-sheet was punishable under section 5403, 5511, or 5512 of the federal revised statutes.

I read an extract from the charge, which supplies a succinct statement of the substance and bearing of the sections named: "By section 5512, Rev. St. U. S., it is made an offense against the United States for any person who has any duty to perform in relation to an election of representative to congress, or in ascertaining the result thereof, or in giving any certificate or document in relation theretes to knowingly violate any such duty, or to do any act unauthorized by law relating or affecting such election, or the result thereof, and for any person to aid, counsel, procure, or advise any such violation of duty. Section 5511, Hev. St. U. S., makes it an offense against the United States for any person knowingly to interfere with an officer of election at which a representative to congress is elected, or by any unlawful means induce any officer of such election whose duty it is to ascertain, announce, or declare the result of such election, or make any certificate document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same; while section 5403 makes it an offense for any person to willfully destroy any paper, document, or record deposited in any public office. The statutes of Illinois impose upon the county clerk, and upon his deputies, the duty of safety keeping all the poll-books, tally-sheets, and ballots delivered to them by the judges of election. The county clerk and his deputies were therefore persons having a duty to perform in regard to this election for representative to congress. So you will readily see that the offense charged in this case is a conspiracy on the part of all these defendants to violate section 5512, by inducing defendants Biehl and Gleason, who had a duty to perform in regard to these evidences of the result of this election, to neglect to perform such duty, and by conspiracy to aid, counsel, procure, or advise such officers to neglect their duty, and thereby enable some person to spoliate and destroy the evidences of this election; also to violate section 5511 by conspiring to induce the county clerk or the county returning board to make a false canyass and certificate of the result of said election,—that is, by altering returns before the day of canvass came, to give the county clerk the means of making a false return of the election; also to violate section 5403 by conspiring to destroy a paper, to-wit, the poll-book, tally-sheet, and ballots, which were properly deposited in the office of the county clerk; the office of such clerk being a public office wherein such poll-books, tally-sheets, and ballots are properly deposited for the purpose of furnishing the proof authenticating the election of a member of congress, and for that purpose the office of county clerk of this state is a public office of the United States. When the certificates of the result of an election for a member of congress, or any other office, for that matter, is altered in any material particular, such certificate is legally destroyed. and is no longer evidence of what it originally stated. It is no longer the document which the judges and clerks signed, but it is a different document, and it makes a different statement."

Now, if it be conceded, as here stated, that, when a certificate or tally-sheet is altered in any material particular, it is legally destroyed, and is no longer evidence of what it originally stated, the conclusion is clear that the election in respect to representative in congress is affected, because an item of evidence in respect thereto, a muniment of title to the seat in congress, has been destroyed.

But suppose it too much to say that the document, as a whole, in legal contemplation, has been destroyed, it is still manifestly true that its integrity and force as evidence are impaired. If the alteration be manifest on the face of the papers, and no explanation given over the signatures of the signers, any party proposing the document as evidence of his rights, I suppose, would be under the necessity of showing aliunde that in other respects the instrument is genuine and true; and under such a burden of proof a party to a close contest, it is easy to understand, might lose a seat in congress to which he was justly entitled. And, if the alteration be more skillful and not apparent, it may be the source of more serious uncertainty and trouble. If, for instance, in the case before us, we suppose the ballots returned with the duplicate tally-sheets lost or destroyed, or other ballots substituted which would show a different result in respect to congressman, and, in addition, suppose that the other tally sheets, with which these altered ones ought to correspond, be found to have been altered in respect to the congressional vote, is it not manifest that in case of dispute, each alteration would be an obstacle in the way of determining the true result of the election, because each tally-sheet would tend to discredit the other? And this would be the effect in respect to congressman as well as in respect to other officers.

To illustrate further by this case: I understand that some members of the board of canvassers, on account of the apparent changes in these tally-sheets and poll-books, refused to sign, and others signed under protest, the certificate of the result of the election in Marion county, including candidates for congress as well as for all local offices. This was an actual, tangible effect upon the election; and, if other members of the board of canvassers had acted in the same way, the vote of Marion county in respect to congressman might

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not have been declared without further proceedings, and possibly not without

litigation.

But the suggestion has been made that the affidavit here shows the authenticity and truth of the altered papers in respect to the election of congressman, and therefore a supposition to the contrary is inadmissible. The plain answer to this is that the accused are charged with having done forbidden things, which, unexplained, impair the proof in respect to the congressional election, and they are no less guilty because the truth of the matter may have been discovered or determined before the formal charge was framed and the prosecution instituted.

Going no further into the discussion, I am clear that this affidavit charges an offense or offenses fully within the rightful cognizance of congress, and am equally clear that the provisions of sections 5511 and 5512 are applicable; and, if the charge as made is in any respect defective, the fault is of form rather than of substance, and affords no ground for raising a question of ju-

risdiction.

Whether or not section 5403 could be made to apply, I am not sure, because uncertain whether any of these tally-sheets or poll-books had been "deposited" with an officer, or in a public office, within the meaning of that section.

The proceedings before the commissioner not having been without jurisdiction, the petitioner, of course, had no right, on that ground, to refuse to

be sworn as a witness.

In respect to the length of time for which the petitioner was committed, I do not think the commissioner exceeded his power. By section 1477 of Indiana Revised Statutes of 1881, which section was enacted in 1853, a justice of the peace was empowered "to subpœna witnesses and enforce their attendance by attachment and fine not exceeding five dollars; to enforce order * * by fine not exceeding five dollars, and imprisonment not exceeding three hours." And by section 1436, enacted at the same time, there was given to justices "jurisdiction co-extensive with the county to administer oaths. issue subpoenas, and attachments for contempt, in any cause pending before them, or in any matter where they may be authorized to take testimony." But in 1879, by an act designed apparently to regulate the entire subject of contempts of court, it was enacted that "every person who, being sworn to testify as a witness in any court of record, in any trial or proceeding therein, shall refuse to testify touching the same, or who, being required by any court to be sworn in any such trial or proceeding, shall refuse to take an oath or affirmation therein, * * shall be deemed guilty of a direct contempt thereof." And in the same act it is provided that punishment for contempts of court under the act may be by fine or imprisonment, or both: the fine not to exceed five hundred dollars, and the imprisonment not to extend beyond the term of three months. Rev. St. 1881, §§ 1006, 1010. These provisions, in my judgment, define the powers of justices of the peace in this respect, because, as the supreme court of the state has often decided, the courts of justices of the peace are courts of record. But if, for any reason, the act of 1879 ought to be construed to embrace only courts of higher and more general jurisdiction, justices may still punish contempts (excepting the particular instances provided for in section 1477) under section 1436, which puts no limitation upon the fine or imprisonment which may be imposed. Quere whether United States commissioners are under the same restrictions as justices of the peace in respect to punishments for contempts.

But, in any view, the necessary conclusion is that the petitioner was not unlawfully committed, and should be remanded, unless now willing to purge himself of contempt, in which case he may be taken before the commissioner

for that purpose.

Appeal prayed to circuit court, and granted.

REED and others v. LAWRENCE and others.1

SAME v. CHASE and others.

(Circuit Court, W. D. Michigan, S. D. October Term, 1886.)

1. PATENT—SUIT FOR INFRINGEMENT—ORIGINAL SUPPLEMENTARY ACCOUNT. In a suit to recover damages for the infringement of a patent, where a supplementary account of the profits since the first accounting is ordered, the master may use on the second accounting, for all proper purposes, the record which he used on the first accounting, without its being put in evidence before him.

2 Same—Principle to be Applied in Accounting for Profits.

In a suit for the infringement of a patent, the defendant is accountable only for the sum which represents that portion of the profits resulting from the employment of the patented devices in the article manufactured by the defendant. If the article made by him embodies the use of other valuable features, not patented to the complainant, but which have contributed to its marketable value, the defendant is not liable to the complainant for the use of such features; and the burden is on the complainant to show what portion of defendant's profits arose from the use of complainant's patent.

Howard & Roos, for complainants. Edwards & Stewart and J. R. Bennett, for defendants.

SEVERENS, J. These cases are now brought before the court on exceptions to the master's report in the several cases made under the order embodied in the interlocutory decrees heretofore made and entered therein. They have been presented and argued together, and no reason is perceived why they are not subject to the like considerations and direction.

A brief history of the proceedings in the causes will facilitate a clear understanding of the action of the court, and the grounds and principles of its decision. The complainants are the owners of what is known as the "Garver Patent," for an invention of certain improvements in the construction of spring-tooth harrows, and as such owners filed their bills of complaint in these causes in this court against the defendants; alleging that the defendants were and had been engaged in the manufacture of spring-tooth harrows, which contained infringements on the complainants' claims under the Garver patent, and praying for an injunction, and for an accounting of the profits and damages already sustained! The defendants, answering, denied the validity of the Garver patent, and their infringement thereof, if valid. The cases were brought to hearing on pleadings and proofs before Associate Justice MATTHEWS and my predecessor, Judge WITHEY, and a decision was made affirming the validity of the patent, and the defendant's infringement thereof, and an interlocutory decree was entered in conformity therewith, which also ordered an accounting of the profits and damages, as is usual in such On the representation by defendants that they would suffer irreparable damages if their business should be closed up by an injunction,

¹See Chase v. Tuttle, 27 Fed. Rep. 110.

the court allowed a suspension of the injunction pending an appeal by the defendants on their giving bonds, which was done. The above-mentioned decree was made June 30, 1882. In pursuance of the order for an accounting, the parties went before the master, and produced their proofs, and he made a report, awarding the sum of \$—. This report, so far as it is necessary to particularize, proceeded on the grounds that the defendants were liable for the whole profits derived by themfrom the manufacture of the harrows, and the sale thereof, and some supplementary damages to the complainants, which were found to be in all \$5.42 for each harrow. Other details of his report are omitted for the sake of brevity, and because they are not essential to the main point in controversy.

Exceptions were filed to the report by the defendants. They were brought on to be heard before Judge WITHEY, and, upon argument, the principal exception, which is also the one relied on in this hearing, was overruled, and the report confirmed. It is clear that this order of confirmation adopted as its cardinal principle the rule upon which the master had proceeded, namely, that in such a case the complainant is entitled to recover from the defendant what the proofs show to have been the profits of the defendant realized by him from the manufacture, which involved the infringement of complainants' patent, as well as the sum which, added to those profits, would equal the profits complainants might have made on the same number of harrows. An opinion was prepared and filed by Judge WITHEY, which, in substance, declared that rule applicable to the cases: the learned judge taking the view, apparently, that the patent was a primary one, and that it was one which gave the whole value to the harrow, as distinguished from one which gives an increased utility to an implement or machine otherwise, in some measure, valuable for the general purpose for which it is designed. I shall, in a subsequent place, refer to that opinion more particularly.

The late Circuit Judge BAXTER having, at the defendant's instance, ordered a rehearing of the original causes on the merits, such rehearing was had before the Hon. STANLEY MATTHEWS, the associate justice of the supreme court allotted to this circuit, sitting alone. On elaborate argument, the interlocutory decree entered on the former hearing was confirmed, the order suspending the injunction was withdrawn, an accounting from the date of the termination of the first accounting up to the date of the rehearing was ordered, and a permanent injunction was directed to issue. 25 Fed. Rep. 94. The court also, in this confirmatory decree, ordered incidentally that the action already taken by the court on the master's report stand affirmed. I am advised, and it is otherwise obvious enough, that on the rehearing no question involved in the accounting was discussed or alluded to, and consequently no consideration was given to any such question, and this part of the decree. being assumed to have been already disposed of, was entered therein sub silentio. The court is also apprised that the defendants have appealed to the supreme court from the decree made on the rehearing on the merits.

Pursuant to the order for accounting for the damages and profits during the interval between the two hearings of the causes, the parties have been again before the master, and, upon some additional proofs, of a like character, however, to those employed on the former accounting, and the proofs then offered, as well as the original record in the case, the master, relying upon the same grounds as before, has reported in favor of the complainants, and against Chase, Taylor & Co., for the sum of \$23,712.34, and against Lawrence & Chapin in the sum of \$13,958.26, being for the sum of \$5.42 for each harrow manufactured and sold by them, respectively. This report is excepted to on the same grounds, substantially, as before, but, as these grounds merge into one principal question, I shall notice but one other.

Some question was made at the hearing whether the original record was before the master, so that he could take cognizance of it without its being put in evidence before him, which it was claimed was not done; and it was argued by defendants' counsel that the master could not refer to or consider it in making his report. No authorities are cited on this point. I am, however, of the opinion that the master is at liberty to do this for any legitimate purpose in preparing his report, and no inju-

rious use is shown to have been made.

The principal question recurs, which is whether the report excepted to is founded on the true doctrine in relation to the damages and profits in patent causes circumstanced as these are, or whether, on the other hand, it has adopted a principle which is inequitable and unjust. I am unable to see that the question thus presented is in any respect different from that which was presented to Judge WITHEY upon the former accounting; and it has been strongly urged by counsel for complainants that the court ought now to follow in his footsteps, and treat this matter as a thing adjudged. And I feel the force of the argument, founded on the incongruity in the action of the court, if opposite results are arrived at on these successive stages in the same proceedings. But, on the other hand, it must be remembered that the causes still remain within the control of the court; that no final decree has yet been rendered; and that there still remains opportunity to the court to set the parties right. if matters have taken a wrong direction, for I cannot but think the appeal which has been taken to the supreme court is premature, and that I must treat the cases as pending here. Profound and sincere as my respect is for the memory of Judge WITHEY, and his legal learning and good judgment, it is not consistent with my sense of duty that I should abdicate the function of exercising my independent judgment, or refuse to suitors, on the score of mere sensibility, the equitable rights to which the conscience of the court thinks them entitled. For though I am quite conscious of the fact that as the cases will undoubtedly go to the supreme court on the questions involved, and what is done at the circuit is in preparation to that end, my conviction is that I ought, so far as is in my power, to put them upon the right course, so that not only what the court thinks should be the right result here shall be attained, but the cases put in such shape that, upon appeal, the supreme court may have

all the material before it for giving such judgment as that court shall find to be just between the parties, whether it shall agree with or differ from the court below. Adding only that no slight doubt, or even a slight inclination of judgment, would justify a change in the ruling already made upon the former accounting, I will now proceed to ex-

amine the question presented.

Whatever uncertainty or confusion there may have been arising from the varying decisions of the subordinate courts, the supreme court has now, by a settled course of decision, established the principles which should govern the court in estimating the damages and profits to be accounted for by the infringers in patent causes. The most generally applicable rule is the one which, resting on the principle of compensation for injury, which runs through all the branches of the law as administered between party and party, declares that the defendant, who is accountable for the profits arising from the infringement of the rights secured to the complainant by his patent, shall account to him for the sum which represents that portion of the profits resulting from the employment of the patented devices in the article manufactured by the defendant. If the manufactured article embodies the use of other valuable features not patented to the complainant, but which have contributed to its market value, whether such other features are patented to any other person or not, the defendant is not liable for the use of them to the complainants. If such other features are patented to some third party, that person is the one entitled to recover for that infringement, to the extent which his patented device has contributed to the defendant's profits. But if, on the other hand, those other qualities are not patented at all, then the defendant, in common with the general public, has a right to apply them to his business, and make the most he can of them. They belong to the common stock, and there is no exclusive right to them in any one. Blakev. Robertson, 94 U. S. 728; Cawood Patent, Id. 695; Black v. Thorne, 12 Blatchf. 20, 111 U. S. 122, 4 Sup. Ct. Rep. 326; Black v. Munson, 14 Blatchf. 265, this last case being, as I understand, a branch of the next preceding; Elizabeth v. Pavement Co., 97 U. S. 127; Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. Rep. 291; Dobson v. Hartford Carpet Co., 114 U. S. 439, 5 Sup. Ct. Rep. 945.

To these authorities I ought to add Tuttle v. Gaylord, 28 Fed. Rep. 97, dicided only last August by Judge Coxe, in a litigation over the Garver patent, on the same or a similar state of the evidence on the account-

ing, in which nominal damages only were awarded.

Corollary to this rule, but manifestly no exception to it, is another one, which is that when the patented feature which has been infringed by the defendant is one which was the sole element of value in the thing manufactured, so that but for it the article would not be marketable, because not sufficiently useful for the purpose to which it was intended, the defendant is liable for the whole profits of the manufacture. Manufacturing Co. v. Cowing, 105 U. S. 203, which case is an excellent illustration of the distinction. And the distinction is again pointed out in Dobson v. Hartford Carpet Co., 114 U. S. 445, 5 Sup. Ct. Rep. 945. This rule is

as plainly just as the other. In both the essential principle is the same, which is to award to the injured party that redress which compensates for the violation of his right. In the first case, his right does not extend

to the whole manufacture; in the second, it practically does.

It is certainly alien to the principles of the court to inflict vengeance. Its aim is rather to administer justice upon strictly equitable principles. In the opinion of Judge WITHEY, and the consequent action of the court in confirming the master's report, the second rule above stated was applied, and the court held in effect, as above stated, that the Garver patent was a primary one, and he held that those features of that patent which had been sustained by the court were the sole element of value in the harrows manufactured and sold by the defendants which made them saleable, and but for which those harrows would not, nor would any appreciable portion of them, have been sold. Now, as appears by the opinion of Mr. Justice Matthews, and the decree entered thereon, the Garver patent was sustained in respect to two devices, namely, the spring-tooth attached to and circling over the frame, and downward and forward to the point below the frame, and also the peculiar method of the attachment of the tooth to its seat upon the frame. This last device is not involved in the present accounting, because it is not claimed that the defendants employed it during the period over which the accounting extends. The feature, therefore, to which the present question of damages relates, is that of the spring-tooth arching over the frame, and with its point inclining forward under the frame.

The court is required to take judicial notice of what is commonly known in the various branches of manufacture and industry. It is required that the court should know what is the current progress in the arts affecting the convenience and methods in common use among the people. Phillips v. Detroit, 111 U. S. 604, 4 Sup. Ct. Rep. 580; King v. Gallun, 109 U. S. 99, 3 Sup. Ct. Rep. 85; Terhune v. Phillips, 99 U. S. 592; Brown v. Piper, 91 U. S. 37. And, because this is so, the court is bound to know what is generally known in this branch of business; that, after the valuable improvement introduced by the Garver patent in the manufacture of spring-tooth harrows, the great advantages of this class of implements were generally recognized, and the business of manufacturing harrows with spring-teeth was entered upon in various parts of the country, and by many individuals, so that the market was, and has ever since continued to be, filled with these harrows of various patterns, and all pushed upon the public with a pertinacity which has become a recognized incident of all such kinds of business. A few of them contained this feature of the Garver patent of the tooth arching over the frame, but more did not. All, however, included the feature in some form of the springing tooth, which takes the form of an arch in some portion of its conformation, and is constructed of steel to give the desired vibratory motion. And the general use of these different patterns of harrows is in promiscuous distribution throughout the country where such implements are in demand. Some have the same structure of frame as the complainants have adopted; others have applied the spring teeth to frames

of other forms. A number of patents have been obtained, other than that of Garver, applicable to different devices in the building of such harrows, some of which the defendants claim to own, and to have used in the manufacture of the harrows now to be accounted for. How can it be said, in the light of all these well-known facts, of which notice must be taken, and which are also shown in the main by the direct evidence in the cases, that the sales which have been made by the defendants, and the profits they have made, are due solely to the value contributed to the harrows by the feature of the arching tooth peculiar to the Garver patent? It seems to me that to say this is to deny the general knowledge and experience. To say that every purchaser would have bought a spring-tooth harrow having the peculiarity of the Garver patent, and would have bought no other spring harrow, is impossible, without ignoring what is constantly happening throughout the country.

In my opinion, the language of the supreme court in Garretson v. Clark and Dobson v. Carpet Co., mutatis mutandis, has a clear and positive ap-

plication.

In the first of these cases, the patent was for an improvement in the method of moving and securing in place the movable jaw of a mop-head. The court said that, with the exception of this mode of clamping, mop-heads like the plaintiff's had long been in use. Before the master, the plaintiff had proved the cost of his implements, and the price at which they were sold, and claimed the right to recover the difference as his damages. This rule was rejected, and, no other evidence of damages being offered, the plaintiff was allowed only nominal damages. This action of the circuit was sustained on appeal. Mr. Justice Field, delivering the opinion of the court, said:

"The rule on this subject is aptly stated by Mr. Justice Blatchford in the court below. The patentee,' he says, 'must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural nor speculative; or he must show by equally reliable and satisfactory evidence that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented features.' The plaintiff complied with neither part of this rule. He produced no evidence to apportion the profits or damages between the improvement constituting the patented feature and the unpatented features of the mop, and the price at which it was sold. And of course it could not be pretended that the entire value of the mop-head was attributable to the feature patented."

Of course it can make no difference in the rule whether the unpatented features were in use before or only since the patent was obtained. In either case, the public are entitled to use them, and the patentee, therefore, has no right to recover damages which include such use.

In the other case (Dobson v. Carpet Co.) the patent was for a design in the manufacture of carpets, and the complainants sought to recover damages to the amount of the difference between the cost of manufacture to him and his selling price for the number of yards manufactured by

the defendants. This was allowed by the court below, and substantial damager were awarded. On appeal, this part of the decree was reversed, and only six cents damages allowed. Mr. Justice Blatchford, delivering the opinion of the court, after taking judicial notice of what is common knowledge, that there is an infinite variety of patterns in carpets, and that between such as are of equal intrinsic merit, as to durability of fabric and color, and equally pleasing in pattern, some having an unpatented design, but one protected by a patent, said it did not follow that the latter would necessarily command the larger price in the market. "If it does, then the increased price may be fairly attributed to the design, and there is a solid basis of evidence for profits or damages. But short of this, under the rules established by this court, there is no such basis. The same principle is applicable as in patents for inventions. The burden is on the complainant, and if he fails to give the necessary evidence, but resorts instead to inference, conjecture, and speculation, he must fail for want of proof. There is but one safe rule, -to require the actual damages or profits to be established by trustworthy legal proof," Again he says, at page 445:

"Approval of the particular design or pattern may very well be one motive for purchasing the article containing it, but the article must have intrinsic merits of material and structure to obtain a purchaser, aside from the pattern or design; and to attribute in law the entire profit to the pattern, to the exclusion of the other merits, unless it is shown by evidence as a fact that the profits ought to be so attributed, violates the statutory rules of actual damages, and of profits to be accounted for."

The pertinency of this language to these cases in hand is so conspicuous that I need not dwell upon it. It is only necessary to make the doctrine concrete by applying it to spring-tooth harrows, and the specific feature of the tooth arching over the frame, of the Garver patent.

The result is that I cannot doubt that the court erred upon confirming the former accounting, and adopted the wrong rule in the computation of profits to be recovered. What the complainants seek now is, confessedly, the profits derived by the defendants in their infringing business, though the reports seem to cover also damages to complainants; and they are undoubtedly entitled to recover them,—not the whole profits of the business, but such profits as they can show are attributable to the use by the defendants of their device claimed under the Garver patent. But, while the profits are what the complainants are now professedly pursuing, the rule would be the same if the inquest were one of damages to complainants, as, indeed, it should be; for the underlying principle is the same, and is not affected by the mode of redress elected. That this is so is very clearly indicated in the opinion of the supreme court in Dobson v. Hartford Carpet Co., above cited.

It appears to me to be clear that the other rule than that adopted by Judge Withey is the one applicable here, because the patent is not one covering the entire structure of spring-harrows. It does not include the frame which is used, that being substantially the old Scotch harrow frame. Nor does it cover springing teeth, except as they contain the

peculiar feature already mentioned. Nor, to make the exclusion short, does it cover anything else than those peculiarities included in the claims. which have been sustained by the court as herein stated and explained. As was to be expected, the master has, on this accounting, proceeded on the principles laid down on the first; and it unfortunately happens that the record is in such shape that the facts necessary to come to a right conclusion are not, in view of the opinion entertained on the law of the

case, in proper or sufficient presentation.

If the present view is right, and the supreme court should adopt it, it is to be feared that the consequences of leaving matters in their present shape, and confirming this report, would be that, when the cases should reach a final determination in the appellate court, that court would be without the means afforded by the record of awarding that redress to which the complainants are apparently entitled, and be under the necessity of awarding them nominal damages only; and, in any event, it is very clear that the most prudent course will be to sustain the present exception, and recommit the matter of reference to the master, with instructions to take such additional evidence as the parties may see fit to offer, and to make further report in conformity with the principle of this opinion. In this way all the material necessary will probably be brought before the court, so that, whatever view may ultimately be held as to the correctness of the opinion now expressed, as has already been said, the court may be able to accomplish justice between the parties. This opinion is much longer than would have been necessary if I had not felt it to be proper that the reasons which have compelled me to adopt a different conclusion from that hitherto reached by the court should be fully stated, and with as much distinctness as was practicable.

In the present situation, I should recommend to the parties that the order confirming the former report be opened, and that a like order be made in that matter as is directed in this, for the objects herein indicated as desirable. No motion of that kind is made, and I should prefer that the parties consent to that course rather than be compelled, when the final decree comes to be made, to go back and revise the earlier proceeding; for, as already indicated, the whole matter is yet within the control of the court, and it is its duty to correct any error which it may conceive it has fallen into, at any time before final decree and the subject has passed beyond its reach. Perkins v. Fourniquet, 6 How. 206; Fourniquet v. Perkins, 16 How. 82; Wooster v. Handy, 21 Fed. Rep. 51.

If such consent is given, both matters may be included in one order.

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THE CITY OF SPRINGFIELD.

THE SAMMIE.

LUTHER and others v. THE CITY OF SPRINGFIELD.

HARTFORD & N. Y. TRANSP. Co. v. THE SAMMIE.

(District Court, S. D. New York. January 31, 1887.)

1. COLLISION — EAST LOVER — TIDE CURRENTS — KEEPING OUT OF THE WAY — SAFE MARGIN.

A steamer, bound to keep out of the way, must, at her own peril, shape her course for a safe margin against the contingencies of navigation, and the effects of tide currents. Held, in this case, that the conflict in the evidence was probably in part to be explained by the westward set of the flood-tide off Twenty-third street, which changed to the westward the course of the S., a steamer 300 feet long, as she struck the current, and that the collision was by her fault only.

2. Same—Tug and Tow—Sudden Backing—Lines Parted — Error of Judgment in Extremis not a Fault.

The collision being with a heavy car-float in tow along-side a tug, and the S. contending that the float had broken loose from the tug just before the collision, through the tug's too sudden backing, which the tug denied, held that, even if the lines were parted, as alleged, before the collision, the tug's backing was made necessary by the fault of the S. when the danger was imminent; and that the error, if there was any error, was one of judgment, under the excitement of the moment, and not a legal fault.

In Admiralty.

E. D. McCarthy, for the Sammie.

Wilcox, Adams & Macklin, for the City of Springfield.

Brown, J. The collision in this case occurred at about half past 6 in the morning of November 19, 1885, in the East river, about opposite Eighteenth street, and not far from the middle of the river, between a car-float 184 feet long, lashed upon the starboard side of the tug Sammie, bound up river, and the passenger steamer City of Springfield, bound The starboard bow of the steamer struck the starboard corner of the float, and each was somewhat damaged. There is very perplexing conflict in regard to many of the details of this collision. Many of them it is not necessary to notice. The tide was the last of the flood. Sammie had passed the Tenth-street buoy in about mid-river,—that is, a little to the eastward of that buoy, - and when at about Twelfth street saw the green light of the City of Springfield, which was at that time coming down between the black buoys, off Thirty-fourth street, having taken the westerly channel past Blackwell's island. The ferry-boat Rockaway was at that time crossing the river, bound for her slip at Twentythird street. She gave a signal of two whistles to the City of Springfield, which the latter answered with two whistles, and starboarded her wheel, going under the ferry-boat's stern about opposite Twenty-third street. Two whistles were about that time given to the ferry-boat Colorado, which was coming up the river ahead of the Sammie, and bound for the same slip as the Rockaway. When about opposite Twenty-third street, and under the stern of the Rockaway, the City of Springfield gave a signal of two whistles to the Sammie, which the latter answered with Each had the other at that time a little on her own starboard bow. and both agreed that, if their courses had been preserved unchanged. they would easily have cleared each other, starboard to starboard, by a considerable interval. Shortly after this a signal of one whistle was heard by each boat. Each attributes it to the other, and each denies that she gave any such whistle. Neither answered with one whistle; but immediately the two boats again exchanged the same signals of two whistles as before, indicating that they should pass starboard to starboard. At the same time, according to the testimony of each, the boats were backed strong, and neither changed her course, and, notwithstanding these efforts, the collision occurred. It is plain that there must be considerable error in this testimony, on one side or the other, or else there were some other circumstances not taken into account.

The City of Springfield insists that when she passed under the stern of the Rockaway, opposite Twenty-third street, she was heading from one to two points east of south, and that she maintained this course until the collision. If this were so, the collision would necessarily have happened considerably nearer to the Brooklyn than to the New York shore. I am satisfied that this is not the fact. There is, I think, a very considerable preponderance of evidence that the collision was much nearer to the New York shore than in the middle of the river. The natural course of the Springfield, from between the black buoys off Thirty-fourth street to a little east of the Tenth street buoy, which it appears was her usual course, would have brought her on the New York side. The Sammie's ordinary course carried her towards the western side of the river. The tide set that way; and the evidence is that, from the time the Springfield's first two whistles were given, the Sammie starboarded her wheel more than necessary to keep her course, and swung about a point to the westward, which would have carried her still more to the westerly half of the river. These circumstances so concur with the direct testimony of several disinterested witnesses, from other boats in the vicinity, to the effect that the collision was considerably on the New York side of mid-river, and only about one-third the distance from the New York shore, that I must find that the collision was in that vicinity rather than in mid-river or on the Brooklyn side.

The evidence from each boat is so positive that she gave no single whistle, that I think the explanation must be found in a signal heard from some other boat, which each of these boats attributed to the other. But, as the whistle was followed immediately by a repetition of two blasts from each, no harm can have come from it. It in no way accounts for or excuses the collision on either side.

On the whole evidence, it is clear that the two vessels were approaching each other all the way between Tenth and Thirty-fourth streets very nearly head and head, but, at first, each slightly on the other's starboard

bow. The testimony of the witnesses for the Sammie that they saw the red light of the City of Springfield after her green light was shut in, strongly confirms the natural inference from the place of the collision itself, that the City of Springfield must, at some time after she had first starboarded to go under the stern of the Rockaway, have turned again to the westward, if, in fact, she did at first change to one or two points east of south. In no other way could her red light have been seen, and in no other way could the Springfield have reached the place of collision. The course of S. by E. could not possibly have been continued long; only two or three minutes, at most. A speedy change was necessary in order to avoid grounding on the Brooklyn shore. A further circumstance, that is testified to very strongly by Bassenden, one of the ferry-boat pilots, called by the Springfield, possibly had an important effect in bringing the Springfield upon the Sammie's course, namely, the strong set of the flood-tide from off the Nineteenth street buoy towards the Twenty-third street slip. This witness says: "The flood-tide sets from the Nineteenth street buoy straight at Twenty-third street pier. It sets over in that cove, and runs as direct from that buoy as you can draw a line into the When the City of Springfield, about 300 feet long, came down, and struck this westward current, that of itself would tend to change her heading, and sufficiently, perhaps, to explain her westerly divergence, even without any change of helm, which her witnesses so positively deny. This would explain, also, the change of the Springfield's lights from green to red, which the Sammie's witnesses testified to. And, after the Springfield had got wholly into the westward current, her starboard wheel would bring her again into the position at the collision sworn to. heading a little towards the Brooklyn shore, while her own canting to the westward with the current would give an appearance of porting to the tug.

Whether these, or some other circumstances not appearing, were the causes of this collision,—such as want of a continuous lookout on the Springfield, and proper observance of the tug, or mistake for the Jason to the westward, in the hazy morning, of which there is at least a suggestion of doubt, from the fact that none of the Springfield's witnesses observed the Sammie's lights, though they were burning,—I think this collision must be ascribed to the failure of the City of Springfield to provide a sufficient margin for safety in shaping her course to pass to starboard of the Sammie. Whatever may have been the natural effect of the tidal current, she was bound to take it into account, and provide The Sammie was proceeding under one bell, and very slowly through the water. She could not change her position much in the short time after the last blasts of two whistles were given, and she was all that time backing. The City of Springfield was at that time going through the water at three or four times the speed of the Sammie. As a side-wheel steamer, she was under perfect control, even in backing, which the tug was not. It was the steamer's duty to provide a safe margin to the eastward, in accordance with her signals. The tug did all that the steamer had a right to count upon, by starboarding her helm. The fact of the collision itself, and the little change possible to the Sammie, are conclusive evidence, to my mind, that the City of Springfield did not fulfill her duty to allow a sufficient margin for safety, as she might have done, and was bound to do, and that the blame of the collision must rest upon her.

It was strenuously contended on the trial that the hawsers that attached the float to the tug were parted before the collision, through the sudden backing of the tug; that the bows of the float were swung somewhat to the eastward, upon the tug's letting her helm run loose on backing; and that, but for this swing of the float to the eastward, no collision would have occurred. There can be no question that it was the duty of the Sammie to back when she did. It is stoutly denied by several witnesses on her part that the lines were parted except by the force of the blow of the collision. But if they were parted before the collision, through the tug's backing, I cannot regard that as any excuse for the steamer, because the danger of collision was then imminent and obvious, through the City of Springfield's fault; and, even if the backing was too strong or sudden for the strain made by so heavy a float, it was nothing more than an error of judgment in the excitement of a peril in extremis, for which the steamer still remains to blame. The Elizabeth Jones, 112 U. S. 514, 526, 5 Sup. Ct. Rep. 468. Nor had the steamer any right to go so near to the tug, without reason or necessity, and to make no allowance for such contingencies of navigation. The Columbia, 9 Ben. 254; The Laura V. Rose, 28 Fed. Rep. 104; The Aurania, 29 Fed. Rep. 98.

I think the evidence sustains the claim on the part of the tug that, from the time the first two whistles were exchanged until she backed, she had starboarded her helm so as to go further to the westward, and thereby aided the Springfield, and did nothing to thwart her. She was proceeding very slowly; backed strong when collision was threatened; and, in my opinion, made no swing to starboard other than the slight change necessarily incident to the backing of a right-handed propeller. This was all she was called upon to do. The libel against her must therefore be dismissed, with costs; and that against the steamer sustained, with a reference to compute the damages.

THE I. C. HARRIS.

HAIMARK and another v. THE I. C. HARRIS.

(Circuit Court, E. D. Texas. November, 1886.)

1. Rules of Navigation—Rev. St. 4233, Rules 20, 23.

Rules 20 and 23 of section 4233, Rev. St. U. S. are to the effect that, when a steam-vessel and a sail-vessel are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel, and the sail-vessel shall keep its course. These rules apply strictly

Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

in all cases arising in an open sea; but whether they should be strictly applied in narrow channels or restricted harbors depends upon the existing dangers of navigation, and the special circumstances attendant upon the case. See rule 24, same section.

2. COLLISION-BOTH PARTIES TO BLAME.

Facts stated, by which libelant is found to be in fault for not exhibiting a torch as required by section 4284, Rev. St., and claimant for not having a sufficient lookout.

Admiralty Appeal.

Wheeler & Rhodes, for libelants.

Waul & Walker, for claimant.

PARDEE, J. This case is one of collision in the night-time in Bolivar channel, leading into Galveston harbor, between the schooner Pat Christian coming in, and the steamer I. C. Harris going out. The libelants allege that the collision was the sole fault of the steamer, and the claimant insists that the schooner was alone in fault. The libelants rely on section 4233, Rev. St., rules 20, 23, to the effect that, when a steam-vessel and a sail-vessel are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel, and the sail-vessel shall keep its course. That these rules apply strictly in all cases arising in an open sea there is no doubt; but whether they should be strictly applied in narrow channels or restricted harbors depends upon the existing dangers of navigation, and the special circumstances attendant upon the case. See rule 24, same section.

There is evidence in this case tending to show that when the master and quartermaster of the steamer first saw the lights of the schooner, that the helm of the steamer was hard a-port, and that she was as near the starboard shore as she could safely go; and the weight of the evidence in the case is to the effect that if the schooner had ported her helm, instead of maintaining her course, the collision would have been avoided. It is probable, therefore, that this case might be disposed of adversely to the libelants upon a proper construction and application of the above-cited rules.

The case, however, is too plain to go into that matter. The weight of the evidence is that the schooner had her red and green lights properly displayed,—in fact the proctor for claimant so admits. The night was dark, but not foggy; and there was apparently nothing to hinder such lights from being seen, by a proper lookout, for a distance of half a mile, while every man aboard the Harris at the time of the collision whose testimony has been taken, swears that the schooner and her lights were not seen until the schooner was within less than 100 yards, and it was too late for the steamer to avoid the collision. I think it follows that the steamer had no proper lookout. It is true that the quartermaster was in the pilot-house, and the master was on the upper deck in front of the pilot-house, with his glasses; but the crew were catting the anchor, and it is very probable that the master was overlooking that operation. He swears he did not see the schooner until she was within 70 to 75 yards. The quartermaster, who was steering the Harris, did

not see the schooner until she struck the Harris, and first knew of her vicinity by hearing voices under the bow. The fault of the steamer is apparent without considering her responsibility under rules 20 and 23,

supra.

Section 4234, Rev. St., provides that all sail-vessels shall be provided with proper signal lights, and that every such vessel shall, on the approach of any steam-vessel during the night-time, show a lighted torch upon that point or quarter to which such steam-vessel shall be approaching, and a penalty is imposed for violating these provisions. In this case no torch-light was shown by the schooner, nor was one ever shown to be aboard, and therefore the schooner was clearly in fault. ants contend that showing a torch-light in this case would have done no good, and that such failure did not contribute to the collision. This contention is not well founded. Non constat that the unwary master of the Harris would not have seen the schooner's lights in time had they been reinforced, as the law required, with a torch-light. If the case were one where the court could find from the evidence that the omission on the part of the schooner to show the torch-light did not contribute to bring on the collision, then the argument of libelant's proctor, supported, as it is, by numerous adjudged cases, might carry his case; but the court cannot so find, because it is now impossible, under the state of facts developed by the evidence for any one to say what would have been the conduct of the steamer had the schooner shown more lights. The steamer was in fault because her officers did not see the lights that the schooner did show, and it seems equally clear that the schooner was in fault in not showing all the lights that the statutes require. That the greater fault was with the steamer may be conceded. At the same time the schooner ought not to deny the steamer the benefit of the arbitrary statutory rule, that sail-vessels approaching a steam-vessel in the nighttime shall show a torch-light, while claiming the full benefit of the equally arbitrary rule that steam-vessels shall keep out of the way of sail-vessels. For adjudged cases as to the necessity of complying with the rule as to showing a torch-light, see The Hercules, 1 Fed. Rep. 925; 17 Fed. Rep. 606; The John H. Starin, 2 Fed. Rep. 100; The Margaret v. The C. Whiting, 3 Fed. Rep. 870; The Algiers, 21 Fed. Rep. 343; The Oregon, 27 Fed. Rep. 751; The Eleanora, 17 Blatchf. 88.

In those cases where the sail-vessel was not held responsible for failure to show the torch-light it will be found that in each case the court found that the failure did not contribute to the collision; but the general rule in the circuit courts has been to hold such failure inexcusable.

Both vessels being in fault in this case, it follows that the damages should be divided. The proof shows that the damages to the schooner amounted to \$415, and to the steamer \$432.70,—near enough equal to permit the court to do substantial justice in the case by a decree dismissing the libel, and dividing the costs.